Chapter Ten

PRECEDENT

Precedent as Source of Law

JUDICIAL precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. According to Salmond: "The great body of the unwritten law is almost entirely the product of outside cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the 13th century... In practice" if not in theory, the common law of England has been created by the decisions of English judges." The one reason why precedent occupies so high a place in the English system is that English judges have occupied a very high position in the country. They have been experts in their line and consequently their decisions have enjoyed high reputation. The Bench has always given law to the Bar in England.[1]

However, there are some writers who are of the view that judicial precedent is not a source of law. It is merely evidence of customary law. Savigny belongs to this school of thought. To quote Stobbe: "Practice is in itself not a source of law; a court can depart from its formal practice and no court is bound to the practice of another. Departure from the practice hitherto observed is not only permitted but required if there are better reasons for another treatment of the question of law."

Keeton rejects this view and holds that a judicial precedent is a source of law. To quote him: "A judicial precedent is a judicial decision

[1] Bentham paid the following tribute to the case-law in England: "Traverse the whole continent of Europe—ransack all the libraries belonging to the jurisprudential systems of the several political States, add the contents altogether...you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement...in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases."

to which authority has in some measure been attached. It must be noted at once, however, that partly because of the high status which judges occupy in political and social organization and partly because of the importance of the issues which they decide, judicial decisions have at all times enjoyed high authority as indications of the law." Again, "the English people have always looked to their judiciary as the fount of law and the courts have made their province to ensure that that fount should never run dry. They have regarded the law as a comprehensive whole, capable of indefinite application to special cases and possessing the inherent quality of consistency. It is precisely this quality of consistency which has enabled English people to accept judge-made law without question as a natural element in English Law." According to Thibaut: "If in any court a rule has been frequently and constantly followed as law, that court must follow these hitherto adopted rules as law, whether they relate to simple forms or to the substances to controversies, if they do not contradict the statutes, but yet only on the points on which the former judgments agreed. Coordinate courts do not bind each other with judgments but upper courts do bind the lower, so far as an earlier practice has not formed itself in the latter, and one ought not to treat the opinions of jurists as equal to the practice of the courts, although the former may, under certain circumstances, be of importance as authorities."

Blackstone writes: "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment."

According to Cardozo: "In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether, I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if

it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years."[2]

Nature of Precedent

A precedent is purely constitutive and in no degree abrogative. This means that a judicial decision can make a law but cannot alter it. Where there is a settled rule of law, it is the duty of the judges to follow the same. They cannot substitute their opinions for the established rule of law. Their function is limited to supplying the vacancies of the legal system, filling up with new law the gaps that exist in the old and supplementing the imperfectly developed body of legal doctrine.

Authority of Precedent

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. That which is delivered in judgment must be taken for established truth. In all probability, it is true in fact and even if it is not, it is expedient that it should be held to be true. The practice of following precedents creates confidence in the minds of the litigants. Law becomes certain and known and that in itself is a great advantage. It is conducive to social development, administration of justice becomes even-handed and fair. Decisions are given by judges who are experts in the study of law.

According to Jessel, M.R.: "If I find a long course of decisions by inferior courts acquiesced which have become part of the settled law, I do not think it is the province of the appeal court after a long course of time to interfere, because most contracts have been regulated by those

[2] pp. 149-51, *The Nature of the Judicial Process.*

decisions. There is another consideration which always has weight with me. When the law is settled, it gets into the text-books which are a very considerable guide to practitioners." Again, "where a series of decisions of inferior courts have put a construction on an Act of Parliament and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decisions and the practice of mankind in conducting their affairs."

According to Lord Loreburn: "I think this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated."

According to Lord Buckmaster: "Firstly, the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered, unless your lordships could say positively that it was wrong and productive of inconvenience. Secondly, decisions upon which the title to property depend or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection. Thirdly, decisions that affect the general conduct of affairs so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected ought in the same way to continue."

According to Dr. Julius Stone: "Precedent had played and will continue to play a most important part in common law judicial achievement. In the first place, precedents present for the instant case a rapid if incomplete review of social contacts comparable to the present, and of a rule thought suitable for those context by other minds after careful inquiry. In the second place, precedents serve to indicate what kind of result will be reached if a particular premises or category is chosen for application in the instant case, and permit comparison with the results if some other premises or category is adopted, either drawn from other cases, or judicially invented. In *Haseldine* v. *Daw* the common carrier cases gave the court a ready view of the results for the lift passenger if that analogy were followed, as well as of the context in which courts in the past had regarded such results as just for an injured plaintiff. The case on occupiers of premises afforded another glimpse of other results deemed just in another context. But the court had still to make up its mind that it wished to reach one or other result, or some result,

quite different from either, in the context that was actually before it in *Haseldine* v. *Daw.* "A good judge is one who is the master, not the slave, of the cases."[3]

Circumstances which destroy or weaken the binding force of precedent

The operation of precedent is based on the legal presumption that judicial decisions are correct. A matter once decided is decided once for all. What has been delivered in a judgment must be taken to be an established truth. In all probability, it is true in fact. Even if it is not, it is expedient that it should be held as true. However, there are circumstances which destroy or weaken the binding force of a precedent. Those are exceptions to the rule of the binding force of precedent.

(*i*) *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. As overruling is the act of a superior authority, a case is not overruled merely because there exists some later opposing precedent of the same court or a court of coordinate jurisdiction. In such cases, a court is free to follow either precedent. When a case is overruled in the full sense of the word, the courts become bound by the overruling case. Overruling need not be express, but may be implied. Until the 1940s, the practice of the Court of Appeal was to follow its own previous decision even though it was manifestly inconsistent with a later decision of the House of Lords provided it had not been expressly overruled. Lord Wright, in a case in the House of Lords, questioned the correctness of this attitude and in *Young's* case, the Court of Appeal accepted the new principle that it is not bound by its previous decision if it cannot "stand with" a subsequent decision of the House of Lords.

In India, the Twenty-fourth Amendment of the Constitution of India was passed to nullify the decision of the Supreme Court of India in the case of *Golak Nath.* Likewise, the Twenty-fifth Amendment of the Constitution sought to remedy the situation resulting from the decision of the Supreme Court in the *Bank Nationalisation* case.

(*ii*) *Affirmation or Reversal on a Different Ground.*—It sometimes happens that a decision is affirmed or reversed on appeal on a different point. Suppose a case is decided in the Court of Appeal on ground *A* and then goes on appeal to the House of Lords which decides it on ground *B*, nothing being said upon *A*. The view of Jessel, M.R. is that where the judgment of the lower court is affirmed on different grounds,

[3] p. 192, *The Province and Function of Law.*

it is deprived of all authority. Such conduct on the part of the appellate court shows that the appellate court did not agree with the grounds mentioned. Although this is sometimes a correct reading of the state of mind of the higher court, it is not so always. The higher court may shift the ground of its decision because it thinks that this is the easiest way to decide the case. It is possible to find cases where judgments affirmed on a different point have been regarded as authoritative for what they decided. It is the same with cases reversed on another point.

The true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force which it might otherwise have had, bat it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.

(iii) 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. Similarly, a court may know of the existence of the statute or rule and yet not appreciate its relevance to the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

(iv) Inconsistency with Earlier Decisions of Higher Court.—A precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court. For example, if the Court of Appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is *per incuriam* and is not binding either on itself or on lower courts. On the contrary, it is the decision of the House of Lords that is binding. Thus, if the High Court of Delhi decides a case in ignorance of a decision of the Supreme Court of India, the decision of the High Court of Delhi is not a precedent and hence is not binding on any lower court. Such a decision is said to be *per incuriam.*

(v) 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 court of appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision, preferring an unreported decision to a reported decision and preferring a decision of a court of coordinate jurisdiction to its own decision.

Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them. The lower court may refuse to follow the later decision on the ground that it was arrived at *per incuriam,* or it may follow such decision on the ground that it is the latest decision. Which of these two courses the court adopts depends upon its own view what the law ought to be.

(vi) Precedents sub silentio or not Fully Argued.—When a particular point involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favour of one party, whereas if all the points had been put forth, the decision may have been in favour of the other party. Hence such a rule is not an authority on the point which had not been argued and this point is said to pass *sub silentio.* This rule can be traced in English Law to 1661 when in a famous English case, the counsel said, "a hundred precedents *sub silentio* are not material," and the judge agreed.

A good illustration of a precedent *sub silentio* given by Salmond is that of a case where an employee was discharged by a company and he obtained damages against the company for wrongful dismissal. The employee applied for a garnishee order in respect of a bank account standing in the name of the liquidator of the company. The only point argued in the court of appeal was on the question of the priority of the employee's claim and the order was granted. No consideration was given to the question whether a garnishee order could properly be made in such a case. The latter point came up for decision in a subsequent case before the same court and the court held that it was not bound by its previous decision.

It is stated in the latest edition of Salmond that a precedent is not destroyed merely because it was badly argued, inadequately considered and fallaciously reasoned. A rather arbitrary line has to be drawn between total absence of argument on a particular point which vitiates the precedent and inadequate argument which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable.

In *K. Balkrishna Rao* v. *Haji Abdulla Sait,* the Supreme Court observed that the binding force of a precedent does not depend on whether a particular argument was considered therein or not, provided the point with reference to which an argument was subsequently advanced was actually decided by the Supreme Court.[4]

(vii) Decisions of Equally Divided Courts.—Where an appellate court is equally divided, the practice is to dismiss the appeal. The rule adopted in the House of Lords is that the decision appealed from becomes the decision of the House of Lords. This problem is not a serious one today as it is the usual practice of most appellate courts to sit with an uneven number of judges like three or five.

(viii) Erroneous Decisions.—Decisions may also err by being founded on wrong principles or by conflicting with fundamental principles of common law. Logic suggests that court should be free to disregard

[4] (1980) 1 SCC 321.

those decisions, but practical considerations may require that perfection may be sacrificed to certainty. Where the decision has stood for some length of time and has been regarded as established in the law, the people must have acted while relying on it and dealt with the property and made contracts on the strength of it and in general made it a basis of expectations and a ground of mutual dealings. In such circumstances, it is better that the decision, though founded in error, should stand. However, courts may overrule erroneous decisions of long standing which involve injustice to the citizen or which concern an area of law such as taxation where it is important for the citizen that the courts should establish what the correct law is.

The rule that courts are bound by decisions of higher courts and in some cases by their own decisions, even though wrong, must stand as authority until overruled by a higher authority. On this principle, an erroneous decision of the House of Lords can only be corrected by statute. However, in *London Transport Executive* v. *Belts*, Lord Danning expressed the view that the House of Lords could disregard a prior decision of its own which conflicted with fundamental principles of common law[5]. In *Scruttons Ltd.* v. *Midland Silicones Ltd.*[6], the House of Lords by a majority of four to one disregarded their own previous decision in *Elder, Dempster and Company* v. *Paterson Zochonis and Company*[7].

The Supreme Court of India has also differed from its previous decisions in many cases. In *Bengal Immunity Co. Ltd.* v. *State of Bihar*, the Supreme Court held that there is nothing in our Constitution which prevents the Supreme Court from departing from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public. However, the Supreme Court should not lightly dissent from a previous pronouncement of the court. Its power of review must be exercised with due care and caution and wholly for advancing the public well-being in the light of the surrounding circumstances of each case brought to its notice but it is not right to confine its power within rigidly fixed limits. If on a re-examination of the question, the Supreme Court comes to the conclusion that the previous majority decision was plainly erroneous, it will be its duty to say so and not to perpetuate its mistake even when one learned judge who was a party to the previous decision, considers it incorrect on further reflection. It should do so all the more readily when its decision is on a constitutional question and its erroneous decision has imposed illegal tax burden on the con-

[5] 1959 AC 213.
[6] 1962 AC 446.
[7] 1924 AC 522.

suming public and has otherwise given rise to public inconvenience or hardship.[8]

Circumstances which increase the authority of a precedent

There are circumstances which tend to increase the authority of a precedent. The number of judges constituting the Bench and their eminence is a very important factor in increasing the authority of a precedent. To some extent, the eminence of the lawyers who argued the case enhances the authority of a precedent. A unanimous decision carries more weight. Affirmation, approval or following by other courts, especially by a higher tribunal, adds to the strength of a precedent. If an Act is passed embodying the law in a precedent, the precedent gains an added authority. To a limited extent, the lapse of time adds to the authority of a decision. Likewise, if a precedent is not followed for a long time, its authority starts deteriorating.

Do Judges Make Law?

There are two contrary views on this point. The first view is that judges only declare the existing law. The second view is that they make law.

Declaratory Theory.—The Declaratory Theory is concerned with the first view. According to this theory, judges are no more than the discoverers of law. They discover the law on a particular point and declare it. This view has been supported by many writers, jurists and judges.

The view of Chief Justice Coke is that judicial decisions are not a source of law but the best proof of what the law is.

Sir Mathew Hale wrote in 1713: "The decisions of courts of justice do not make a law properly so called, for that only King and Parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is... And though such decisions are less than a law, yet they are greater evidence thereof than the opinion of any private persons, as such, whatsoever."

Blackstone wrote: "They (judges) are the depositories of the laws; the living oracles who must decide in all cases of doubt and who are bound by an oath to decide according to the law of the land. These judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law... A judge is sworn to *determine*, not according to his private judgment but according to the known laws and customs of the land; not delegated to pronounce a new law but to maintain and explain the old one."

[8] AIR 1955 SC 661.

Lord Esher says in *Willis* v. *Baddeley:* "There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply the existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."

Blackstone's view has been supported by Dr. James Carter. According to him, all judicial decisions merely declare the existing law. If no law existed and a judge decided a case before him, he was guilty of an indefensible outrage. However, if law did exist, then the judge did not create it. To quote Carter: "If what the judges did was to declare a law not existing before, the subjection by them of one of the parties to liability for an infraction of the law in a transaction occurring before the existence of law would be an indefensible outrage. Anyone who undertakes to support Austin's theory encounters here an ugly dilemma; the law by which the judge makes a decision either existed at the time of the transaction involved in the case, or it did not, and was made by the judge; if it did exist, the judge did not make it—if it did not exist at the time of the transaction, then what the judge has done and the sovereign ratified is to compel a man to suffer for the violation of a law committed before the law was made. No theory of law can stand which involves such a consequence." (*Law, Its Origin, Growth and Function,* p. 185).

Many other judges have voiced the same view. In *Hernett* v. *Fisher,* Scrutton, L.J. said: "This court sits to administer the law; not to make new law if there are cases not provided for."

According to Dr. Allen: "A man who chops a tree into logs has in a sense made the logs." The same applies to the judges who are the discoverers and not the creators of law.

In *Rajeshwar Prasad* v. *State of West Bengal,* Justice Hidayatullah observed: "No doubt, the law declared by this court (Supreme Court of India) binds courts in India, but it should always be remembered that this court does not enact."[9]

The declaratory theory has been criticised by Bentham as "a wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not, openly claim it." His disciple John Austin called this theory as "the childish *fiction* employed by judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges."

Munroe Smith writes that the declaratory theory cannot be taken seriously. To quote him: "The fact that English common law has never

[9] AIR 1965 SC 1887.

had any existence except in decisions; that by decisions it has been developed in historical times from scanty beginnings into a great and complex system; that by decisions its rules have continually been modified and frequently overruled, these facts have been more cogent to the average mind than any official theory."

Salmond writes: "Both at law and in equity, however, the declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation and authoritative declaration of the law. Doubtless, judges have many times altered the law while endeavouring in good faith to declare it. But we must recognise a distinct law-creating power vested in them and openly and lawfully exercised. Original precedents are the outcome of the intentional exercise by the courts of their privilege of developing the law at the same time they administer it."

Blackstone's theory that judges can make no new law but merely declare it, is only a *fiction*. In its origin perhaps, this fiction served a useful purpose. An open profession by judges that they made new law, might have made them unpopular. Unsuccessful litigants might submit with resignation to what is declared to have been the law of the land, but they would have rebelled against a decision avowedly applying new law. The judges, being naturally conservative, seem to have adopted this fiction in order to guard against unwise innovations and to preserve the element of certainty in law. Such perhaps were the reasons why this fiction was originally adopted but an explanation of its origin is not its justification. If we want to have a sound theory of the nature of judiciary law and the true operation of precedents, it is necessary to reject the fiction that the duty of the judge is only to expound the pre-existing law.

Critics also point out that in the field of equity, judges have not only been active in modifying, rationalising and explaining common law rules but also in creating new laws at times. It is forgotten by the advocates of the declaratory theory that judges not only interpret the existing law but also expound new propositions of law.

Judges as Law-makers.—The other view is that judges make laws. A number of jurists have supported this view. Lord Bacon said that the points which the judges decide in cases of first impression is a "distinct contribution to the existing law".

In his book *Law and Opinion in England*, Dicey writes: "As all lawyers are aware, a large part and as many would add, the best part of the

law of England is judge-made law—that is to say, consists of rules to be collected from the judgments of the courts. This portion of the law has not been created by Act of Parliament and is not recorded in the statute book. It is the work of the courts; it is recorded in the reports; it is, in short, the fruit of legislation." (p. 361).

Prof. Gray goes to the extent of saying that judges alone are the makers of law. He supports the following proposition of Bishop Hoadly: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes and not the person who first wrote or spoke them." Prof. Gray gives his own view in these words: "*A fortiori*, whoever hath an absolute authority not only to interpret the law, but to say what the law is, is truly the law-giver."[10]

Sir Frederick Pollock, the distinguished English jurist, wrote: "No intelligent lawyer would at this day pretend that the decisions of the courts do not add to and alter law. The courts themselves, in the course of the reasons given for those decisions constantly and freely use language admitting that they do."

Speaking on the role of the judges, President Roosevelt in his message of 8 December, 1908 to the Congress of the United States, said: "The chief law-makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process or law, liberty, they necessarily enact into law parts of the system of social philosophy; and as such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century, we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions."

Critics point out certain limitations on the legislative powers of the judges. A judge cannot overrule a statute. Where a statute has clearly laid down the law, the judge has to enforce it. He has to leave it to the legislator to deal with any unpleasant consequences not foreseen when the law was made. Authoritative precedents also limit the law-making power of the judge as he cannot depart from them. The legislative power of the judge is restricted to the facts of the case before him. Any ruling which he may lay down will be law only insofar as it is necessary for the decision of the case. Any principles laid down by a judge which do not form the ground of his decision and which are not

[10] *Nature and Sources of the Law*, p. 122.

applicable to the case under consideration are only *obiter dicta*. Such *dicta* have no binding authority. In *Quinn* v. *Leatherm*, Lord Halsbury observed: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that law is not always logical at all." The judge is confined to the facts of the case while enunciating legal principles. Within those limits alone it can be said that judges make law.

Prof. Allen writes: "The judge cannot, however much he may wish to do so, sweep away the prevailing rule of law and substitute something else in its place. In this sense it is no childish fiction to say that he does not and cannot make law. The legislature, on the other hand, has an entirely different prerogative. It is not confined to law in the present or the past, but may do as it wills with the future. It can make new law in a sense which is quite precluded to the judge. It legislates where the judge interprets. The legislature can at any time project into the future a rule of law which has never existed in England; the courts can do nothing of this kind."[11]

According to Justice Holmes: "I recognise without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say, I think, the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

The view of Justice Cardozo is that "the judge, even though he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains."[12]. Again, "it is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable

[11] *Law in the Making*, p. 174.

[12] *The Nature of the Judicial Process*, p. 141.

pre-existence in the legislator's mind."[13] Again, "the work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built."[14]

Conclusion.—It is submitted that both the above views regarding the function of judges contain only a partial truth. Whether judges make or declare law depends on the nature of the particular legal system. In common law countries, the role of the judges has been greatly creative. In countries where the law has been codified, the role of the judges has been comparatively less creative. However, the difference between the two is not very great.

The two views regarding the role of the judges are rather complementary and not opposed to each other. A true picture of the judicial function lies in the synthesis of the two views. The creative role of the judges in England has been so dominant that English Law is sometimes referred to as judge-made law, but this does not mean that judges in England have made the law in the same sense in which legislatures make it. Moreover, this view does not apply to other countries. A judge may be said to be laying down law in cases of first impression, but while doing so he is guided by certain principles, conventions and ideals. Even in countries where law is codified, a judge gives creative touches while applying the codified law. The result is that judges not only declare law but also make law. However, the words make and declare should not be taken in their common meaning but in a special sense.

The conclusion is that really speaking, there is not much difference between declaring and making. Though these words are not synonyms, the difference is only that of degree. Declaring does not mean something mechanical. It also involves a creative and intelligent process by which the rules are applied to particular cases. Likewise, making does not mean that judge make law in the sense in which legislators make law. A judge merely works upon the material given to him by the legislature. His function is interpretation only and while doing so, he plays a creative role. He gives life to the skeleton of law. He adapts it to the changed conditions and causes its dynamic growth.

Even if judges do not make law in the sense of promulgating it, it must be acknowledged that they develop the law. The personal stamp of the great judge is upon every legal system. It cannot be denied that the personality of Papinin and Tribonian has entered into the Roman law. The stamp of Coke and Mansfield is indelibly imprinted on Eng-

[13] *Ibid*, pp 14-15.
[14] *Ibid*, p. 178.

lish Law. Chief Justice Marshall was undoubtedly the creator of much that has stood the test of time in the American Constitution. Justice Muthuswami Ayyar stands out as personally responsible for things of the first moment in Indian law. By removing ambiguities, clarifying obscurities and harmonising antinomies, the judges impart certainty to the legal system.

The law-making function of the judges has taken a new turn in the twentieth century. The sociological approach emphasizes the creative role of the judges in society. During recent times, some political systems left enough powers in the hands of the judges to make laws. During the regime of Hitler, judges in Germany gave a political interpretation to law and twisted it to further the aims of the Nazi rulers. The Jews of Germany were suppressed and executed under the orders of the courts. However, such a function cannot be called creative.

An important place is given to the judiciary both in a democratic set-up and a totalitarian set-up. In a democratic set-up, courts help the establishment of democratic values. In a totalitarian State, the judiciary is used to support the political ideology of the State. Article 1 of the Soviet Criminal Code, 1926 lays down that the object of the Code is to protect the socialist State of workers and peasants and the legal order established by it. Article 2 provides that no judge may let acts included within the terms of Article 1 go unpunished simply because such acts are not defined or forbidden by law or because of obscurities or contra dictions in the laws.

Methods of Judicial Decisions

There are two methods of judicial decisions: deductive an inductive. In the case of deductive method, the general legal rule is already fixed and certain and the same is applied in individual cases by the judges. The latter are not required to use their own brains. Their function is merely to apply the law which is already clearly laid down in the same way as a student of geometry uses the axioms. In the case of inductive method, the judge has to start from a particular case and come to a general principle of law. The process is from the particular to the general. According to Allen: "In the one theory, antecedent decisions are helpful only as the illustrations of a general proposition; in the other, they are the very soil from which the general propositions must be mined."

Defects in Judicial Legislation

There are certain defects in judicial legislation or precedent. In the first place, the decisions of the judges are not intelligible to the common man. Those are to be found in the law reports which are not accessible

to the man in that street. It is not possible for an ordinary individual to understand them and draw correct conclusions from them. Very often it is difficult to find out the *ratio decidendi* in a case. That requires a very high training of the mind. Although the people are bound by them and are liable to be punished if they disobey them, they, as a matter of fact, are not in a position to understand them without the help of competent lawyers.

Another defect of judicial precedents is that they create an atmosphere of uncertainty. Judges make law only when certain cases are brought before them and not otherwise. Moreover, a decision by one court may be reversed by another court. The result is that so long as a decision is not given by the highest court of the country, the law on the point is not settled and the atmosphere of uncertainty continues.

Natural justice demands that the law should be known before it is enforced. In the case of judicial legislation, what happens is that a case is brought before a court of law and then the decision is given by a judge. It is only when a decision is given that the law is laid down. It is obvious that when the act was actually done, the law had not been laid down. No wonder the critics criticise the retrospectivity of operation of judicial legislation.

The view of Bentham was that these defects could be removed by means of the codification of law. Very many uncertainties of law could be removed by codifying law on a particular point. This could be done at regular intervals. However, during those intervals new precedents may be set up and thus create uncertainty. The view of Amos is that codification should be done after every 10 years. This may be a very good suggestion, but it is not certain how far the same can be actually adopted in practice. The labour and expenditure involved may be too much and no government may undertake such a thankless task.

Kinds of Precedents

(1) *Authoritative and Persuasive*

According to Salmond, an authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. Authoritative precedents are the legal sources of law and persuasive precedents are merely historical. Authoritative precedents establish law in pursuance of definite rule of law which confers upon them that effect. If persuasive precedents succeed in establishing law at all, they do so indirectly by serving as the historical ground of some later authoritative precedent. They do

not have any legal force or effect in themselves. The authoritative precedents must be followed by the judges whether they approve of them or not. The persuasive precedents can merely persuade the judge but it is up to the judge to follow them or not.

The authoritative precedents in England are the decisions of the superior courts of justice. Examples of persuasive precedents are the foreign judgments, especially those of American courts, Canadian courts, Australian courts, Irish courts, etc., the decisions of superior courts in other parts of the British Empire, the judgments of the Privy Council and the judicial dicta. To quote the Court of Appeal: "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect and rejoice if we quite agree with it."

In *Attorney General* v. *Dean and Canons of Windsor,* Lord Campbell observed: "Observations made by members of the House... beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed insofar as they may be considered agreeable to sound reason and to prior authorities."

(2) *Absolute and Conditional Precedents*

Authoritative precedents are of two kinds, absolute and conditional. In the case of absolutely authoritative precedents, they have to be followed by the judges even if they do not approve of them. They are entitled to implicit obedience. In the case of authoritative precedents having a conditional authority, the courts can disregard them under certain circumstances. Ordinarily, they are binding but under special circumstances, they can be disregarded. The court is entitled to do so if the decision is a wrong one. The decision must be contrary to law and reason. It is contrary to law when there is already in existence an established rule of law on the point and the decision does not follow it. When a law on a point is already settled, the only duty of the judge is to declare it and apply it. However, when the law is not settled, the judge can make law for the occasion. But while doing so, it is his duty to follow reason. Unreasonableness is one of the vices of a precedent. While overruling conditional authoritative precedents, the courts must not run the risk of making the law uncertain. Certainty of law is as important as justice itself. According to Lord Eltom: "It is better that the law should be certain than that every judge speculate upon importance of it."

A conditional precedent can be disregarded either by dissenting or by overruling. In the case of overruling, the precedent overruled is authoritatively pronounced to be wrong so that it cannot be followed by

courts in the future. In this connection, Warrington, L.J. observes: "The conclusion I draw is that in order that a case may be treated as overruled one must find either a decision of a superior court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that court as a whole that such case was wrongly decided on its own facts and not merely that it ought not to be treated as an authority in a case arising out of different facts." By dissenting, a court declines to follow the precedent and lays down the law in a different sense. The conflict thus created can be resolved only by a superior tribunal when an occasion arises. Till that is done, the law remains in a state of uncertainty. In India, the decision of a single judge of a High Court is only conditionally authoritative and may be dissented from by another single judge or it may be overruled by a division bench. If one division bench dissents from another division bench, the procedure to be adopted is as follows: "While a judge of a High Court sitting alone is not bound on a question of law by the decision of another judge sitting alone, this principle goes on further. The division bench is the final court of appeal in an Indian High Court unless the case is referred to a full bench, and one division bench should regard itself bound by the decision of another division bench on a question of law. In England where there is the Court of Appeal, the divisional courts follow the decisions of other divisional courts on the ground of judicial comity. If a division bench does not accept as correct the decision on a question of law of another division bench, the only right and proper course to adopt is to refer the matter to a full bench for which the rules of this court provide. If this course is not adopted the courts subordinate to the court are left without guidance."[15]

A question has been raised whether the decision of a full bench of the High Court can be overruled by another full bench consisting of a larger number of judges. In the case of *Ningappa* v. *Emperor*[16], Chief Justice Beamount expressed the view that the decision of a full bench, until it is overruled by the Privy Council, is absolutely authoritative. To quote him: "There can be no doubt that a full bench can overrule a division bench and that a full bench must consist of three or more judges; but it would seem anomalous to hold that a later full bench can overrule an earlier full bench merely because the later bench consists of more judges than the earlier. If that were the rule, it would mean that a bench of seven judges, by a majority of four to three, could overrule a unanimous decision of a bench of six judges though all the judges were of coordinate jurisdiction." However, the Madras High Court has taken the view that even a full bench may be overruled by a

[15] *Seshamma* v. *Venkata Narasimha Rao*, (1940) I MLJ 400 (FB).

[16] 1941 Bom 408.

numerically stronger full bench. In *Raja of Mandasa* v. *Jagammaykula*[17], Wallace, J. observed: "The rules on the appellate side permit a division bench to refer any matter to a full bench and there are precedents for a division bench referring the decision of a full bench for consideration to a larger bench." The proper procedure to be adopted is "to refer the matter to the Chief Justice and it is then for him to consider whether the question should be reconsidered by a larger bench".

The view of Blackstone is that precedents must be followed unless they are absurd or unjust. If a precedent is erroneous, it can be disregarded. The maxim of the law is *cessante ratione legis cessat ipsa lex* which means that when the reason for any particular law ceases so does the law itself. A precedent can also be disregarded in the interest of justice.

A court of superior jurisdiction can overrule the decision of a subordinate court. A court of coordinate jurisdiction can simply dissent from another court. This means that the coordinate court can refuse to follow the precedent of another court and also lay down a different rule on the same point. The conflict between the two coordinate courts can be resolved only by a superior court. In the case of India, the decision of a single judge of a High Court is only a conditionally authoritative precedent. Another judge of the same High Court can differ from him. A division bench of the same High Court can overrule the same. There is a difference of opinion on the point whether a full bench of one High Court can overrule the decision of the full bench of another High Court. According to Beaumount, the decision of one full bench is as good as that of another as both of them possess coordinate authority. The numerical superiority of a full bench does not entitle it to overrule the decision of another full bench. It is only the superior court that can overrule a decision of the full bench. Formerly that was the Privy Council and now it is the Supreme Court of India. According to the Madras High Court, a numerically stronger full bench can overrule the decision of a similar full bench.

The decisions of the House of Lords are absolutely binding on all the courts in England. Even the House of Lords itself is bound by its own decisions. The Court of Appeal is bound by its own decisions or by those of coordinate jurisdiction. There are *three exceptions* to this rule. If there are two conflicting decisions of a court, it must decide which of the two it should follow. If a decision of a court is in conflict with a decision of the House of Lords, it must refuse to follow it even if it is not expressly overruled by a decision of the House of Lords. The court

[17] AIR 1932 Mad 612

is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*

In the case of India, an inferior court is bound by the decisions of a superior court. A single judge of a High Court is bound by the decisions of a bench of two or more judges. A decision of the full bench of the same court is binding on a bench consisting of two or more judges. Formerly, the decisions of the Privy Council and Federal Court were binding on all the courts in India. Now, the decisions of the Supreme Court of India are binding on all the courts in India.

In *K.C. Nambiar* v. *State of Madras*[18], Chief Justice Subba Rao observed: "A single judge is bound by a decision of a division bench exercising appellate jurisdiction. If there is a conflict of bench decisions, he should refer the case to a bench of two judges who may refer it to a full bench. A single judge cannot differ from a division bench unless a full bench or the Supreme Court has overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a bench decision on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A division bench must ordinarily respect another division bench of coordinate jurisdiction; but if it differs, the case should be referred to a full bench."

(3) *Declaratory and Original Precedents*

According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule. In the case of a declaratory precedent, the rule is applied because it is already law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same. An original precedent is an authority and source of new law but both original and declaratory precedents have their own value.

Stare Decisis

To begin with, there was no doctrine of *stare decisis* as there was no reporting of the decisions of the courts. It was in the 17th century that the decisions of the Exchequer Courts came to be reported in England and were given a binding force. In 1833, the famous decision of Chief

[18] AIR 1953 Mad 351.

Justice Park in *Mirehouse* v. *Rennel* reiterated the urgent need for recognising the binding force of precedents. Then came the Supreme Court of Judicature Acts of 1873 and 1875 and the theory *of stare decisis* was firmly established. Today it is a characteristic feature of the legal systems of England and India.

The doctrine of *stare decisis* has been recognised by the Constitution of India. Article 141 provides that the law declared by the Supreme Court of India shall be binding on all courts in India. Although the expression "all courts" is wide enough to cover the Supreme Court of India itself, it has been held in *Bengal Immunity Co. Ltd.* v. *State of Bihar* that the expression does not include the Supreme Court of India[19]. The result is that like the House of Lords, the Supreme Court is free to depart from its previous decisions if valid reasons exist for doing so.

In *Minerva Mills Ltd.* v. *Union of India,* the Supreme Court observed: "Certainty and continuity are essential ingredients of the rule of law. Certainty in the application of law would be considerably eroded and suffer a serious setback if the highest court in the land were readily to overrule the view expressed by it in the field for a number of years... It would create uncertainty, instability and confusion if the law propounded by this court on the faith of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years."[20]

In *Mahadeolal* v. *Administrator-General of West Bengal,* the Supreme Court held that judges of coordinate jurisdiction should not set aside one another's judgments, for judicial decorum no less than judicial propriety, forms the basis of judicial procedure and certainty in law is not only desirable but also essential. When a single judge of a High Court is of the opinion that the previous decision of another single judge of the same High Court on a point of law is erroneous, he should refer the matter to a larger bench and should not himself hold that the previous decision is wrong. This rule applies not only to judges sitting singly but also to divisional benches. One division bench should not set aside the decision of another division bench of the same High Court.

In *Sheshamma* v. *Venkata Rao,* the Madras High Court held that a division bench is the final court of appeal in a High Court in India. If a division bench does not accept as correct the decision, on a question of law, of another division bench of that court, the only proper course is to refer the matter to a full bench.[21]

[19] AIR 1955 SC 661.
[20] (1980) 3 SCC 625.
[21] (1940) Mad LJ 400.

A similar view was taken by the Andhra Pradesh High Court in *Yedlapat Venkateswarlu* v. *State of Andhra Pradesh.* It was held that if one division bench of a High Court has expressed a view and another division bench is not inclined to agree with it, the latter cannot, by itself, express a contrary view, but must refer the matter to a full bench.[22]

Under the *stare decisis* rule, a principle of the law which has become settled by a series of decisions is generally binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy. Although this rule is generally followed by the courts, it is not applicable in all cases. The reason is that previous decisions should not be allowed to perpetuate a wrong if the court is convinced that the previous decision is wrong. The rule of *stare decisis* is not so imperative or inflexible that it cannot be departed from but its application must be determined in each case by the discretion of the court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result.

In *Maktul* v. *Manbhari,* it was held that where the correctness of the decision has been challenged from time to time and in fact had been reversed and its decision has been considerably impaired by a Privy Council decision, the doctrine of *stare decisis* is not applicable.[23]

A similar view was taken by the Supreme Court of India in *Bachan Singh* v. *State of Punjab*[24]. It was urged before the Supreme Court that the question of constitutional validity of death sentence stood concluded against the petitioners by the decision of a Constitution Bench of 5 judges of the Supreme Court in *Jagmohan Singh v. State of U. P.*[25] and could not therefore be allowed to be reagitated before a bench consisting of the same number of judges. The plea was rejected by the Supreme Court. It was pointed out that the rule of *stare decisis,* though a necessary tool in what Maitland called "the legal smithy", is only a useful servant and cannot be allowed to turn into a tyrannous master. Reliance was placed on the following observation of Brandeis, J. in *State of Washington* v. *Dawson and Co.:" Stare decisis* is ordinarily a wise rule of action. But it is not a universal and inexorable command." If the rule of *stare decisis* was followed blindly and mechanically, it would dwarf and stultify the growth of law and affect its capacity to adjust itself to the changing needs of society. Cardozo, J. observed thus in his New York State Bar address: "That was very well for a time, but now at last the precedents have turned upon us and are engulfing and an-

[22] AIR 1978 AP 333.
[23] AIR 1958 SC 918.
[24] (1982) 3 SCC 24.
[25] AIR 1973 SC 947.

nihilating us—engulfing and annihilating the very devotees that worshipped at their shrine."

The Supreme Court emphasised the necessity of ridding *stare decisis* of something of its petrifying rigidity and warned with Cardozo, J. that "in many instances the principles and rules and concepts of our own creation are merely apercus and glimpses of reality" and "the need of reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social consciousness of the hour, the social consciousness which it is our business as judges to interpret as best as we can."

The Supreme Court pointed out that in the present case there were supervening circumstances which justified a reconsideration of the decision in the case of *Jagmohan Singh*. One circumstance was the introduction of the new Code of Criminal Procedure in 1973 by which Section 354(3) made life sentence the rule in case of offences punishable with death or in the alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons. Another supervening circumstance was the decision of the Supreme Court in *Maneka Gandhi* v. *Union of India*[26] which gave a new interpretation to Articles 21 and 14 of the Constitution of India. The new dimension of Articles 21 and 14 rendered death penalty provided in Section 302 of the Indian Penal Code read with Section 354(3) of the Code of Criminal Procedure, 1973, vulnerable to an attack on a ground which was not available at the time when the case of *Jagmohan Singh* was decided in 1973. Moreover, since the case of *Jagmohan Singh* was decided, India had ratified two international instruments of human rights and particularly the International Covenant on Civil and Political Rights. Under those circumstances, the Supreme Court did not follow the principle of *stare decisis*.

Decisions reached per incuriam

A decision given *per incuriam* is a case in which a statute or rule having statutory effect is not brought to the attention of the court. Lord Halsbury mentioned a case decided by the House of Lords in ignorance of a statute as one which would not be binding on the House. Lord Greene gave a judgment in the Court of Appeal in *Lancaster Motor Co. (London) Ltd.* v. *Bremith* in which a previous judgment of the court was ignored because it contravened the terms of a rule of the Supreme Court. Lord Greene characterized that judgment as one "delivered without argument and delivered without reference to the crucial words of the rule and without any citation of authority". It has since been doubted whether a decision on the interpretation of a stat-

[26] AIR 1978 SC 597: (1978) 1 SCC 248.

ute given without reference to a well-recognized general rule of statutory construction can be said to have been given *per incuriam*. The most important development under this head has been the clear recognition of the fact that a decision given in ignorance of a case which would have been binding on the court is given *per incuriam*. The following is the leading statement of the principle in *Morrelle Ltd.* v. *Wakeling* by Lord Evershed, M. R.: "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must, in our judgment, consistently with the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence." The principle appears to be that a decision can only be said to have been given *per incuriam* if it is possible to find a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect or an authoritative case which might have made the decision different from what it was. A failure to cite authority which would not bind the court is presumably insufficient to render a decision once given *per incuriam*. Such a decision would only be overruled when the later court is satisfied that the earlier court would have decided the case differently had it been made aware of the relevant material.

Decisions sub silentio

In some cases the court may make no pronouncement on a point with regard to which there was no argument and yet the decision of the case as a whole assumes a decision with regard to the particular point. Such decisions are said to pass *sub silentio* and they do not constitute a precedent.

As regards exceptions to the doctrine of *stare decisis*, Prof. Rupert Cross writes that even if a court would be bound by a particular decision in the ordinary way, that decision need not be followed if the court is House of Lords, if it conflicts with a previous decision of the same court, if it has been impliedly overruled by the subsequent decision of a higher court, if it was reached *per incuriam*, if the court is the Court of Appeal and the previous decision was made on an interlocutory appeal, if perhaps it conflicts with a previous decision of a higher court, notwithstanding the fact that that decision was considered by the court which decided the case in question, which case accordingly cannot be

said to have been decided *per incuriam*, if perhaps the previous decision is obsolete, if the previous decision is obscure, out of accord with authority or established principle, or too broadly stated, in these cases the decision but not the *ratio decidendi* is binding, if perhaps the previous case has two *rationes decidendi* in which case a choice may be made between them and if perhaps the result of the case has been reversed by statute, its *ratio decidendi* need not be followed.

Doctrine of Prospective Overruling

In the case of *Golak Nath*[27], the Supreme Court of India adopted the Doctrine of Prospective Overruling. In that case, the validity of the First, Fourth and Seventeenth Amendments of the Indian Constitution was challenged and it was contended that those were invalid. Prior to that case, the Supreme Court had held in the cases of *Shankari Prasad* and *Sajjan Singh* that those amendments were valid. The earlier decisions enabled the government to put an end to the Zamindari system and distribute land among the peasants. In the case of *Golak Nath*, the Supreme Court held by a majority of 6 to 5 that the abovementioned amendments were invalid as they prejudicially affected the fundamental right to property. Ordinarily, this would have upset everything done so far in the agrarian field and would have created many complications. The result was that the Supreme Court restricted the effect of its decision to future cases. It was laid down that the fundamental rights could not be taken away or abridged by constitutional amendment in future but whatever had already been done under the First, Fourth and Seventeenth Amendments was not to be disturbed. This is called the Doctrine of Prospective Overruling.

Ratio Decidendi

According to Salmond: "A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large."

Rupert Cross says that a *ratio decidendi* is a rule of law expressly or impliedly treated by the judge as a necessary slep in reaching his conclusion.[28]

Writers on jurisprudence have advanced different tests for ascertaining the *ratio decidendi*. Professor Wambaugh suggests that the *ratio decidendi* can be discovered by reversing the proposition of law put

[27] AIR 1967 SC 1643.

[28] *Precedent in English Law*, p. 86.

forward by the court and inquiring whether the decision would be the same notwithstanding the reversal. If it is the same, then the proposition of law is no part of the ratio. Lord Simonds has pointed out defects in the suggestion. In cases where a judge has given two alternative grounds for a decision, the test of Professor Wambaugh would compel us to deny the case any *ratio decidendi* because whichever proposition was reversed the decision would still stand on the other.

Professor Goodhart points out that the *ratio decidendi* is not the reason for the decision because the reason may be bad and yet the case may come to be an authority. The *ratio decidendi* is also not necessarily the proposition of law stated in the judgment. There may be no rule of law expressly set out or there may be several rules of law set out by different judges as in appellate decisions. The rule may be broader than is necessary to cover the facts of the case before the court. The view of Goodhart is that *ratio decidendi* is nothing more than the decision based on the material facts of the case. There are certain rules by which the material facts can be discovered. Certain facts may be presumed to be immaterial unless expressly stated to be material. Such would be the facts regarding time, place, name, amount, etc. If the judgment does not give the facts, the facts stated in the report must be assumed to be material. If the judgment does state the facts, we must not look beyond that. The difficulty is as to how much of these facts the judge has treated as material. The view of Goodhart is that facts such as time, place, etc., are presumed to be immaterial unless expressly stated to be material. If the judgment does not distinguish between the material and immaterial facts, all facts mentioned in it must be considered to be material except facts regarding time, place, etc. All facts which the judge has expressly or impliedly treated as immaterial must be ignored. The *ratio decidendi* is the decision as applied to the material facts as ascertained according to the rules suggested by him. If in a later case, the material facts coincide with or are contained within the material facts of the earlier case, then the earlier case is a precedent in the point.

Critics point out that the view of Goodhart that a *ratio decidendi* of a case consists of the decision based on the material facts is superficially true. Its inadequacy becomes evident when it is applied in detail. It rests entirely on the meaning of the phrase "material facts." The theory of Goodhart implies that it is the deciding judge who decides what are the material facts and those can be discovered by a perusal of the judgment. The theory overlooks two points. The first point is that it is within the function of the judges in the subsequent cases to say what they choose to regard as the material facts of the earlier case. The second point is that two persons may agree to a collection of individual facts and yet form different impressions of the group of them as a unit.

A case in law is a collection of facts. Whether two cases resemble each other sufficiently so that one can be regarded as a precedent for the other rests entirely on the impression which a particular judge forms of the facts of each case as a whole. According to M. R. Cohen: "You cannot pass from past decisions to future ones without making assumptions. From the statement that court has ruled so and so in certain cases nothing follows except insofar as the new cases are assumed to be like the old cases. But this likeness depends on our logical analysis of classes of cases." The result is that the *ratio decidendi* of a case depends a good deal on what later tribunals have declared to be the *ratio decidendi*.

Obiter Dictum

All that is said by the court by the way or the statements of law which go beyond the requirements of the particular case and which lay down a rule that is irrelevant or unnecessary for the purpose in hand, are called *obiter dicta*. These *dicta* have the force of persuasive precedents only. The judges are not bound to follow them. They can take advantage of them but they are not bound to follow them. *Obiter dicta* help in the growth of law. These sometimes help the cause of the reform of law. The judges are expected to know the law and their observations are bound to carry weight with the government. The defects in the legal system can be pointed out in the *obiter dicta*. The judges are not bound to make their observations on a particular point unless that is strictly relevant to the point in issue but if they feel that they must speak out their own minds on a particular point, the public should be grateful to them for their labour of love.

According to Professor Patterson, an *obiter dictum* is a "statement of law in the opinion which could not logically be a major premise of the selected facts of the decision". In *Lickbarrow* v. *Mason*, Ashhurst, J. observed that "wherever one of the two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it". This could logically have formed the major premise of the decision if it is ever permissible to treat such a statement as a major premise and the decision that the defendant should have judgment is the conclusion of any syllogism. The observation of Ashhurst, J. was nonetheless a dictum and has been so treated ever since it was made. The *ratio decidendi* was that the right of stoppage in *transitu* is unavailable against an endorsee for value of a bill of lading.

Dr. Goodhart defines *obiter dictum* as "a conclusion based on a fact the existence of which has not been determined by the court".

It is a truism upon which there is no need to enlarge that *dicta* are of varying degrees of persuasiveness. At the end of the scale we have the

considered opinion of all the members of the House of Lords who sat to hear a case. At the other end of the scale we have broad observations made on the spur of the moment such as the remark which prompted Lord Abinger to say: "It was not only an *obiter dictum*, but a very wide divaricating *dictum*." *Dicta* of the highest degree of persuasiveness may often, for all practical purposes, be indistinguishable from pronouncements which must be treated as *ratio decidendi* and there are certain situations where this is the case which are of sufficient importance to be separately mentioned.

According to Lord Sterndale: "*Dicta* are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such *dicta*, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some *dicta*, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the court. It is open, no doubt, to other judges to give decisions contrary to such *dicta*, but much greater weight attaches to them than to the former class."

Decision on Authority and Decision on Principle

Only that precedent is binding on a court which is on all fours with the case before it. If the facts in both cases are the same, the decision is said to be on authority. If the facts of the case are different and the judge merely acts on the analogy of a previous rule, he expounds a new principle of law and his decision is said to be on principle.

Disregard of Precedent

A precedent of conditional authority can be disregarded when it is opposed to a well-recognized existing rule of law or when it is opposed to reason. In both these cases, only a short period should have elapsed since the precedent was set up. If a long time has passed since the precedent was set up, the circumstances may have changed so much that it is not proper and just to retain the precedent. It may also be in the interest of justice to disregard the precedent. It is obvious that a precedent gains in authority with age. If the people have followed a particular precedent for a long time, it is unfair and inexpedient to depart from the same. Even if a precedent is wrong, it may have been followed in a very large number of cases and it may not be desirable to disappoint innumerable parties who may have followed it. This rule is known as the rule of *stare decisis*. It is rightly pointed out that common

errors make law *(communis error facit jus)*. If an error has persisted for a long time and people have believed in it, it should be upheld as law. However, if circumstances have changed on account of the lapse of time, it may not be proper and expedient to enforce an old precedent which may be out of touch with the needs of the people. Under the circumstances, it is advisable to evolve a new law. We should follow the principle that "with the ceasing of the reason for the rule, the rule itself ceases" *(cessante ratione cessat lex ipsa)*.

According to Salmond: "A moderate lapse of time will give added vigour to a precedent but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the intelligent and perhaps partially forgotten principle with later decisions. The tooth of time will eat away an ancient precedent and greatly deprive it of all authority. The law becomes animated by a different spirit and assumes a different course and the older decision becomes obsolete and inoperative."

Precedent and Legal Development

Sometimes it is desirable to alter the precedent in the light of changed circumstances. This can be done in many ways. The judicial power of granting new remedies may be used to realize the objective, but this method is not approved by all. Another method is the moulding of different and often scattered legal rules or remedies into a broad and comprehensive principle which combines restatement, remoulding and the making of new law. An outstanding example is the rule in *Rylands* v. *Fletcher*. It collected several cases of liability without fault which "wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met by the mastermind of Blackburn, J., who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge coordinated them all in their true category." The same has been done by the decision in *Donohgue* v. *Stevenson* in another field.

Though a long-established rule, even if not formally binding on the court, will not lightly be upset, this consideration will be overruled where demands of justice are felt to be weightier. The House of Lords in *Fibrosa* case[29] did not feel deterred by the fact that the rule in *Chandler* v. *Webster* was 40 years old, from overruling it. However, where the House of Lords itself has spoken before, the way for non-legislative reform may be barred. Although the doctrine of common employment is generally found irksome and although the courts have whittled it down to a considerable extent, they have felt unable to abolish it.

[29] 1943 AC 32.

The irksome effect of binding precedent no longer in accordance with current legal ideals can, to some extent, be overcome by the technique of either ignoring or distinguishing precedent. The possibilities and the limitations of moulding the law in the light of changing legal ideals are well illustrated by the changes in the doctrine of common employment. This doctrine was introduced into the common law as a result of a "prejudiced and onesided notion on what was called public policy", of social ideals now repudiated by legislative reforms and current public opinion. Various judgments in recent times demonstrate the strong aversion of present day judges against a doctrine so much at variance with modern social ideals. However, the House of Lords has not decided to abolish a rule based on industrial and social conditions which have changed and to do justice under new and changing conditions because "in a matter of clear and precise decision such as the doctrine of common employment, it is well settled that the decision of the House is final and that the rule can only be changed by the legislature" (Lord Wright). However, if abolition has proved impossible, the courts have been able to restrict the scope of the doctrine to a remarkable extent.

In recent years, there has been a partial but open departure from the strict rule of *stare decisis* on a lower level. Both the Court of Appeal and the Court of Criminal Appeal in England have substantially modified their attitude in regard to *stare decisis*. In 1944, the Court of Appeal held that the court is entitled and bound to decide which of the two conflicting decisions of its own it will follow. The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. According to Lord Greene, M.R.: "Two classes of decisions *per incuriam* fall outside the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction—in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such case a subsequent court is bound by the decision of the House of Lords."

In 1950, the full Court of Criminal Appeal overruled an earlier decision of its own of 1939 on a question of bigamy. Lord Goddard, C.J. observed thus: "This court...has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused per-

son has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person has been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present ..."

Sources of Judicial Principles

Sometimes the question arises as to how the course of law supplements the existing law by laying down new judicial principles. When there is no authority or rule of law to guide the judges, they look to persuasive sources of law for guidance. Although these sources have no legal authority, they are considered with great respect. Reference is made to foreign law, opinions of distinguished jurists and lawyers and the *obiter dicta* of the judges. Common sense is also employed to arrive at a decision. Sometimes analogies are drawn from the existing law to arrive at the new rules.

Functions of Judges and Jury

Generally speaking, all questions of law are decided by the judges and all questions of fact are decided by the jury. It is the duty of the judge to explain the law on the point to the members of the jury. It is only then that the members of the jury can be expected to return a correct verdict. All questions of law have to be elucidated by the judge. It is for him to decide whether a particular evidence is permissible or not. However, the evidence has to be weighed by the members of the jury alone. The jury decides questions of fact which do not admit of any principles. The jury does not lay down any principles of law. It is merely concerned with concrete cases. According to Salmond, the jury decides in *concreto*, not in *abstracto* but the judge strives after the general and the abstract. The decision of a judge can form a precedent but not the verdict of a jury.

According to Dias and Hughes: "The future of the doctrine of precedent in England is a matter of utter conjecture. It is sometimes asserted that the bulk of reported case law is now becoming so unmanageable that the doctrine of *stare decisis* cannot operate effectively for very much longer. The physical labour of discovering all the relevant authorities on a given point, and of keeping up with the annually fresh case law on a topic will become intolerable. Professor Goodhart has pointed out that the position is infinitely worse in America, where the lawyer can expect an annual output of reported cases of some three hundred and fifty volumes. The modest handful of English reports seem less frightening when compared with this teeming profusion. But the difficulty is less acute in America, since the doctrine of *stare decisis* operates here

with far less strictness than it does in England. Professor Goodhart indeed suggests that the English lawyer can very well manage with a working library of some six hundred volumes, which he does not consider excessive, but this seems to be a view more appropriate to the freedom of the academic library and the study than to the every-day life of the working lawyer. Sir Carleton Allen has demonstrated the growing frequency of the overlooking of relevant, sometimes vital, authorities by the courts in coming to decisions. This must be due to the multiplication of authorities, and it is a phenomenon which, if it grows, will bring the whole doctrine of *stare decisis* into disrepute. That doctrine can only function with dignity and effect if there is something approaching a guarantee that all relevant cases will be brought to the notice of the courts. This practice is clearly impossible in the work of the magistrates and county courts, and it is therefore necessary to inquire whether the whole theory of precedent is in modern conditions the most effective way of developing English Law in the appellate courts. But this is a tonic which cannot be discussed until the alternative to precedent is examined. The alternative is the codification of English Law with a provision depriving all decisions before the code of any binding effect."

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Chapter Eleven

Custom

Definition

CUSTOM is also an important source of law and it is desirable to define the same. According to Salmond, custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. According to Keeton, customary law may be defined as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as sources of law because they are generally followed by the political society as a whole or by some part of it. According to Carter: "The simplest definition of custom is that it is the uniformity of conduct of all persons under like circumstances." According to Holland, custom is a generally observed course of conduct. The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common: one man crosses the common in the direction which is suggested either by the purpose he has in view or by mere accident. If others follow in the same track—which they are likely to do after it has once been trodden—a path is made. According to Austin, custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior. According to Allen, custom as a legal and social phenomenon grows up by forces inherent in society, forces partly of reason and necessity and partly of suggestion and limitation. According to Halsbury, a custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. The Judicial Committee of the Privy Council has defined custom as a rule which in a particular family or in a particular district has from long usage obtained the force

of law. In the *Tanistry* case[1], custom was described in these words: "It is *jus non scriptum* and made by the people in respect of the place where the custom obtains. For where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made and being used from time to which memory runneth not to the contrary obtains the force of law."

Origin of Custom

Custom is the oldest form of law-making. A study of ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others.

When the same thing was done again and again in a particular way, it assumed the form of custom. Holland rightly points out that custom originated in the conscious choice by the people of the more convenient of the two acts. Imitation also must have played an important part in the growth of customs.

According to Maine: "The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development whichever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that *usage which is reasonable generates usage which is unreasonable*. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it."

According to Baghot: "The most intellectual of men are moved quite as much by circumstances which they are used to as by their own will. The active voluntary part of a man is very small, and if it

[1] 30 ER 516.

were not economized by a sleepy kind of habit, its results would be nil. We could not do every day out of our own heads all we have to do. We should accomplish nothing, for all our energies would be frittered away in minor attempts at petty improvements. One man, too, would go off from the known track in one direction, and one in another; so that when a crisis came requiring massed combination, no two men would be near enough to act together. It is the dull traditional habit of mankind that guides most men's actions, and is the steady frame in which each new artist must set the picture that the paints. And all this traditional part of human nature is, *ex vi termini*, most easily impressed and acted on by that which is handed down." According to Trade, imitation is not mere curiosity of psychology, it is one of the primary laws of nature. Nature perpetuates itself by repetition and the three fundamental forms of repetition are rhythm or undulation, generation and imitation.

According to Vinogradoff: "Social customs themselves obviously did not take their origin from an assembly or tribunal. They grew up by gradual process in the households and daily relations of the clans, and the magistrate only came in at a later stage, when the custom was already in operation, and added to the sanction of general recognition the express formulation of judicial and expert authority."[2]

A study of ancient society shows that law-making was not the business of the kings. Law of the country was to be found in the customs of the people. The people were accustomed to a particular way of living and doing things and that was to be found in the customs of society. The King was anxious to rule the people according to the popular notions of right and wrong and those were to be found in their customs. Later on, the same custom was recognised by the sovereign by putting his imprimatur on it. It was in this way that custom was transformed into law. Custom was vague in the beginning but it became definite and concrete with the passage of time. It became a rule of law when it was recognised by the sovereign. Sometimes it was adopted by the legislature in its enactments. Sometimes it was recognised by the courts in their decisions. The judicial decisions on Hindu law are based on the customs of the Hindus. Custom is considered as transcendental law. According to Salmond, the importance of custom diminishes as the legal system grows. In countries like England, it has been almost entirely superseded by legislation and precedent. Even the common law of England was originally based on the customs of the country. The travelling judges went from place to place to try cases and based their decisions on the customs prevailing in various parts of the coun-

[2] *Historical jurisprudence.*

try. As they gave similar decisions in similar cases in all parts of the country, a law common to the whole country came into existence and this came to be known as the common law. It is true that the common law of England grew out of the decisions given by the travelling judges but the decisions of the travelling judges were originally based on the customs of the country.

According to Ancel: "Writers are in the habit of giving their own interpretations of the law, which are sometimes contrary to the solutions of the courts, but which they nevertheless consider as the only real expression of French law. On many important points...there exists a doctrine of the courts and doctrine of law writers. So you can find in France a law which is printed in books and taught in universities, and which yet differs much from, even when not contrary to, the law applied by the courts of justice. Writers nowadays take care to state not only their own opinion, but also the opinion of the jurisprudence, but yet they put forward their solution as the only legal one."

Binding Force of Custom

There are many reasons why custom is given the force of law: (1) Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public policy. The very fact that any rule has the sanction of custom raises a presumption that it deserves the sanction of law also. Judges are inclined to accept those rules which have in their favour the prestige and authority of long acceptance. Custom is the external and visible sign of the national conscience and as such is accepted by the courts of law as an authoritative guide. To quote Salmond: "Custom is to society what law is to the State. Each is the expression and realisation of the measure of man's insight and ability, of the principles of right and justice. The law embodies those principles as they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the State, but by the public opinion of the society at large."

(2) Another reason for the binding force of custom is that the existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated. The observance of a custom may not be ideally just and reasonable, but it cannot be denied that it brings stability and certainty in the legal order. In the case of California, the customs which developed on the goldfields regarding the regulation of mining industry, were later on given the authority of law by the legislature. In the case of New Zealand, the customs of the Maoris,

the original inhabitants of the country, were recognised by the Native Rights Act of 1865, which provided thus: "Every title to or interest in land over which the native title has not been extinguished shall be determined according to the ancient custom and usage of the Maori people so far as the same can be ascertained."

(3) Sometimes a custom is observed by a large number of persons in society and in course of time the same comes to have the force of law. Reference may be made in this connection to the custom of giving three days of grace on bills of exchange.

(4) Custom rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.

(5) According to Paton: "Custom is useful to the law-giver and codifier in two ways. It provides the material out of which the law can be fashioned—it is too great an intellectual effort to create law *de novo*. Psychologically, it is easier to secure reverence for a code if it claim to be based on customs immemorially observed and themselves true even though historically the claim cannot be substantiated. There is inevitably a tendency to adopt the maxim 'Whatever has been authority in the past is a safe guide for the future'."

Theories regarding Transformation of Custom into Law

There are two theories regarding the question as to when a custom is transformed into law. Those are the historical theory and analytical theory.

(a) Historical Theory

According to the historical theory, the growth of law does not depend upon the arbitrary will of any individual. It does not depend upon any accident. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people. Savigny gives it the name of Volkgeist. To quote Savigny: "Law like language stands in organic connection with nature or character of the people and evolves with the people." Again, "the foundation of the law has its existence, its reality in the common consciousness of the people... . We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners and custom. *Custom is the sign or badge of positive law and not its foundation or a ground of origin.*" The view of Savigny is that custom is the type of all law and law is valid and just only insofar as it makes known and objectifies in concrete forms the true legal instinct of the community which it purports to govern.

According to Puchta, custom is not only self-sufficient and independent of State imprimatur but is a condition to all sound legislation. According to Arndt: "Customary law contains the ground of its validity in itself. It is law by virtue of its own nature, as an expression of the general consciousness of right, not by virtue of the sanction, express or tacit, of any legislature." James Carter writes: "What has governed the conduct of men from the beginning of time will continue to govern it to the end of time. The human nature is not likely to undergo a radical change and therefore that to which we give the name of law always has been, still is, and will for ever continue to be, custom."

The historical theory has been criticised by many writers. According to Paton, the growth of most of the customs is not the result of any conscious thought but of tentative practice. According to Gray: "Not only does custom play a small part at the present day as a source of non-contractual law, but it is doubtful if it ever did, doubtful whether, at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated legal rules. It has often been assumed, almost as a matter of course, that legal customs preceded judicial decisions and that the latter have served to give expression to the former but of this there appears to be little proof. It seems at least as probable that custom arose from legal decisions." According to Jethrow Brown: "That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the pretence of declaring custom, judges frequently give rise to it." According to Allen, all customs cannot be attributed to the common consciousness of the people. In many cases, customs have arisen on account of the convenience of the ruling class. According to Sir Henry Maine: "Custom is a conception posterior to that of Themistes or judgments." Themistes were the awards which were dictated to the King by the Greek goddess of justice. It is later on that custom came into existence.

The view of the historical school is not balanced. Customs have not always arisen out of convenience or the needs of the people. Sometimes they have been imposed upon the people by the ruling class. Though there are some rules of law which are based on the common conviction of the people the majority of them are so complicated and technical that the common conviction might never have thought of them. The historical jurists did not pay proper attention to the fact that the State has the power of abrogating a custom. They underestimated the creative roles of the judges and legislators which are so important in modern times.

(b) Analytical Theory

The great advocates of the analytical theory are Austin, Holland, Gray, Allen and Vinogradoff. According to Austin, custom is a source of law and not law itself. Customs are not positive laws until their existence is recognized by the decisions of the courts. A custom becomes law when it is embodied in an Act of the legislature. It becomes law when it is enforced by the State. It is not every custom that is binding. Only those customs are valid which satisfy the judicial test. The sovereign can abolish a custom. A custom is law only because the sovereign allows it to be so. Austin writes: "A customary law may take the quality of a legal rule in two ways: It may be adopted by a sovereign or subordinate legislature and turned into a law in the direct mode (statute law) or it may be taken as a ground of a judicial decision, which afterwards obtains as a precedent and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign." Austin maintains that custom has only persuasive value. Customary practices have to be recognized by courts before they become law. While deciding a case, if the judge finds that no statute governs the facts of the case, he can seek the help of custom but he may follow it or not. That depends upon his discretion. Custom has only persuasive value and does not become law until it is followed by the courts. In the words of Austin: "Law styled customary is not to be considered a distinct kind of law. It is nothing but judiciary law founded upon anterior custom."

According to Holland, customs are not laws when they arise but they are largely adopted into laws by State recognition. English courts require that not only the existence of a custom be proved but it should also be proved that the same is reasonable. The legislature can also abrogate customs whether partially or wholly. To quote Holland: "Binding authority has thus been conceded to custom, provided it fulfils certain requirements the nature of which has also long since been settled and provided it is not superseded by law of a higher authority. When, therefore, a given set of circumstances is brought into court and the court decides upon them by bringing them within the operation of a custom, the court appeals to that custom as it might to any other pre-existent law. It does not *proprio motu* then for the first time make that custom a law; it merely decides as a fact that there exists a legal custom about which there might up to that moment have been some question, as there might about the interpretation of an Act of Parliament."

According to Gray: "The true view, as I submit, is that the law is what the judges declare; that statute, precedents, the opinions of the learned experts, customs and morality are the source of the law; that

at the back of everything lies the opinions of the ruling spirits of the community who have the power to close any of the sources; but that so long as they do not interfere, the judges in establishing law have recourse to these sources. Custom is one of them, but to make it not only one source but the sole source of law itself, requires a theory which is as little to be trusted as that of Austin."

The analytical theory has been criticised by Allen in these words: "Custom grows by conduct and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law or by other determinate authority. The characteristic feature of the great majority of customs is that they are essentially non-litigious in origin. They arise from any conflict of right adjusted by a supreme arbiter, not from any claim of *meum* against *tuum*, but from practices prompted by the convenience of the society and of the individual, so far as they are promoted by any conscious purpose at all. The starting point of all custom is convention rather than conflict, just as the starting point of all society is cooperation rather than dissension." According to Vinogradoff: "It is not conflicts that initiate rules of legal observance, but the practices of everyday directed by the give and take considerations of reasonable intercourse and social cooperation. Neither succession nor property, nor possession nor contract, started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of the household on the death of its manager; property began with occupation; possession is reducible to *de facto* detentions; origins of contract go back to the customs of barter."

The analytical theory contains some truth but that is only partial and not the whole truth. The analytical approach is defective due to many reasons. The bulk of customs is non-litigious and hence it does not come before the courts. The society regulates its conduct in accordance with those customs. In most cases, customs are recognised not with the assumption that that recognition gives them the sanctity of law but with the assumption that they are law and have to be treated as such. Though the courts play a creative role in rationalising and shaping customs, they draw their raw material from customs. Hence the view that a custom is not law until it receives the recognition of or declaration by the sovereign is not fully correct.

The correct position lies in a synthesis of the two views and by adopting a sociological point of view. Customs lie in the foundation of all legal systems. They come into existence with the existence of society. Custom is to society what law is to the State. Each is the expression and realisation of the principles of right and justice. Sometimes we can trace some reason, need or convenience behind some custom but

that is not so in every case. It is also not correct that customs are always of local origin and they arise out of the conviction of the people. Sometimes foreign customs such as the customs of the ruling class and sometimes international customs, such as the commercial customs, are adopted and observed. When society develops judicial organs, it exercises some control over them. With the development of society, many other forces exercise their influence on customs, e.g., jurists, codifiers, law-givers etc. Customs are rationalised, systematized and incorporated and embodied in legal rules. These influences can be traced in any legal system. There was the creative role of the magistrates in Roman law. Equity judges played their part in English Law. English writers from Bracton to Blackstone made their own contributions. A similar contribution was made to Hindu law by the Smritikaras and the Privy Council. They interpreted and moulded the customs. One must appreciate their contributions if one wants to understand the proper course of the development of customs. In developed legal systems, courts always exercise some control over customs. Their function is essentially that of scrutiny. They have to find out how far an alleged custom is a rule of conduct or is observed and how far it satisfies the tests laid down for customs. If the court comes to the conclusion that an alleged custom is in existence and is generally observed and satisfies the tests, its duty is to declare it. The function of the court is "declaratory rather than constitutive".

The view of Vinogradoff is that most of the branches of law did not start from legislation or from any other source. They started from customs. This applies to the law of succession, property, possession and contract. Customs started in one form or the other in primitive society. Succession started from the necessary arrangement of the household on the death of the manager or the head of the family. Property began from occupation, possession from *de facto* retention, and contract from the custom of barter. Those customs do not have the same form and substance which they had in the beginning. They are no longer customs and have become a part of the law. Judges, legislators, jurists and other agencies have transformed customs into laws. The conclusion is that customs are the basis of most of the laws but those have been moulded by judges, legislators and jurists in course of time.

Kinds of Customs

Legal Custom

Customs are of two kinds, legal and conventional. The *legal custom* is one whose legal authority is absolute. It possesses the force of law *proprio vigore*. The parties affected may agree to a legal custom or not but they are bound by the same. Legal customs are of two kinds, local cus-

toms and general custom. Local customs apply only to a locality and general custom applies to the whole country.

Conventional Custom or Usage

A conventional custom is one whose authority is conditional on its acceptance and incorporation in the agreement between the parties to be bound by it. A conventional custom is an established practice which is legally binding because it has been expressly or impliedly incorporated in a contract between the parties concerned. When two parties enter into an agreement, they do not put down in black and white all the terms of the contract. There are certain implied terms which can be omitted. The expressed terms of the contract are merely its framework or skeleton. The contract becomes complete only when we take into consideration the implied terms. The intention of the parties to the contract can be gathered from the customary law and other things which can reasonably be taken to be implied in the contract. The customs of the locality or trade or profession are taken to be included in the contract. The courts are bound to take notice of these customs.

In the case of *Hutton* v. *Warren,* the Court of Exchequer held that a lease of agricultural land must be read subject to the custom of the locality that the tenant was bound to observe a certain course of husbandry and that he was entitled to an allowance for seed and labour on quitting the land. Baron Parke observed thus: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent... This has been done upon the principles of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages."

Certain conditions must be satisfied before a court is entitled to incorporate the usages into contracts. The usage must be so well-established as to be notorious. This is necessary because without notoriety, it will be impossible to show that both parties were contracting in the light of the usage. Another condition is that the usage cannot alter the general law of the land whether statutory or common law. The reason is that usage derives its force from its incorporation into an agreement and can have no power to alter the law than an express agreement. Another condition is that the usage must be reasonable. A custom or usage will not be enforced in a particular case if it purports to nullify or vary the express terms of the contract. The sole function of such usage is to imply the terms when the contract is silent. The parties cannot be understood to have contracted in the light of a convention

which they have expressly contradicted. To quote Lord Birkenhead: "The learned judge has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter."

There is a process by which conventional usage comes to have the force of law. To begin with, when a usage begins to emerge, the court will not take notice of it unless it is expressly provided in each case. However, in course of time, the usage becomes sufficiently notorious before the courts for them to dispense with proof in the particular case and to take judicial notice of it. At this stage, the usage already acquires the character of settled law. Later on, the legislature may wish to codify or enact upon the particular branch of law in which this body of usage occurs. The enactment normally takes the form of a statement of law as it is found in the decisions of the courts. This process has actually been employed in the case of the Bills of Exchange Act, the Marine Insurance Act and the Sale of Goods Act.

There is a distinction between a custom and a usage. A custom is binding irrespective of the consent of the parties to be bound thereby. A usage is binding only when it is not expressly excluded by the terms of the agreement entered into by the parties. A custom to be valid should have existed from time immemorial but that is not so in the case of usage. A usage of recent origin can be given effect to by the courts on the ground that the parties had contracted with reference to that usage. A local custom can freely derogate from the general or common law of the realm but not from the statute law. A usage can derogate from the general or common law to the extent to which it is possible to exclude the common law by specific and express contract between the parties. If in any particular case, common law cannot be excluded by express agreement, it cannot be excluded by usage also. However, custom can override the common law.

The Law Merchant

The Law Merchant is the accumulated product of the merchants to which sanction has been given by the decisions of the courts. The law of negotiable instruments, before it was embodied in the statute, was a part of the Law Merchant which is conventional custom. Its law-creating efficacy is dependent upon the fact that it has met with acceptance extensively among traders and courts, will be prepared to construe their contracts in the light of the law merchant and import into the contracts implied conditions based upon mercantile usage. Any principle which can be introduced by express agreement can also be

introduced by means of the law merchant which is not a permanently fixed and stereotyped body of law. The exigencies of trade are continually expanding and the courts of the country are usually not slow in according recognition to the expedients devised by traders for satisfying them. If any part of the general law is absolute and admits of no contract to the contrary, it cannot be impaired by the law merchant which is only a conventional custom and can operate only by means of an implied agreement. This is based on the theory that what cannot be done directly by express agreement cannot be done indirectly by setting up a mercantile custom.

Legal Custom

Legal custom is of two kinds. It is either local custom or the general custom of the realm. Local custom is that which prevails in some defined locality only such as borough or county and constitutes a source of law for that place only. The general custom prevails throughout England and constitutes one of the sources of the common law of the country. The term custom in its narrowest sense means local custom exclusively. At the present day, local customs consist for the most part of customary rights vested in the inhabitants of a particular place to the use for diverse purposes of land held by others in private ownership, e.g. a custom for the inhabitants of a parish to enter on certain land for the purpose of dancing, games and recreation.

In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements. It must be reasonable. It must conform to statute law. It must have been observed as obligatory. It must be of immemorial antiquity.

A custom must be reasonable. The authority of usage is not absolute but conditional on a certain measure of conformity with justice and public utility. This does not mean that courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom or whenever they think that better rule could be formulated in the exercise of their judgment. That would deprive custom of all authority, whether absolute or conditional. The true rule is that in order to be deprived of legal efficacy, a custom must be so obviously and seriously repugnant to right and reason that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity.

Another requirement is that a local custom must be in conformity with statute law. It must not be contrary to an Act of Parliament. In the words of Coke: "No custom or prescription can take away force of an Act of Parliament."

Another requisite of a valid custom is that it must be observed as of right. This does not mean that the custom must be acquiesced in as a matter of moral right. The custom must have been followed openly, without the necessity for recourse to force, and without the permission of those adversely affected by the custom being regarded as necessary.

Another requirement of a local custom is its immemorial antiquity. In order to have the force of law, the custom must be immemorial. It must have existed for so long a time that "the memory of man runneth not to the contrary". Recent or modern custom is of no account.

General Custom

A general custom is that which prevails throughout the country and constitutes one of the sources of the law of the land. There was a time when common law was considered to be the same as the general custom of the realm followed from ancient times. To quote: "The common law of the realm is the common custom of the realm." This view held the field up to the end of the 18th century. However, it cannot be denied that it is incorrect to regard common law as the embodiment of the general custom of the land. No doubt common law is partly based on the customs of England as the travelling judges adopted some of the local customs in their decisions, but they also used their own discretion in taking help from natural law, Canon law and the principles of Roman civil law.

There is no unanimity of opinion on the point whether the general custom must be immemorial or not. According to one decision, a recent trade usage treating debentures payable to bearer cannot be recognized as it is against the common law. In another case, it has been held that an instrument which is transferable by delivery under a trade usage, though recently developed, is a negotiable instrument. If we insist that a general custom must be immemorial, the result is that once such a custom is recognized by a court of law, it cannot be changed or abrogated by a new custom and thus the growth of customary law is checked. The general custom which forms a part of the law merchant prevents new trade customs of a general nature from developing.

The view of Salmond is that the general custom must be immemorial. It is true that trade-customs of a comparatively recent growth are occasionally recognized by the courts, but those are exceptions only. The general rule is that a general custom cannot have the force of law unless and until it is also immemorial. According to Parker, when a general custom is adopted as a precedent, it is accepted as a form of conventional law. It is adopted because common law provides that an agreement should be enforced according to its terms. A general cus-

tom, once recognized, cannot be set aside by a later general custom. A new general trade-custom cannot derogate from an earlier custom but can develop or add to it. A general trade-custom cannot become law if it conflicts with law.

According to Keeton, a general custom must satisfy certain conditions if it is to be a source of law. It must be reasonable. It must be generally followed and accepted as binding. It must have existed from immemorial times. It must not conflict with the statute law of the country. It should not conflict with the common law of the country.

Requisites of a Valid Custom

(1) A custom to be valid must be proved to be *immemorial.* According to Blackstone: "A custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom." According to Littleton: "No custom is to be allowed but such custom as hath been used by title of prescription, that is to say, from time out of mind." The idea of immemorial custom was derived by the law of England from the canon law and by the canon law from the civil law. English Law places a limit to legal memory and fixes 1189 A. D. as enough to constitute the antiquity of a custom. Undoubtedly, the year 1189 is an arbitrary limit. If we can trace back a certain custom as being prevalent from 1189 without interruption, the validity of a custom is established. It is to be observed that in the case of India, the English Law regarding legal memory is not applied. All that is required to be proved is that the alleged custom is ancient. In the case of *Subhani* v. *Nawab,* the Privy Council observed: "It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient: but it is not of the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district."[3]. In *Baba Narayan* v. *Saboosa,* Sir George Rankin observed: "In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties' rights in place of the general law."[4]

[3] ILR (1941) Lah 154 (PC).

[4] (1943) 2 MLJ 186.

(2) Another essential of a valid custom is that it must be *reasonable.* It must be useful and convenient to the society. If any party challenges a custom, it must satisfy the court that the custom is unreasonable. To ascertain the reasonableness of a custom it must be traced back to the time of its origin. The unreasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. The bye-laws in England are required to satisfy the test of reasonableness. If they are not reasonable, they are set aside by the courts. Where the courts find a custom in existence which, either by aberration or by change in law, since its origin, not merely differs from but directly conflicts with an essential legal principle (including the principle of public policy), these have power in modern communities to put an end to the custom. In short, custom, once indisputably proved, is law, but the courts are empowered, on sufficient reason, to change the law which it embodies. According to Prof. Allen, the unreasonableness of the custom must be proved and not its reasonableness.

(3) Only that custom is valid which has been *continuously observed* without any interruption from time immemorial. If a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never existed at all.

(4) The enjoyment of a custom must be a peaceable one. If that is not so, consent is presumed to be wanting in it.

(5) A valid custom must be certain and definite. In one case, a customary easement was claimed to cast on the lands of neighbours the shadow of overhanging trees. It was held to be vague and indefinite on the ground that the shadow of overhanging trees was a changing occurrence.

(6) A custom is valid if its observance is compulsory. An optional observance is ineffective. It is the duty of the court to satisfy itself that the custom is observed by all concerned and not by anyone who pleases to do so. Blackstone says: "A custom that all the inhabitants shall be rated towards the maintenance of a bridge, will be good, but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all."

(7) The custom must be general or universal. According to Carter: "Custom is effectual only when it is universal or nearly so. In the absence of unanimity of opinion, custom becomes powerless, or rather does not exist."

(8) A valid custom must not be opposed to public policy or the principles of morality. In *Raja Varma* v. *Ravi Varma,* the question for decision was whether a custom recognizing the sale of the trusteeship of a temple was a valid custom or not. The Privy Council held: "If the custom

set up was one to sanction not merely the transfer of the trusteeship, but as in this case the sale of a trusteeship is for the pecuniary advantage of the trustee, they would he disposed to hold that circumstance alone would justify a decision that that the custom was bad in law."[5]

(9) A valid custom must not conflict with the statute law of the country. According to Coke: "No custom or prescription can take away the force of an Act of Parliament." A State can abrogate a custom and not *vice versa*. However, it is to be observed that there are writers who hold different views on this point. According to them, legislation has no inherent superiority over custom. If the enacted law comes first, it can be repealed or modified by a later custom. If the customary law is the earlier, it can similarly be dealt with by later enacted law. According to Savigny: "If we consider customs and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may complete, modify or repeal a statute; it may create a new rule and substitute it for the statutory rule which it has abolished." According to Windscheid: "The power of customary law is equal to that of statutory law. It may, therefore, not merely supplement but also derogate from the existing law. And this is true not merely of rules of customary law *inter se* but also of the relations of customary law to statute law." Allen writes: "Age cannot wither an Act of Parliament, and at no time, so far as I am aware, has it ever been admitted that a statute might become inoperative through obsolescence."[6]

According to Blackstone: "Customs must be consistent with each other; one custom cannot be set up in opposition to another. For if both are really customs then both are of equal antiquity, and both established by mutual consent, which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom."

Custom and Prescription

When a thing is practised for a long time, it gives rise to a *rule of law* known as custom, but if it gives rise to a *right*, it is called prescription. A custom is a source of law but a prescription is a source of right. For example, in a certain community of a particular locality, a daughter has priority over collaterals of the third or remoter degree from time immemorial. It is a local custom and it gives rise to a rule of law. If

[5] ILR 1 Mad 235 (PC).

[6] *Law in the Making*, p. 393.

X and his forefathers have from time immemorial been grazing cattle on a particular land belonging to Y, it gives rise to a right in-X and it is called prescription. On account of their similarly, local custom and prescription were both bracketed under the heading of particular custom and prescription was regarded as a branch of custom. Prescription was considered as a particular custom confined to an individual. Both local custom and prescription require the same essentials to be valid. However, at present, local custom and prescription are clearly distinguished as there are prescriptive rights which do not show any similarity to local custom. The rule regarding time immemorial has been replaced in the case of prescription. Uninterrupted enjoyment for 20 years is considered to be enough to acquire a right to light and air.

Custom is based on long usage but prescription is based on lost grant and operates as a source of right. A custom must be reasonable and conform to justice, public policy and utility, but that is not necessary in the case of prescription. Custom is a generally observed course of conduct and has the force of law on account of long usage. Prescription means the acquisition of a right or title by user or possession in the manner laid down by law. Local custom relates to a particular locality or the members of a particular class. It is *lex loci*. Prescription is personal and applies to persons. While custom must be ancient, prescription requires only a period of 20 years.

Present Position of Customary Law

In primitive society, custom was the sole source of law. There was no other mechanism to perform that function. However, with the passage of time, the importance of custom began to decline. The judgments of the courts began to cover some of the fields previously occupied by custom. Later on, legislatures began to pass laws dealing with subjects previously covered by custom. The law-creative activity of custom is now on the decline and has practically exhausted itself. Most of the customs have become a part of the law of the land. One of the tests of a valid custom is that it should be ancient. In England, a valid custom must have had its origin at least as far back as 1189 A.D. This shows that at present custom cannot be a living and operative source of law. New situations arise in quick succession. Modern society is changing at a very rapid pace. What was ten years ago is not the same today. Modern society cannot wait for generations so that a custom becomes ancient and is recognised by court. Custom as a source of law has lost its former position and importance. Modern man looks to legislature for enacting laws at a speed which is demanded by the atomic age.

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CHAPTER TWELVE

PROFESSIONAL OPINIONS AND RELIGION

Professional Opinions

PROFESSIONAL opinions are also a source of law. These can be discussed under the heads of the *obiter dicta* of judges, general opinions of the legal profession and opinions of writers upon legal subjects.

(1) The *obiter dicta* are the statements of law made by a judge in the course of a decision, arising naturally out of the circumstances of the case, but not necessary for the decision. The value of these *dicta* as a source of law depends upon the reputation of the judge and the relation of the rest of the law upon the specific point in question and upon similar topics.

(2) The *legal profession* consists of the judges, the practising lawyers and teachers of law. These branches of the legal profession exercise a powerful influence upon the development of law. Although the influence of professional opinion is not so great in England as was the case in Rome, yet their influence is considerable. English judges are chosen from the ranks of the Bar and teachers of law and their decisions reflect rather the opinions of their order than of themselves. Many existing rules of law owe their origin to the support of the legal profession. In the case of India, the judges are recruited from the services and the Bar and their views have done a lot for the growth of law.

According to Sir Amir Ali: "The four principal schools of law among the Sunnis named after their founders, originated with certain great jurists, to whom has been assigned the distinguished position of Mujahid Imams, namely, Expounders of Law par excellence. By virtue of their learning and their eminence, they were entitled not to be bound to the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy."

(3) The *opinions of the writers of text-books* also help the growth of law. It has been particularly so in the case of international law. Its rules have frequently depended upon the opinions of jurists. International law in its present form would not have been possible without the work of writers like Grotius. The influence of writers of text-books was greater in Roman law than in English Law. That is partly due to the fact that the study of law occupied a very important position in the lives of the educated Romans. No wonder, many of the greatest minds of the age were attracted to the study of law and consequently the prestige of jurisprudence was very high. The writers of text-books on law moulded and educated public opinion and pointed out the changes and developments which seemed desirable to them. Each text-book on law enjoyed an almost binding authority. However, its importance depended upon the reputation of the author. The writings of jurists like Gaius, Ulpain, Paul, Papinian and Modestinus enjoyed almost statutory authority. According to the Law of Citations of 426 A.D., the opinions of the above five jurists were to be considered as binding in any law suit. If the authorities differed, the opinion of the majority was to be followed. Where the numbers on each side were equal, that side was to prevail which had the support of Papinian. If Papinian was silent on any point and the other authorities were equally divided, the judge was free to make his own choice.

In medieval and modern Europe, the writings of great jurists proved a very important source of law. They actually decided what system of law should prevail in a particular country. In Italy, the labours of the Glossators and the commentators created the Pandect law which ultimately triumphed in that country. The German civilians brought the Pandect law to Germany.

A large number of English jurists expounded and influenced law in their own way. Bracton was the earliest English jurist whose name can be mentioned in this connection. The same was the case with the writings of Littleton, Fitzherbert, Coke, Blackstone, Dicey, Anson and Chitty. The same was the case with Justice Story in the U.S.A. Blackstone combined the functions of a judge, a text-book writer and a university professor. According to Dr. Jenks: "It is sometimes said that, even so late as the period now under discussion, the text-books of certain very eminent writers have been treated as authorities by English courts, and should therefore be regarded as sources of modern English Law. But this is true only in a modified sense. Doubtless such works as Blackstone's *Commentaries*, Dalton's *County Justice*, and Hawkin's *Pleas of the Crown*, may be fairly treated by the historian as statements, *prima facie* correct, of the law at the time when they were written. It may even be that, having regard to the great reputation of such writers, English

judges will allow advocates to quote from them, and will even themselves, in delivering judgments, allude with respect and approval to those works. But it cannot be seriously contended that these works are authorities in the sense in which Bracton, Litteton, and even Coke, are authorities for the law of their respective periods. The difference between the weightiest passage of modern text-book writer and the most ordinary judgment of a Court of First Instance, or an unimportant section of an Act of Parliament, is quite clear. The advocate may show that the passage in question is inconsistent with statute or judicial decision; and, if he succeeds, its so-called 'authority' is at once gone. He may attempt to show the unwisdom, absurdity, or inconsistency of the judicial decision or the section of the Act of Parliament; but, until these have been overruled by a later statute, or (in the case of the judicial decision) by a superior tribunal, they remain binding in *pari materia*, and even if the advocate is not pulled up for irrelevance, his argument will be of no avail. Even Blackstone, one of the greatest text-book writers, admits freely the truth of this view. Text-book writers, whatever they once were, are now guides only, and not authorities for English Law."

According to Keeton: "The conservatism of English Law in refusing to admit the authority of a text-book writer until his works have adequately satisfied the test of time is justified when we remember that the writer is essentially a theorist, rather than a practising lawyer, at the time of writing, and in consequence he is subject to certain influences arising out of that situation. In the first place, he is apt to state his rules too broadly. He is always eager to discover general principles and tendencies underlying his science; the modern literature of Roman law, especially, contains works written purely from the standpoint of some particular theory, and the evidence has been 'interpreted, twisted, and even forgotten altogether, in order to preserve that theory. Again, a text-book writer has not the same responsibility as a judge, whose decisions, in the form of reasoned judgments, are composed with an actual case before him, reminding him of the fact that the rights of definite individuals will be affected by his decisions, and further, that his decisions form a link in a chain of precedents vitally affecting human existence in that particular community, in general. This gives judicial decisions a more cautious character than the writings of jurists. Indeed, largely on account of their remoteness from the general trend of human affairs, there have been jurists advocating the direct penalties and the most severe constructions of the laws of some systems when they themselves were among the most peaceful and benevolent of mankind in their personal relations. The doctrines of ruthlessness, based on State necessity, put forward by some writers upon international law during the nineteenth century and the opening years of the

twentieth gave some colour of legal justification to the perpetration of some of the most reprehensible acts of recent warfare."

According to Paton, the text-book writer attempts to universalise, to reduce to an ordered unity and to discover the deeper principles that underlie particular decisions. However, he has a much narrower creative function than a judge as he holds no official position. According to Pomponious, legal reforms cannot be brought about without the help of experts in common law. Law is like a complicated machine and it can be improved only by those who are cognizant of its mechanism.

According to Holdsworth: "No doubt the practice of conveyancers is not law in the same sense as a statute or judgment is law, and if it is founded on an erroneous view of the law it will be disregarded. But provided that it is unanimous and provided that it is not contrary to an ascertained rule of law, it will be such cogent evidence of the law that it will rarely be disregarded by the courts."

"For the exposition of our very complicated real property law", says Byrne, J., "it is proper in the absence of judicial authority to resort to text-books which have been recognized by the courts as representing the views and practice of conveyancers of repute", and he proceeds to make reference, among other works, to *Challis on Real Property*—a book which has been constantly cited with approval in the Chancery Division. Nor in this principle confined to any particular jurisdiction. In a very different branch of the law—Admiralty—we find Lord Atkin paying the following compliment to extra-judicial doctrine: "This is one of those cases dealing with damages which in my experience I have found to be a branch of law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book on the subject."

In *Bastin* v. *Davies*[1], Lord Goddard, C.J. said that *"this court would never hesitate to disagree with a statement in a text-book, however authoritative or however long it had existed, if it thought right to do so"*, but he added: "It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known text-book for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years."

Lord Denning wrote the following about the third edition of Winfield's *Text-book on the Law of Tort*: "The reason why such books are so useful in the courts is that they are not digests of cases but repositories of principles. They are written by men who have studied the law as a

[1] (1950) 2 KB 579.

science with more detachment than is possible to men engaged in busy practice. The influence of the academic lawyers is greater now than it has ever been, and is greater than they themselves realize. Their influence is largely through their writings. The notion that their works are not of authority except after the author's death has long been exploded. Indeed, the more recent the work, the more persuasive it is, especially when it is a work of such an authority as Professor Winfield: because it considers and takes into account modern developments in case law and current literature. Winfield is now cited in place of Pollock; and Cheshire and Fifoot in place of Anson. The essays of Professor Goodhart have had a decisive influence in many important decisions. The vast tomes written and edited by practitioners for practitioners fulfil a different purpose. They are valuable as works of reference. They are cited not for principles but for detailed rules on special subjects. They are most important in day-to-day practice, but do not compare with books such as Winfield when it comes to fundamental principles."

Religion

Religion is also a source of law. According to Sir Henry Maine and Sir James Frazer, the religious fear of evil was the principal instrument in securing uniformity of conduct in primitive society at a time when law did not enjoy an independent existence. The Jews regarded their laws as divine in origin and the same is the case with the Hindus and Mohammadans. In the case of Roman law, *Jus* was at first inextricably mixed up with *Fas* and for a time, the pontiffs administered both. The law of western Europe would have been different in form and content if there had been no Christianity. It was Christianity which preserved the substance of Roman law.

According to Sir Henry Maine, the origin of law in Greece was the Themistes or the divinely inspired judgments of the priest judges. Religion also enriched the law of England. The Chancellors of England who were responsible for the growth of equity, were guided by their conscience. In the case of *Cowan* v. *Milbourne*, it was held that "Christianity is part of the law of England". This view was set aside in 1917 in the case entitled *Bowman* v. *Secular Society*, but in spite of this, to ridicule the tenets of Christianity is blasphemy under the English Law.

Agreement

According to Sir John Salmond, an agreement is also a source of law as it gives rise to conventional law. To quote him: "That an agreement operates as a source of rights is a fact too familiar to require illustration." If X and Y enter into an agreement which is a lawful one, the courts of law recognise that agreement and enforce the same on X and

Y. The same is the case if A and B enter into an agreement with a lawful purpose. However, such agreements bind only the parties to the agreement and not others. Law is a rule of conduct and generality is the test of law. There is no generality in an agreement between two parties. An agreement is recognised so long as it exists, and when it is dissolved, it has no further effect. Agreements play an important part in international law. There may be an agreement among a large number of States to follow a particular procedure with regard to a certain matter. The States entering into the agreement are bound by that. If the agreement is continued for a long time by a large number of States, it acquires the force of a custom and custom thus born is a source of international law. According to Keeton: "Custom is a source of international law, but agreement never is so; agreement is merely a source of custom and only then if a number of other agreements exist compelling uniformity of conduct in the States who are parties to them. The process of municipal law is exactly the same. A number of agreements concluded in the same way and enforcing similar courses of conduct on the parties to them may cause a custom to grow. But it is the custom and not the agreement which is always the source of law."

SUGGESTED READINGS

Amos and Walton	:	*Introduction to French Law.*
Dias and Hughes	:	*Jurisprudence.*
Levi, E.H.	:	*Introduction to Legal Reasoning.*
Levy—Ullmann	:	*The English Legal Tradition.*
Paton	:	*Jurisprudence.*
Pound, R.	:	*The Formative Era of American Law.*
Salmond	:	*Jurisprudence.*
Stone	:	*The Province and Function of Law.*

Chapter Thirteen

Legal Rights and Duties

THE TERMS "wrong" and "duty" are closely connected with rights and it is desirable to refer to them before discussing the important subject of legal rights.

Legal Wrong

According to Salmond: "A wrong is simply a wrong act—an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of injuria (that which is contrary to *jus*), though by a modern perversion of meaning this term has acquired the secondary sense of harm or damage whether rightful or wrongful and whether inflicted by human agency or not."

According to Pollock: "Wrong is in morals the contrary of right. Right action is that which moral rules prescribe or commend, wrong action is that which they forbid. For legal purposes anything is wrong which is forbidden by law; there is wrong done whenever a legal duty is broken. *A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered insofar as it gives rise to liability.* Hence the existence of duty, as it involves right, involves also the possibility of wrong; logically no more than the possibility, though we know too well that all rules are in fact sometimes broken. Duty, right and wrong are not separate or divisible heads of legal rules or of their subject-matter, but different legal aspects of the same rules and events. There may be duties and rights without any wrong; this happens whenever legal duties are justly and truly fulfilled. There cannot, of course, be a wrong without a duty already existing, but wrongs also create new duties and liabilities. Strictly speaking, therefore, there can be no such thing as a distinct law of wrongs. By the law of wrongs we can mean only the law of duties, or some class of duties, considered as exposed to infraction, and the special rules for awarding redress or punishment which come into play when infraction has taken place.

There is not one law of rights or duties and another law of wrongs. Nevertheless there are some kinds of duties which are more conspicuous in the breach than in the observance. The natural end of a positive duty is performance. A thing has to be done, and when it is duly done the duty is, as we say, discharged; the man who was lawfully bound is lawfully free. We contemplate performance, not breach. Appointments to officers are made, or ought to be, in the expectation that the persons appointed will adequately fulfil their official duties."[1]

Wrongs are of two kinds, *legal* and *moral*. The essence of a legal wrong is that it is a violation of justice according to the law—not the manner in which the guilty are treated. It is a legal wrong if a debt is not paid within the period of limitation. A moral wrong is an act which is morally or naturally wrong. It is contrary to the rule of natural justice. It is a moral wrong to disobey one's parents. A legal wrong need not be a moral wrong and *vice versa*.

Duty

According to Salmond: "A duty is an obligatory act, that is to say, it is an act opposite of which would be a wrong. Duties and wrongs are correlatives. The commission of a wrong is the breach of a duty and the performance of a duty is the avoidance of wrong."

Duties are of two kinds, *legal* and *moral*. A legal duty is an act the opposite of which is a legal wrong. It is an act recognized as a duty by law and treated as such for the administration of justice. A moral or natural duty is an act the opposite of which is a moral or natural wrong. A duty may be moral but not legal, or legal but not moral, or both at once. In the case of England, there is a legal duty not to sell or have for sale adulterated milk knowingly. There is no legal duty in England to refrain from offensive curiosity about one's neighbours even if its satisfaction does them harm. There is a moral duty but not a legal duty. There is both a legal and moral duty not to steal.

Duties may be positive or negative. When the law obliges us to do an act, the duty is called positive. When the law obliges us to forbear from doing an act, the duty is negative. If *R* has a right to a land, there is a corresponding duty on persons generally not to interfere with his exclusive use of the land. Such a duty is a negative duty. It is extinguished only if the right itself is extinguished. If *S* owes a sum of money to *Y*, the later is under a duty to pay the amount due. This is a positive duty. In the case of positive duties, the performance of the duty extinguishes both duty and right but a negative duty can never be extinguished by fulfilment.

[1] *Jurisprudence and Legal Essays*, pp. 37-38.

Duties can also be primary and secondary. Primary duties are those which exist *per se* and independently of any other duty. An example of a primary duty is to forbear from causing personal injury to another. A secondary duty is that which has no independent existence but exists only for the enforcement of other duties. An example of a secondary duty is the duty to pay a man damages for the injury already done to his person. It is also called a remedial, restitutory or sanctioning duty.

According to Salmond, if a law recognizes an act as a duty, it generally enforces its performance and punishes those who disregard the same. According to Keeton, a duty is an act or forbearance compelled by the State in respect of a right vested in another and the breach of which is a wrong. According to Hibbert, duties are imposed on persons and require acts and forbearances which are their object. Hibbert refers to absolute and relative duties. Absolute duties are owed only to the State. The breach of an absolute duty is generally a crime and the remedy is the punishment of the offender and not the payment of any compensation to the injured party. Relative duties are owed to a person other than the one imposing them. The breach of a relative duty is called a civil injury and its remedy is compensation or restitution to the injured party.

According to Austin, some duties are absolute. Those duties do not have a corresponding right. Examples of absolute duties are self-regarding duties such as a duty not to commit suicide or become intoxicated, a duty to indeterminate persons or the public such as a duty not to commit a nuisance, a duty to one not a human being such as a duty towards God or animals and a duty to sovereign or State.

If we examine these four classes of duties critically, they are reduced to one category and that is the duties to the State. A duty not to commit suicide or nuisance is enforced by the State and can be included in the category of duties to the State. The result is that the corresponding right vests in the State. However, the view of Austin is that "a sovereign government in its collegiate or sovereign capacity has no legal rights against its own subjects" and therefore the duties towards the State are absolute duties. Dr. Allen, Markby and Hibbert support Austin. Allen writes: The State, no doubt, may have definite rights-interests in the strict sense, similar to those of the individual citizens—rights of a very different kind from the 'right to punish' or 'right to command' or the 'right of sovereignty'. It may enter into contracts and other relationships which give birth to rights and duties in the ordinary legal sense." Where the State imposes duties by virtue of its sovereign character, Allen denies that there are correlative rights in the State. To quote him: "A State, for example, compels children to go to school, or to be

vaccinated, prohibits the sale of certain drugs or alcoholic liquors, or forbids the importation of animals which have not first been quarantined." In such cases, the State has no corresponding right. Particularly, the duties enforced by criminal law are absolute duties. According to Hibbert: "The distinction between absolute and relative duties is logical and convenient since it harmonises with the distinction between might and right."

The view of Austin is criticised by Gray, Pollock and Salmond. According to Salmond: "There can be no duty without a right any more than there can be a husband without a wife or a parent without a child." The result is that rights and duties are always correlated and there is absolutely no scope for absolute duties. The view of Pollock is that "there seems to be no valid reason against ascribing rights to the State in all cases where its officers are enjoined or authorised to take steps for causing the law to be observed and breakers of the law to be punished."

Definition of Legal Rights

Many definitions of rights have been given by various writers and reference may be made to some of them. According to Hibbert, a right is "one person's capacity of obliging others to do or forbear by means not of his own strength but by the strength of a third party. If such third party is God, the right is Divine. If such third party is the public generally acting through opinion, the right is moral. If such third party is the State acting directly or indirectly, the right is legal."

According to Gray, a legal right is "that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons". According to Salmond: "A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong." A legal right must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by law inasmuch as cruelty to animals is a criminal offence. But beasts are not for that reason possessed of legal rights. The only interest and the only right which the law recognizes in such a case is the interest and right of society as a whole in the welfare of the animals belonging to it. He who ill-treats a child violates a duty which he owes to the child and a right which is invested in him. But he who ill-treats a dog breaks no *vinculum juris* between him and it, though he disregards the obligations of humane conduct which he owes to the society or the State and the co-relative right which society or State possesses.

According to Vinogradoff: "We can hardly define a right better than by saying that it is the range of action assigned to a particular will within the social order established by law... . A right, therefore, supposes a potential exercise of power in regard to things or persons. It enables the subject endowed with it to bring, with the approval of organized society, certain things or persons within the sphere of action of his will. When a man claims something as his right, he claims it as his own or as due to him."

According to Holland, a right is "a capacity residing in one man of controlling, with the assent and the assistance of the State, the actions of other". Again, "that which gives validity to a legal right is, in every case, the force which is lent to it by the State. Anything else may be the occasion but is not the cause of its obligatory character. Sometimes it has reference to a tangible object. Sometimes it has no such reference. Thus on the one hand, the ownership of the land is power residing in the landowner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in himself as its subject and exercised over his child as its object, available against all the world besides. On the other hand, a servant has a power residing in himself as its subject, over no tangible object, and available only against his master to compel the payment of such wages as may be due to him."

Holland explains the conception of legal rights by contrasting them with might and moral rights in these words: "If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'might' so to carry out his wishes."

"If, irrespective of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his doing, then he has a 'moral right' so to carry out his wishes."

"If, irrespective of his having or not having, either he might or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes."

If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of the public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the State to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed

to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the State. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as we stated previously, for the definition and protection of rights.

According to Justice Holmes, a legal right is "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force". Legal right is the power of removing or enforcing legal limitations on conduct.

According to Martin: "It is said that he had a right to go along the path across which the machinery was erected, for he was a workman employed in the dockyard and had liberty to use the water closet. But that is a fallacious argument. It is true that the plaintiff had permission to use the path. Permission involves leave and licence, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a licence, not of a right. It is an abuse of language to call it a right."

According to Pollock: "Right is freedom allowed and power conferred by law." According to Kirchmann, a right is "a physical power which through the commands of authority not only is morally strengthened but also can protect against a transgressor by the application of compulsion or evil". According to Buckland, a legal right is an interest or an expectation guaranteed by law. According to T. H. Green: "Rights are powers which it is for general well-being that the individual should possess." According to Kant, a right is "the authority to compel." According to K. R. R. Shastri: "A right may be defined as an interest recognized and protected or guaranteed by the State since it is conducive to social well-being."

According to Austin, law is a general command of the sovereign and duty is the liability to incur the evil of its sanction in case of non-compliance with the command. A person in whose favour or to whose benefits the command enures is said to be invested with a right. A person has a right if he can exact from another acts or forbearances. "A party has a right when another or others are bound or obliged by the law to do or forbear towards or in respect of him." This definition does not make any reference to the element of interest involved in the conception of right. Mill pointed out that a prisoner may be said to have a right to be imprisoned because the jailor is bound by law to imprison him. To be imprisoned is no right. It is only a disability imposed by the sanction of law.

According to Austin, liberty is illusory if it is not protected by law and if law protects it, it amounts to a right. The difference between a right and liberty lies only in the emphasis laid on particular elements in the conception. In liberty, prominence is given to the absence of legal restraint and protection is secondary, but in the case of right it is just the other way. Right denotes protection and the absence of restraint. However, the same elements are comprised in both. For this reason, Austin came to the conclusion that rights and liberties were essentially the same. However, critics point out that Austin ignored the element of interest involved in liberty. What the law protects in liberty is not the interest involved in it but only the exercise of liberty. Rights and liberties are essentially different. Rights pertain to the sphere of obligations and liberties pertain to the sphere of free will. Rights refer to those things which others ought to do for me and liberties refer to those things which I may do for myself.

Theories about Legal Rights

There are many theories with regard to the nature of legal rights.

(1) Austin, Holland, Pollock, Vinogradoff and others are the exponents of the *will theory*. According to this theory, a right is an inherent attribute of the human will. The subject-matter of a right is derived from the exercise of a human will. The will theory was inspired and extended by the doctrine of natural rights. It is the function of law to confer certain powers or allow certain freedom to individuals in the form of legal rights. A legal right is a power conferred by law. According to Justice Holmes, a legal right is "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force". Again, "legal right is the power of removing or enforcing legal limitations on conduct". According to Puchta, a legal right is a power over an object which by means of this right can be subjected to the will of the person enjoying the right. According to Holland, a legal right is "the capacity residing in one man of controlling with the assent and assistance of the State, the actions of others".

(2) Another theory is known as the *interest theory of rights*. Ihering is the greatest advocate of this theory and many English and American writers have followed him. According to Ihering: "A legal right is a legally protected interest." Ihering does not put stress on the element of will in a legal right. On the other hand, he puts emphasis on the material element of interest. The basis of right is not will but interest. According to Buckland, a legal right is "an interest or an expectation granted by law". According to Salmond, a legal right is "an interest recognised and directed by a rule of right". Paton defines a legal right

in terms of recognition and protection by the legal order. According to him, although enforceability by legal process is said to be a necessary condition of a legal right, yet there are three qualifications to the above statement. Law does not always enforce a right and the injured party is guaranteed merely damages. There are certain imperfect rights which are recognised by law only partially. A time-barred debt cannot be realised through the agency of courts as it is an imperfect right, but if the creditor comes to have the money in some way, he can adjust the same towards the debt and need not return the same. Likewise, a time-barred debt may be revived if the debtor acknowledges the same. In certain cases, the courts of justice do not have an adequate machinery to enforce their decisions. This is particularly so in the case of international law.

Allen tries to bring about a reconciliation between the will theory and the interest theory. According to him, the essence of a legal right seems to be not legally guaranteed power by itself nor legally protected interest by itself, but the legally guaranteed power to realise an interest. A similar attempt at reconciliation is made by Jellinek also. According to him, a right is the will power of man applied to a utility or interest recognised and protected by a legal system. The human will does not operate in a vacuum and interests are the objects of human desire. An interest is a formal expression of the will of an individual or a group of individuals. A correct theory of legal rights must take into consideration both the elements of will and interest.

(3) According to Duguit, will is not an essential element in law or right. The real basis of law is social solidarity. The emphasis on will is anti-social as it shows that man is in conflict with his fellow beings. Duguit rejects altogether the conception of legal rights. There is no conflict of interests between society and the individuals. The theory of subjective rights is merely "a metaphysical abstraction". To quote him: "The right of the individual as a pure hypothesis, a metaphysical affirmation, is not a reality. It implies a social contract at the origin of society, a manifest contradiction. No one has any other right than always to do his duty". Duguit goes to the extent of saying that the term 'right' should be removed from legal vocabulary.

The theory of Duguit has been criticized from many quarters. According to Dr. Jenks; "If one individual can in the name of the law and by the agency of the State's officials bring down upon another who has committed a breach of a legal duty, the sanction attached to that duty, there exists in the first individual a power to enforce, with the aid of the State, a legal duty and to that power the jurist gives the name of

legal right". According to Laski, the denial of legal rights by Duguit is "terminological rather than actual".

(4) According to the totalitarians, the whole concept of legal rights is wrong. The only real thing is the State and not much importance should be attached to the individuals. The State is omnipotent and all embracing and individual has no existence independent of the State. All rights belong to the State and the individual as such can claim nothing.

Essentials of a Legal Right

According to Salmond, every legal right has five essential elements:

(*i*) The first essential element is that there must be a person who is the owner of the right. He is the subject of the legal right. He is sometimes described as the person of inherence. The owner of a right need not be a determinate or fixed person. If an individual owes a duty towards society at large, an indeterminate body is the subject of inherence. In the case of a bequest to an unborn person, the owner of the right is an unborn child who is an unascertained person.

(*ii*) A legal right accrues against another person or persons who are under a corresponding duty to respect that right. Such a person is called the person of incidence or the subject of the duty. If *A* has a particular right against *B*, *A* is the person of inherence and *B* the subject of incidence.

(*iii*) Another essential element of a legal right is its content or substance. It may be an act which the subject of incidence is bound to do or it may be a forbearance on his part.

(iv) Another essential element is the object of the right. This is the thing over which the right is exercised. This may also be called the subject-matter of the right.

(v) Another essential element of a legal right is the title to the right. Facts must show how the right vested in the owner of the right. That may be by purchase, gift, inheritance, assignment, prescription, etc.

A man buys a house from another. The buyer will be the person of inherence and the seller and the other persons generally the persons of incidence. The subject-matter of the right will be the house. The contents of the right would lie in the fact that the seller and every other person should not disturb the peaceful possession and enjoyment of the house by the buyer. The title to the right is to be found in the fact of the sale of the house.

When a person purchases anything by paying the price for it, he is entitled to the undisputed right of use in the thing purchased by him.

Other persons are bound by the co-relative duty. The owner has a right against all the world. The object or subject-matter of the right in the thing purchased is his legal right. He acquires the title of the right because the property in the object has been conveyed to him in the same manner as it was acquired by the former owner. Every right involves a threefold relation in which its owner stands. It is a right against some person or persons. It is a right to some act or omission of such person or persons. It is a right over or to something which that act or omission relates. Every right involves a relation with its owner. An ownerless right is not recognised by law, although it is not a legal impossibility. Although ownerless rights are not recognised, the ownership of a right may be uncertain or contingent. Such an owner may be an indeterminate person. He may be an unborn person. He may perhaps never be born. Although every right has an owner, it need not have any certain or vested owner.

An object is as essential an element in the idea of right as the subject to whom the right belongs. A right being a legally protected interest, the object of the right is the thing in which the owner has his interest which he desires to keep or to obtain and which he is able to keep or obtain by means of the duty which the law imposes on other persons. As regards rights over material things, all civilized societies have a great mass of legal rules which are the most important legal rights.

There are rights in respect of one's own person. Every person has a right not to be killed. The object of that right is his own life. One has a right not to be physically injured or assaulted. He has a right not to be coerced or deceived into acting contrary to his desires and interests. Likewise, one has a right to reputation, rights in respect of domestic relations, rights over immaterial property, rights to services etc. As regards the right of personal service, the law which recognises slavery makes it perfectly legal for another to buy and sell a human being in the same manner as he buys a horse or a steam engine. Where slavery is not recognised, the only right one can acquire over a human being is the temporary and limited right to the use of that person created by a voluntary agreement with that person. Such an agreement does not create a permanent and general right of ownership over the person.

Parties to a Legal Right

According to Austin, there are three parties to a legal right. The first party is the State or the sovereign which confers legal rights on certain individuals and which imposes corresponding duties on others. The second party is the person or persons on whom the right is conferred. The third party is the person or persons on whom the duty is imposed or to whom the law is set or directed.

Enforcement of Legal Rights

There are many methods of enforcing legal rights. If a party has suffered, the usual method is to award damages in civil cases. If it is found that damages are not an adequate remedy, an order can be made for the restitution of the thing itself. This is particularly so in the case of rare articles. In certain cases the court orders the specific performance of the contract itself. Sometimes, penalty is imposed in certain cases. The injured party is given the power to recover an amount which is more than the loss suffered. Sometimes, a legal right can be enforced by means of an injunction. When an injunction is issued, it is the duty of the person concerned to abstain from doing an act or contravening an act.

Extinction of Rights

There are many methods by which legal rights can be extinguished. Right is extinguished if the other party performs its duty. If there is a conflict for the payment of debt and the same is paid by the debtor, the legal right is extinguished. Certain rights may be waived by the agreement of the parties. Sometimes, a legal right becomes extinguished when it becomes impossible to perform the same. A person contracts to render personal service to another. The legal right to personal service is extinguished if the promisor dies. A right may be extinguished by the operation of law. A right in land may be extinguished if a law is passed by which Zamindaries are abolished. Likewise, a right is extinguished if the debt becomes time-barred. Law helps the vigilant and not the dormant. If a person does not bother about his rights, no court of law is going to help him. A right acquired by fraud or undue influence may be extinguished if the other party takes action at the right time.

Relation between legal right and legal liberty

Liberty or privilege denotes the absence of restraint. It is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act.

The view of Austin is that "liberty and right are synonymous. The liberty of acting according to one's will would be illusory if it were not protected from obstruction". When law affords such protection, it is in fact conferring a right and so liberty and right are synonymous. In liberty, the prominent idea is the absence of restraint while protection for the enjoyment of that liberty is the secondary idea. Right denotes the protection and connotes the absence of restraint.

It is true that liberty and rights are alike benefits conferred upon a person by law. However, there is a vital distinction between the two. Austin's statement that liberty and right are synonymous is not correct. The term "liberty" implies that the law does not forbid a person from doing an act and arises out of the absence of duties imposed upon him. The term "right" implies that the law enjoins on another the duty of doing or forbearing from doing something for the benefit of the person entitled to the right.

Salmond writes: "Rights are what others are to do for me; liberties are what I may do for myself." I am at liberty to carry on business as a shopkeeper. The law does not in consequence impose on another any duty in this respect. Therefore, I cannot complain if another person opens a rival business next door to me. I have not merely the liberty but the right of using my trade mark. If my rival sells goods with a trade mark in which I have proprietary rights, I have a legal remedy as he has infringed my right to the trade mark.

There is no suitable word to express the co-relative of liberty. As the co-relative of liberty would be the jural contradictory of right, Hohfeld has suggested that the word "no right" may be used as the co-relative of liberty.

Right and Power

A power "is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act". When I speak of a testamentary power, it means that I have the ability to make a will and thereby dispose of may property. A power of appointment enables a person to dispose of the property of another for his own benefit or that of others. A pledger's power of sale or the power of re-entry on the land by a landlord when the lessee defaults in payment of rent are examples of legal powers. In the case of power, there is no correlative duty imposed on another. In this respect, power differs from right and resembles liberty. The distinction between liberty and power consists in the fact the liberty is what one may do innocently without committing a wrong while power is what one may do effectively and validly.

Powers and Immunity

Exemption from the power of another is an immunity. The correlative of immunity is disability. A foreign sovereign enjoys immunity from legal proceedings in our courts. We cannot institute legal proceedings against a foreign sovereign. Immunity stands to power in much the same relation as liberty is to right. Liberty arises from the absence of a right in another and the absence of a duty in oneself. Immunity arises

from the absence of a power in another and the absence of liability in oneself.[2]

Relation between Rights and Duties

It is a debatable question whether rights and duties are necessarily co-relative. According to one view, every right has a corresponding duly. Therefore, there can be no duty unless there is someone to whom it is due. There can be no right without a corresponding duty or a duty without a corresponding right, just as there cannot be a husband without a wife, or a father without a child. Every duty is a duty towards some person or persons in whom a corresponding right is vested. Likewise, every right is a right against some person or persons upon whom a co-relative duty is imposed. Every right or duty involves a *vinculum juris* or a bond of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due. Likewise, there can be no right unless there is someone from whom it is claimed.

According to Holland, every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty. A moral duty is that which is demanded by the public opinion of society and a legal duty is that which is enforced by the power of the State.

According to Keeton, a duty is an act of forbearance which is enforced by the State in respect of a right vested in another and the breach of which is a wrong. Every right implies a co-relative duty and *vice versa.*

Paton writes: "We cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right, we really refer to a right-duty relationship between two persons and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed."

The view of Salmond is that rights and duties are co-relative. If there are duties towards the public, there are rights as well. There can be no duty unless there is some person to whom that duty is due. Every right or duty involves a bond of obligation.

In *Minerva Mills Ltd.* v. *Union of India,* the Supreme Court observed: There may be a rule which imposes an obligation on an individual or authority, and yet it may not be enforceable in a court of law, and therefore not give rise to a corresponding enforceable right in another person. But it would still be a legal rule because it prescribes a norm

[2] See also Hohfeld's *Scheme of Jural Relations.*

of conduct to be followed by such individual or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of, the mechanism of enforcement. A rule imposing an obligation would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite any problem relating to its enforcement."[3]

The other school is represented by Austin. According to him, duties are of two kinds: absolute duties and relative duties. Relative duty corresponds to a right. It is a duty to be fulfilled towards a determinate superior. All absolute duties are enforced criminally. They do not correspond with rights in the sovereign. There is an absolute duty in certain cases. Those are duties not regarding persons e.g., those owed to God and lower animals, duties owed to persons indefinitely, e.g., towards the community, self-regarding duties and duties owed to the sovereign. In case of an absolute duty, it is commanded that an act shall be done or forbidden towards or in respect of the party to whom the command is directed.

Duties towards the public at large or towards indetermined portions of the public have no co-relative rights. The duty to refrain from committing a public nuisance has no co-relative rights. Where trustees held property on trust for religious purposes, even though there is no ascertained beneficiary, the trustees are under a duty not to use the property for a purpose other than religious purpose. The question is to whom the duty is due.

According to Austin, every right implies a corresponding duty, but every duty does not imply a corresponding right. A right to a debt implies a corresponding duty to pay the amount of the debt to the creditor. However, every duty does not imply a corresponding right. It is the duty of a magistrate to punish an offender if his guilt is proved in the court, but it cannot be said that the offender has a corresponding right to be punished.

According to Professor Hibbert: "The distinction between absolute and relative duties is logical and convenient, since it harmonises the distinction between might and right; for the State can only redress infringement of absolute duties by its own might, whereas persons invested with legal rights do not redress infringement by their own might but by appealing to the sovereign for protection of their rights which is quite a different method of redress."

[3] (1980) 3 SCC 625.

Critics point out that the absolute duties enumerated by Austin are not duties in the legal sense. If they are duties at all, they are not absolute. The duty towards God is not a legal duty if it is not embodied in some statute. If it is embodied in a statute, it is a duty towards the State and not towards God. Certain duties imposed on individuals towards animals are in essence the duties towards the State or the owner of the animal and not towards the animal itself. By duties towards persons indefinitely, Austin perhaps means duties towards the community in general. The general duty towards the community is nothing more than a bundle of duties towards each particular individual of the community and each individual has got a co-relative right. Self-regarding duties are also duties towards the State because it is a part of the criminal law as an attempt to commit suicide.

According to Austin, the right-duty relationship between two individuals can exist only where there is a political superior to protect and enforce it. Without the political superior, there can be no right-duty relationship. If we regard the relationship between the State and the individual as the right-duty relationship, where is the political superior? In recognising any other political superior, Austin's definition of the sovereign would be exploded. The sovereign has the power to change the law at any time. Therefore, the relationship between the State and the citizen cannot be termed as right-duty relationship. The sovereign commands and the duty of the citizen is to obey. This power of the State cannot be called a co-relative legal duty against the citizen.

It is submitted that the view of Austin is not correct. It is true that the relationship between the State and the citizen is not on the same footing as the relationship between a citizen and a citizen. It depends more on the nature of the State than on anything else. In democratic countries, a citizen has rights against the State. This is the condition under the Indian Constitution. A co-relative duty binds the State and the State is bound until it changes the law. Likewise, the State has rights against citizens. It is clear that Austin's theory is not correct in modern times.

Ownerless Rights

There is no unanimity of opinion as to whether every right must have an object or not. According to Salmond, an ownerless right is an impossibility. There cannot be a right "without a subject in whom it inheres any more than there can be weight without a heavy body; for rights are merely attributes of persons and can have no independent existence". The object of law is to protect a person in the exercise and enjoyment of a particular right and not to protect a right in itself. A right cannot exist in vacuum. A right may be held of a determinate individual or by the public at large. Although every right has an owner,

it need not have a vested and certain owner. The fee simple of a land may be left by will to a person who is unborn at the time of the death of the testator. The ownership of the land is contingent on the birth of the child. Sometimes, the question arises as to who is the owner of a debt in the interval between the death of the creditor intestate and the vesting of his estate in an administrator. According to Roman law, the rights contingently belong to the heir but they were for the time being vested in the inheritance by virtue of its fictitious personality. The fictitious personality was that of the deceased and not of the future heir. Before the passing of the Judicature Act of 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the judge of the Court of Probate. Now, it vests either in President of the Probate, Divorce and Admiralty Division or in the judges of the High Court collectively.

At present, neither the Roman nor the English fiction is necessary. There is no difficulty in saying that the estate of an intestate is presently owned by a *incerta persona* or by the person who is subsequently appointed its administrator.

There are some writers who are of the opinion that there are some rights without objects. According to them, the object of a right means some material thing to which it relates. In this sense, an object is not an essential element in the conception of right. There are others who admit that a person or a material thing may be the object of a right as in the case of a husband having a right in respect of his wife or a father having a right in respect of his children. They deny that the right of reputation or personal liberty or the right of a patent or copyright has any object at all.

On the point of ownerless rights, Salmond concludes: "An object is an essential element in the idea of a right. A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs. A right is...a legally protected interest; and the object of the right is the thing in which the owner has this interest."

Classification of Rights according to their Objects

Salmond refers to seven kinds of rights by reference to their objects:

(1) There can be *rights over material things*. These are the most important legal rights in respect of their number and variety. Examples are my right to own my car, my land, my house, my furniture, etc.

(2) There are *rights in respect of one's own person*. I have a right not to be killed and the object of this right is my life. I have a right not to be physically injured or assaulted and the object of this right is my bod-

ily health and integrity. Likewise, I have a right not to be coerced or deceived or imprisoned.

(3) There is also the *right of reputation*. By reputation we mean the good opinion that other persons have about a person. A person has as much interest in his reputation as in the money in his pockets. A person has a right not to be libelled. Such a right has obtained legal recognition and protection.

(4) There are *rights in respect of domestic relations*. Every person has an interest and a right in the society, affections and security of his wife and children. No person is to be allowed to seduce his wife or daughter or take away his child or interfere with his life in any way.

(5) There are *rights in respect of other rights*. A right may have another right as its subject-matter. In the case of an agreement to sell land, the right transferred is a right to the right of ownership which passes only when the sale is completed. By a promise of the marriage, a woman acquires a right to be married. She acquires the rights of a wife on being actually married. There are writers like Gray who distinguish between rights to rights which can be specifically enforced and rights to rights the violation of which give rise only to some lesser remedy. On making a valid contract to purchase land, a right to the ownership is acquired. A contract to marry only gives a right to be married or to obtain damages in case the engagement is broken. This treats enforcement and not recognition as the essence of a right and on that basis only the distinction seems to be valid.

(6) There are *rights over immaterial property* and examples of such rights are patent rights, copyrights, trade-marks and commercial goodwill. The object of patent right is an invention and the patentee has a right to its exclusive use. The object of literary copyright is the form of literary expression produced by the author of a book.

(7) There are *rights to services* as well. These rights are created by a contract between master and servant, physician and patient and employer and workman. In these cases, the object of the right is the skill, knowledge, strength, time, etc., of the person bound. If a physician is hired, the hirer gets a right to the use and benefit of his skill and knowledge. If a person hires a horse, he gets a right to the use and benefit of his strength and speed. The object of a right of personal service is the person of him who is bound to render it. The mind and body of a person constitute an instrument which is capable of certain uses just as a horse or steam-engine is.

Legal Rights in a Wider Sense

The term 'legal right' is also used in a wider sense to include any legally recognised interest whether it corresponds to a legal duty or not. In this generic sense, a legal right may be defined as an addition or benefit which is conferred upon a person by a rule of law. Rights in this sense are of three different kinds, *viz.*, rights in the strict sense, liberties and powers.

(*a*) As regards the *rights in the strict sense,* there are legally protected interests corresponding to legal duties imposed upon others.

(*b*) The *legal liberties* of a person are the benefits which he derives from the absence of legal duties imposed upon him. Those are the things which he can do without being prevented by law. A person has a right to do whatever he pleases with himself but he has no right or liberty to interfere with others. He may have a right to express his opinions on public affairs but he has no right to publish a defamatory or seditious libel. He can defend himself against violence but he cannot take the law into his own hands. In *Musgrove* v. *Toy,* it was held: "It is often said that all rights whatever correspond to duties; and by those who are of this opinion a different explanation is necessarily given of the class of rights which we have just considered. It is said that a legal liberty is in reality a legal right not to be interfered with by other person in the exercise of one's activities. It is alleged that the real meaning of the preposition that I have a legal right to express what opinions I please, is that other persons are under a legal duty not to prevent me from expressing them. So that, even in this case, the right is the correlative of a duty. Now there is no doubt that in most cases a legal liberty of acting is accomplished by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. But in such a case there are in reality two rights and not merely one; and there are instances in which liberties are not thus accompanied by protecting rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty: but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity. So a trustee has a right to receive from the beneficiaries remuneration for his trouble in administering the es-

tate, in the sense that in doing so he does no wrong. But he has no right to receive remuneration in the sense that the beneficiaries are under any duty to give it to him. So an alien has a right, in the sense of liberty, to enter British dominions, but the executive government has an equal right, in the same sense, to keep him out. That I have a right to destroy my property does not mean that it is wrong for other persons to prevent me: if means that it is not wrong for me so to deal with that which is my own. That I have no right to commit theft does not mean that other persons may lawfully prevent me from committing such a crime, but that I myself act illegally in taking property which is not mine."

(c) According to Salmond, a *power* is an ability conferred upon a person by law to determine, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either all by himself or by other persons. According to Halsbury: "A power is an authority reserved by or limited to a person to deal with or dispose of either wholly or partially, real or personal property, either for his own benefit or that of other." According to Paton: "A power is an ability on the part of a person to produce a change in a given relation by doing or not doing an act." Examples of powers are the right to make a will, the right to alienate property, the power of sale vested in a mortgagee, the right of re-entry on the part of a landlord, the right to cancel a contract on the ground of fraud, etc. These rights have no corresponding duties. The right to make a will does not involve any duty on the part of somebody else. The right of a mortgagee to sell the mortgaged property does not impose any duty upon the mortgagor.

Powers are of two kinds: public and private. Public powers are those which are vested in a person as an agent or instrument of the functions of the State. They comprise the various forms of legislative, executive and judicial authority. Private powers are those which are vested in persons to be exercised for their own purposes and not as agents of the State.

According to Salmond: "A liberty is that which I may do innocently; a power is that which I can do effectively; a right in the narrow sense is that which other persons ought to do on my behalf. I use my liberties with the acquiescence of the law. I use my power with its active assistance in making itself an instrument of my will; I enjoy my rights through the control exercised by it over the acts of others on my behalf."

Kinds of Legal Burdens

According to Salmond, legal burdens are of three kinds, viz., duties, disabilities and liabilities. A duty is the absence of liberty. A disability is the absence of power. *A liability* is the presence either of liberty or

of power vested in someone else as against the person liable. An example of a liability is the liability of a trespasser to be ejected forcibly. Likewise, the goods of a defaulting tenant can be seized for rent. There is a liability of a mortgagor to have the property sold by the mortgagee. There is a liability of a judgment-debtor to have execution issued against him. There is a liability of the unfaithful wife to be divorced. The most important form of liability is that which corresponds to the various powers of action and prosecution arising from the different forms of wrongdoing.

A *disability* is the mere absence of capacity of powers and can be called "no-power". According to the Indian Penal Code, a child below seven years of age is immune from a criminal trial and the courts are under a disability to try him. Likewise, a minor is under a disability to enter into a contract or make a will.

According to Paton: "An immunity is a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person." Just as a power is a legal ability to change legal relations, likewise an immunity is an exemption from having a given legal relation changed by another. A judge is immune from being punished for whatever he says during the course of the trial. The right of a peer to be tried by peers is an immunity from the power of the ordinary criminal courts. It is neither a right in the strict sense, nor a liberty, nor a power.

A foreign sovereign or an ambassador cannot be tried by the courts of law of the country. This immunity is neither a legal right nor a legal wrong nor a liberty nor a power. It is merely an exemption from the ordinary process of the courts of the land. The Members of Parliament cannot be arrested during the seisson.

Rights and Duties of the State

According to Austin: "The sovereign has no rights and duties. It cannot issue commands against itself or bind itself to anything. Consequently, no subject can own a right against the State," Under the English Law, a person is allowed to sue the State in certain cases only when the State allows him to do so. The special procedure of the petition of right has to be followed. The subject has to approach the State in the form of a beggar. He cannot enforce his right.

The State can have no rights. As the State has no political superior over it, there is none to confer a legal right on it. If we suppose that the State has rights, we take away from it its sovereignty. According to Hibbert, to concede rights to the State is to confuse might with right.

Such a view is based on the fact that sovereignty is unlimited and illimitable. However, that is not the case with sovereignty.

According to Gray: "The State has an indefinite power to create legal right for itself; but the only legal rights which the State has at any time are those interests which are then protected by the law—that is, by the rules in accordance with which the judicial organs of the State are then acting." According to Pollock: "There seems to be no valid reason against ascribing rights to the State in ail cases whether its officers are enjoined or authorised (by law) to take steps for causing the law to be observed and breakers of the law to be punished."

Rights against State

However, according to Holland, the State possesses rights against the subjects and it also owes duties to the subjects. According to Salmond, a subject may claim rights against the State in the same way as against another subject. The right of a subject is not a perfect right as it cannot be enforced. A State cannot enforce a judgment against itself.

Jethrow Brown writes: "We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self-imposed, if as a matter of fact the sanction is invariably admitted by the sovereign and applied by the courts." If the sovereign having laid down the law that contracts shall be enforced enters into contracts with his own subjects and if those contracts are enforced as a matter of fact by its courts even as against the sovereign, then it is impossible to deny that the sovereign is under a legal duty towards its subjects. The view of Sir John Salmond is that the right of the subject in such a case is an imperfect right because although a judgement can be obtained against the sovereign, it cannot be enforced against the will of the sovereign and can be enforced only with the assistance of the sovereign. The view of Pollock is: "According to the view of the nature of law which regards it as the command of supreme political authority and nothing else, it is difficult to describe rights and barely possible to ascribe duties to the State." Salmond says: "If the judicial proceedings in which the State is a party are properly included within the administration of justice, the principles by which they are governed are true principles of law in accordance with the definition of law, and the right defined by these legal principles are true legal rights." The better view seems to be that the State can have rights and is subject to duties. It is true that the rights of the subject against the State as well as the duties of the State towards the subjects are prescribed by the State itself which has the physical power to disregard them and the constitutional power to repudiate them but nevertheless they are true legal rights and legal duties insofar as they are normally capable of enforcement in courts of law.

A change has been brought about in the law of the country by the passing of the Crown Proceedings Act of 1947. In certain cases, the aggrieved party has been given the power to file a suit against the government. In spite of this, the Crown possesses certain advantages in matters of litigation.

In the case of India, the State has both rights and duties. Legal duties have been imposed upon the State by the Constitution in the form of fundamental rights. There is no provision for a special procedure like that of the petition of right. A suit can be filed against the Union of India and the State Governments and *vice versa*.

Estate and Status

An estate connotes the rights of the owner in the property. Status includes not only his rights but also his duties, liabilities and disabilities.

Many *definitions of status* have been given by various writers. According to Austin: "Where a set of rights and duties, capacities and incapacities, specially affecting a narrow class of persons, is detached from the bulk of the legal system and placed in a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacities, is called status." According to Scott, L.J.: "Status is in every case the creation of substantive law; it is not created by contract although it may arise out of contract, as in the case of marriage where the contract serves as the occasion for the law of the country of the husband's domicile to fix the married status of the parties to the contract." According to Allen, status is "the conditions of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities and incapacities or both". According to Westlake, status is "the sum of liberties in which a person's condition differs from that of the normal man". According to Brett, L.J.: "The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community." The status of a person is not defined by contract or agreement but by law.

According to Sir Henry Maine, status means a legal condition in which rights and duties are imposed by the operation of law. The status of a person is determined without his consent. Marriage creates status in this sense. Although it comes into existence by the agreement of the parties, it cannot be dissolved at the will of the parties and they are bound by the legal conditions imposed by law. According to Sir Henry Maine, the movement of progressive society has been from *status to contract*.

Dicey refers to seven particular kinds of status, *viz.*, parent and child, guardian and ward, infancy, legitimacy, husband and wife, lunatic and curator and corporation.

Rights of Beneficiary

The right of the beneficiary in trust property is an equitable right. The beneficiary is an equitable owner and the trustee is the legal owner. However, there is a difference of opinion whether the rights of the beneficiary are rights *in rem* or rights *in personam*.

Historically, the right of a beneficiary was regarded to be a right *in personam*. The right was available against the trustee personally. However, things changed later on. The limitation of binding the trustee personally was removed and now the right of a beneficiary is considered to be of a proprietary nature. The beneficiary has a right in trust property against the whole world except in case of a *bona fide* purchaser for value and without notice of the trust.

According to Maitland, Langdell and Amos, the right of a beneficiary is a right *in personam*. A trust binds only a certain class of persons and not the world at a large. It was held in the case of *Burgess* v. *Wheate* that the right of the beneficiary is a personal one and cannot pass to the Crown by escheat. In another case, it has been held that death duties are liable to be paid in England if the trustee lives in England although the property is situated outside England.

Another view is that the right of a beneficiary is a right *in rem*. The beneficiary is the owner of trust property. It is the duty of the trustee to hold the trust property for the benefit of the beneficiary. This is not only the view of Hohfeld but also of the House of Lords.

Paton points out that it is frequently contended that the right of the beneficiary is not a right *in rem* as it is not available against a *bona fide* purchaser for value and it is not merely a right *in personam* against the trustee. However, if we admit that a right is not *in rem* merely because it can be defeated by a particular class of purchaser, the same argument applies not only to the beneficiary but also the whole class of negotiable instruments. He asks the question whether a person has no right *in rem* to his money merely because another person who receives it for value and in good faith acquires the superior title although the same was originally taken from him by a thief.

The present view is that the right of a beneficiary is a right *in rem* and not *in personam*. However, the matter has not been finally concluded.

Kinds of Civil Rights

Civil rights are of two kinds. Those are primary and sanctioning rights. The object of civil proceedings is the enforcement of the right of the plaintiff. The right so enforced is either primary or sanctioning. A sanctioning right is one which arises out of the violation of another right. All other rights are primary rights. If *A* enters into a valid contract with *B*, the right of *A* have the contract fulfilled is the primary right. If the contract is broken, his right to damages for the breach is a sanctioning right.

The purpose of a sanctioning right can be penal action which means the imposition of a pecuniary penalty upon the defendant for the wrong committed by him. It can also be restitution and penal redress, i.e., grant of pecuniary compensation to the plaintiff in respect of the damage which he has suffered from the wrongdoing of the defendant.

Penal action does not mean penal prosecution. It means a civil action in which the defendant is made to pay a penalty. The law often creates and enforces a sanctioning right which has in it no element of compensation to the injured person. It intended only as a punishment for the wrongdoer. The action is called penal action as it is brought for the recovery of a penalty although it is not a criminal proceeding.

Another form of sanctioning right is the right to pecuniary compensation or damages. That compensation may be restitution and penal redress. In restitution, the defendant is compelled to give up the pecuniary value of some benefit which he has wrongfully obtained at the expense of the plaintiff. He has to restore the plaintiff to his original position (*status quo*). If a defendant has made profits by infringing the trade mark of the plaintiff, he must compensate the plaintiff by handing over all the profits made by him as a result of the infringement. In penal redress, the defendant has to restore all the benefits derived from his wrongful conduct in addition to full redress for the loss of the plaintiff. The defendant may have to pay much more than what he has gained by his wrongful conduct.

Kinds of Legal Rights

(1) *Perfect and Imperfect Rights*

Legal rights have been variously classified. According to Salmond, a perfect right is one which corresponds to a perfect duty. A perfect duty is one which is not merely recognized by law but also enforced by law. In all fully developed legal systems, there are rights and duties which, though recognized by law, are not of perfect nature. Those rights are called imperfect rights. Examples of imperfect rights are the claims

barred by the lapse of time, claims which cannot be enforced on account of the absence of some special form of legal proof, claims against foreign States or sovereigns, claims which cannot be enforced as they do not lie within the local limits of the jurisdiction of the court, debts due to an executor from the estate which he administers. In these cases, the rights and duties are imperfect as no action lies for their maintenance. The law of limitation does not destroy a right but it merely provides that the right cannot be enforced through the agency of law. An imperfect right may be good as a ground of defence, though not good as a ground of action. If a contract is not properly executed, the courts of law refuse to enforce the same but if money comes into the hands of the person in whose favour the contract has been executed, he can appropriate the same and take the plea that the payment is in pursuance of the contract. An imperfect right is sufficient to support any security that has been given for it. An imperfect right may become perfect. The right of action may be dormant and not nonexistent. A verbal contract may become enforceable on account of the fact that a written evidence of the contract comes into existence. Likewise, part-payment of a time-barred debt makes the right a perfect one.

(2) *Positive and Negative Rights*

According to Salmond, a positive right corresponds to a positive duty and entitles its owner to have something done for him without the performance of which his enjoyment of the right is imperfect and incomplete. Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. The majority of negative rights are against all the world.

My right to the performance of a contract of service is a positive one. If another person owes some money to me, my right to the money in the pocket of that person is a positive one. If I have some money in my pocket, my right to it is a negative right. The right of a first possessor to quiet enjoyment is a negative one. It corresponds to the negative duty of all others not to interfere.

In the case of positive rights, the person subject to the duty is bound to do something. In the case of a negative right, others are restrained from doing something. The satisfaction of the positive rights results in the betterment of the position of the owner. In the case of negative rights, the position of the owner is merely maintained as it is. In the case of positive rights, the relation between the subject and object is mediate and the object is attained by the help of others. In the case of negative rights, the relation is immediate. There is no necessity of any outside help. All that is required is that others should refrain from interfering. In the case of positive rights, a duty is imposed on one or

a few persons. In the case of negative rights, the duty is imposed on a large number of persons.

(3) *Real and Personal Rights*

According to Salmond, a real right corresponds to a duty imposed upon persons in general. A personal right corresponds to a duty imposed upon determinate individuals. A real right is available against the whole world. A personal right is available only against a particular person. My right to the possession and use of money in my purse is a real right. However, my right to receive money from a person who owes me is a personal right. I have a real right against everyone not to be deprived of my liberty or reputation. I have a personal right to receive compensation from any individual who in any way harms me. I have a real right to use and occupy my house but I have a personal right to get accommodation in some hotel.

Real rights are more important than personal rights as they are available against the whole world. The right of a patentee is much more valuable than the right of a person who has purchased the goodwill of business from another person.

According to Salmond, all real rights are negative and most personal rights are positive although in a few exceptional cases they are negative. A real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference. No person can have a legal right to the active assistance of all the world. The only duties which can be expected from the whole world are of a negative character.

Although all legal rights are negative, it is not true that all personal rights are positive. This is so in most of the cases. However, there are certain cases in which rights are both negative and personal. These are usually the product of some agreement by which some particular individual deprives himself of a liberty which is enjoyed by others. While traders can compete with me, the person whose goodwill of a business I have purchased is restrained from competing with me. I have the right of exemption from competition from that person and that right is both personal and negative. My right is protected against a particular individual alone.

It is to be observed that real rights are rights *in rem* but personal rights are rights *in personam*. Real rights are always negative rights but personal rights are generally positive rights. A real right is protected against the whole world but a personal right prevails against a determinate person or persons.

(4) Rights in rem and Rights in personam

These terms 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*. The plaintiff claimed that a certain thing belonged to him and the same ought to be restored or given to him. An *actio in personam* was one for the enforcement of an *obligatio*. In such a case, the plaintiff claimed the payment of money, the performance of a contract or the protection of some other personal right vested in him as against the defendant. The right protected by an *actio in rem* came to be called *jus in rem* and a right protected by *actio inpersonam* came to be called *jus in personam*. These terms were invented by the commentators of civil law and are not to be found in the original sources.

Literally interpreted, *jus in rem* means a right against or in respect of a thing. *Jus in personam* means a right against or in respect of a person. As a matter of fact, every right is at the same time one in respect of something and against some person. Every right involves not only a real but also a personal relation. Although the two relations exist together, their relative importance is not the same. In real rights, it is the relation to the thing which is very important. In the case of personal rights, it is the relation to other persons who owe the duties which is important. Real rights are usually derived from some special relation to the object but personal rights are derived from special relation to the individual or individuals under the duty.

A right *in rem* is available against the whole world but a right *in personam* is available against a particular individual only. A right *in rem* is available against persons generally. Examples are rights of ownership and possession. My right of possession and ownership is protected by law against all those who may interfere with the same. A right *in personam* corresponds to a duty imposed upon determinate persons. Rights under a contract are rights *in personam* as the parties to the contract alone are bound by it. The right of a creditor against a debtor is a right *in personam*. The same is the case with the right of a landlord to recover rent from a tenant. However, my right to reputation is a right *in rem*. I have a right to prosecute all those who dare to libel me. Rights *in rem* are almost always negative. Those are rights to be left alone. Rights *in personam* are usually positive and negative only in exceptional cases. This is so in the case of sale of goodwill when the seller promises not to set up a rival business within a particular locality and for a specific period. The right of the purchaser is both negative and *in personam*. He acquires the right of exemption from competition from the seller.

Rights *in personam* usually arise out of contracts but a contract alone is not the sole source of personal rights. It is possible to have rights

against a definite individual independently of any agreement with him. One may have the right to receive compensation from a wrong-doer for the breach of a duty imposed upon him by law and not by contract. Such a right is a personal right arising independently of contract. The rights which arise out of *status* are also rights *in personam*. They are not of so definite a character as to be reducible to a money value. The rights and duties which arise out of coverture or by membership of a family consist often in lifelong course of conduct and do not always have an economic significance. In this respect, they differ from rights *in personam* that arise out of a contract.

Dr. Holland has explained the distinction between the rights *in rem* and rights *in personam* by an example. If a surgeon is practising in a town, there is a negative duty incumbent on all not to prevent him from exercising his calling. There is no general duty not to compete for his practice and hence a rival may establish another surgery shop next door. However, if the surgeon bought his business from a predecessor who contracted with him not to practise in that town, the predecessor would be under a contractual duty of not competing with the successor by the exercise of his profession in that town. The rights of the surgeon against his predecessor are rights *in personam* and his rights against everyone else are rights *in rem*. The personal right in this illustration is a negative one. It corresponds to the negative duty of his predecessor not to compete with him. Rights *in personam* are usually positive rights which correspond to positive duties undertaken by a determinate person.

(5) *Proprietary and Personal Rights*

The proprietary rights of a person include his estate, his assets and his property in many forms. Proprietary rights have some economic or monetary value. Examples of proprietary rights are the right to debt, the right to goodwill, the right to patent, *etc.* Proprietary rights are valuable but personal rights are not valuable. Proprietary rights are the elements of the wealth of a man. Personal rights are merely elements in his well-being. Proprietary rights possess not merely judicial but also economic importance. Personal rights possess merely judicial importance.

The distinction between proprietary and personal rights is not confined to rights in the strict sense of the term but applies to other classes of rights as well. The estate of a person is made up not merely of his valuable claims against other persons but also of such of his powers and liberties as are either valuable in themselves or are accessory to other rights which are valuable. A general power of appointment is proprietary but the power of making a will or a contract is personal. A

liability to be sued for a debt is proprietary but a liability to be prosecuted for a crime is personal. The duty of fulfilling a contract for the purchase of goods is proprietary, but the duty of fulfilling a contract to marry is personal. The status of a person is made up of his personal rights, duties, liabilities and disabilities. The same person may have at the same time the status of a free man, a citizen, a husband, a father, etc. When we speak of the status of a wife, we refer to all her personal benefits and burdens arising out of marriage. In the same way, we speak of the status of an alien, a lunatic or an infant. The true test of a proprietary right is not whether it can be alienated but whether it is equivalent to money. It may be equivalent to money although it may not be possible to sell it for a price. A right to receive money or something which can itself be turned into money, is a proprietary right and is to be counted as a part of the estate of the possessor although the same may not be alienable.

(6) *Inheritable and Uninheritable Rights*

A right is inheritable if it survives its owners. It is uninheritable if it dies with him. Proprietary rights are inheritable but personal rights are uninheritable. The heirs of a proprietary owner become owners after his death. In the case of personal rights, they die with the owner and cannot be inherited.

(7) *Rights in re propria and rights in re aliena*

According to Salmond, a right *in re aliena* or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All other rights are rights *in re propria*. These two terms were invented by the commentators on civil law and are not to be found in the original sources. The owner of a chattel has *jus in re propria* or a right over his own property. The pledgee has *jus in re aliena* or a right over the property of someone else. Rights *in re propria* are rights in one's own property. These are complete rights to which other rights can be attached. Rights *in re aliena* are rights over the property of another person. These rights derogate from the rights of other persons and add to the rights of their holder. My right of ownership of my land is a right *in re propria*. My right of way across the land of another person is a right *in re aliena*. My right of way is the dominant right. A dominant right is an encumbrance and a servient right is subject to an encumbrance. In the case of a landlord and tenant, the lessee has a dominant right *in re aliena* and the lessor has a servient right *in re propria*.

There are four main classes of encumbrances, *viz.*, leases, servitudes, securities and trusts. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another. A

servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by possession of it. Examples of servitudes are the right of way, the right to the passage of light or water across an adjoining land, *etc.* A security is an encumbrance vested in a creditor over the property of his debtor for the purpose of securing the recovery of the debt. An example of security may be the right to retain possession of a thing till the payment of the debt. A trust 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 called the trustee and the owner of the encumbrance is called the beneficiary.

(8) Principal and Accessory Rights

Principal rights exist independently of other rights. Accessory rights are appurtenant to other rights and they have a beneficial effect on the principal rights. A security is accessory to the right secured. A servitude is accessory to the ownership of the land for whose benefit it exists. The rent and covenant of a lease are accessory to the ownership of the property by the landlord. Covenants for title in a conveyance are accessory to the estate conveyed. A right of action is accessory to the right for whose enforcement it is provided.

X owes money to *Y* and he executes a mortgage deed in favour of *Y*. The debt is the principal right and the security in the form of mortgage is the accessory right. The security has a beneficial effort on the principal right of recovery. The mortgage continues so long as the debt is not paid and is extinguished when the debt is paid off. *X* has a piece of land and as the owner of that land, he has the right of way on the adjoining land. The ownership of the land by *X* is the principal right. The right of way in the adjoining land is the accessory right. When the land is sold by *X*, the accessory right of way is also lost. A dominant right is generally an accessory right. There is an exception in the case of a lease which is a dominant right and not an accessory right.

(9) Legal and Equitable Rights

Legal rights were recognized by common law courts and equitable rights were recognized by the Court of Chancery. The Judicature Act of 1873 put an end to the distinction between legal and equitable rights. Although no court now recognises the distinction between legal and equitable rights, the distinction is still of great importance. The methods of their creation and disposition are different. A legal mortgage must be created by deed but an equitable mortgage may be created by a written agreement or by the deposit of title deeds. The same is the case with legal and equitable leases. Equitable rights have a more precarious existence than legal rights. When there are two inconsistent

legal rights claimed by different persons over the same thing, the first in time prevails. The same is the case when there is a competition of two inconsistent equitable rights. However, when there is a conflict between a legal right and an equitable right, the legal right prevails and destroys the equitable right even if it is subsequent to the equitable right in origin, but the owner of the legal right must have acquired it for value and without notice of the prior equity. If there is a competition between a prior equitable mortgage and a subsequent legal mortgage, preference is given to the subsequent legal mortgage. The rule is that where there are equal equities, the law prevails.

In India, there are no separate equity courts and both common law and equity jurisdictions are combined in one court which acts according to justice, equity and good conscience in the absence of specific rules of law. The expression *"justice, equity and good conscience"* implies the rules of English equity so far as those are applicable in India. In the absence of a specific law on the subject, the practice of the English equity courts is followed in India with necessary modifications.

Under Clause 36 of the Supreme Court Charter of 1823, the Supreme Court of Bombay was expressly made a Court of Equity and given an equitable jurisdiction corresponding to that of the Court of Chancery. Regulation 4 of 1827 required the Courts of the East India Company to act according to justice, equity and good conscience in the absence of a specific law and usage.

In England, estates are either legal or equitable. The right of the mortgagor to redeem the property is regarded as a creation of the courts of equity and is an equitable right known as the equity of redemption. Such is not the case in India where no distinction is made between legal and equitable estates.

In England, these estates are recognised. A contract to sell property in England creates an interest in favour of the purchaser and the vendor holds the property in trust for him. Sections 40 and 54 of the Transfer of Property Act of India show that merely by virtue of a contract of sale of an immovable property, no interest is created in favour of the purchaser, but only an obligation is annexed to the ownership of the property.

In England, a mortgage passes the legal estate to the mortgagee and the mortgagor has only the equitable estate which means the equity of redemption. In India, what passes to a mortgagee is a few rights of ownership of the mortgagor who still continues to be the owner of the mortgaged property.

In *Chhatra Debt* v. *Mohan Bikram*, the Privy Council observed: "The Indian law does not recognise legal and equitable estates. By that law,

therefore, there can be but one owner and where the property is vested in a trustee, the owner must be the trustee.

This is the view embodied in the Indian Trusts Act, 1882, *see* Sections 55, 56 *etc.*, the right of the beneficiary being in a proper case to call upon trustee to convey to him."[4]

(10) Primary and Secondary Rights or Antecedent and Remedial Rights

Primary rights are also called antecedent, sanctioned or enjoyment rights. Secondary rights are called sanctioning, restitutory or remedial rights. Many writers prefer to use the term antecedent and remedial but Pollock prefers to use the term substantive and adjectival rights. He does so on the ground that the term remedial does not apply to interpleader proceedings and payment of money into court by a trustee where the first step is taken not "against someone else's breach of duty but against the risk of unwilling breach of duty on his own part". Primary rights are those rights which are independent of a wrong having been committed. They exist for their own sake. They are antecedent to the wrongful act or omission. Examples of primary rights are the right of reputation, the right in respect of one's own person, the right of the owner of a guardian, *etc.* Secondary rights are a part of the machinery provided by the State for the redress of injury done to primary rights. Their necessity arises on account of the fact that primary rights are very often violated by persons. Secondary rights come in the form of remedial rights.

(11) Public and Private Rights

A public right is possessed by every member of the public. When one of the persons connected with the right is the State and the other is a private person, the right is called a public right. A private right is concerned only with individuals. Both the parties connected with this right are private persons: Private rights are of an infinite variety and are enjoyed by individuals who happen to own certain property, who hold a certain office, who enter into a contract, *etc.*

Public and private rights differ in the same way as public and private wrongs differ. According to Blackstone: "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community (or the State) considered as a community and are distinguished by the harsher appellation of crimes and misdemeanours." However, Salmond pointed out that all public wrongs are not

[4] 58 IA 279.

crimes. The breach of a public trust is a public wrong but the method of redress is a civil one. Moreover, all crimes are not public wrongs. Many minor offences can be punished at the instance of a private person.

(12) Vested and Contingent Rights

A vested right is a right in respect of which all events necessary to vest it completely in the owner have happened. No other condition remains to be satisfied. In the case of a contingent right, only some of the events necessary to vest the right in the contingent owner have happened. If a valid deed of transfer is executed by *A* in favour of *B*, *B* acquires a vested right. All formalities are complete and nothing remains to be done. However, if a property is given to a person on the condition that he will be entitled to take possession of it only if he attains the age of 21, the right acquired is a contingent right. The right fails if the person dies before he attains the age of 21.

According to Paton: "When all the investitive facts which are necessary to create the rights have occurred, the right is vested; when part of the investitive facts have occurred, the right is contingent until the happening of all the facts on which the title depends."

(13) Servient and Dominant Rights

A servient right is one which is subject to an encumbrance. The encumbrance which derogates from it may be contrasted as dominant. The land for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof is called the dominant owner. The land on which the liability is imposed is called the servient heritage and the owner or the occupier is called the servient owner. *X* as the owner of a certain house has a right of way over the land of *Y*, his neighbour, or has the right of maintaining eaves for the discharge of water from his roof on to *Y's* grounds. The house of *X* is the dominant heritage and *X* is the dominant owner. The house of *Y* is the servient heritage and *Y* is the servient owner.

(14) Municipal and International Rights

Municipal rights are conferred by the law of a country. International rights are conferred by international law. All municipal rights are enjoyed by the individuals living in a country. The subjects of international rights are the persons recognized as such by international law. There is no unanimity of opinion as to who are the international persons recognized by international law. According to one view, only the States are the subject of international law. According to another view, individuals are also the subject of international law.

(15) *Rights at Rest and Rights in Motion*

This classification of rights has been given by Holland. According to him, when a right is stated with reference to its 'orbit' and its 'infringement', it is a right at rest. The meaning of the term 'orbit' is the sum or the extent of the advantages conferred by the enjoyment of the rights. The term 'infringement' means an act which interferes with the enjoyment of those advantages. Causes by which rights are either connected or disconnected with persons are discussed under rights in motion. Hibbert points out that this classification leaves no place for the treatment of absolute duties. He suggests the substitution of the term 'duty' for the term 'right'.

(16) *Ordinary and Fundamental Rights*

Some rights are ordinary rights and some are fundamental rights. The Constitution of India has guaranteed certain fundamental rights to the citizens of India like the right to life and equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and the right to constitutional remedies. In the case of *Golak Nath*, it was held by the Supreme Court that the Fundamental Rights of the people cannot be curtailed at all even by a constitutional amendment but the Constitution has been so amended as to provide that even fundamental rights can be curtailed by constitutional amendments.[5]

(17) *Jus ad rem*

A *jus ad rem* is a right to a right. The person of inherence has the right to have some other right transferred to him. The *jus ad rem* is always a right *in personam*. If I sell my house to *K*, *K* acquires a right against me to have the house transferred to himself. The right of *K* is said to be a *jus ad rem*. Whether the right to be transferred is a *right in rem* or only a *right in personam*, the *jus ad rem* is always a *right in personam*.

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Chapter Fourteen

Ownership and Possession

OWNERSHIP

THE CONCEPT of ownership is one of the fundamental juristic concepts common to all systems of law. This concept has been discussed by most of the writers before that of possession. However, it is pointed out that it is not the right method. Historically speaking, the idea of possession came first in the minds of people and it was later on that the idea of ownership came into existence. The idea of ownership followed the idea of possession.

Development of the Idea of Ownership

The idea of ownership developed by slow degrees with the growth of civilization. So long as the people were wandering from place to place and had no settled place of residence, they had no sense of ownership. The idea began to grow when they started planting trees, cultivating lands and building their homes. The transition from a pastoral to an agricultural economy helped the development of the idea of ownership. People began to think in terms of "mine and thine". To begin with, no distinction was made between ownership and possession. However, with the advancement of civilization, the distinction became clearer and clearer. This distinction was made very clearly in Roman law. Two distinct terms were used to point out the distinction and these were *'dominium'* and *'possessio'*. *Doininium* denoted the absolute right to a thing. *Possessio* implied only physical control over a thing. The English notion of ownership is similar to the conception of *dominium* in Roman law. According to Holdsworth, the English Law reached the concept of ownership as an absolute right through developments in the law of possession.

Definition of Ownership

According to Keeton: "The right of ownership is a conception clearly easy to understand but difficult to define with exactitude. There are two main theories with regard to the idea of ownership. The great exponents of the two views are, Austin and Salmond. According to one view, ownership is a relation which subsists between a person and a thing which is the object of ownership. According to the second view, ownership is a relation between a person and a right that is vested in him."

Austin

According to Austin: "Ownership means a right which avails against everyone who is subject to the law conferring the right to put thing to user of indefinite nature." Full ownership is defined as "a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". It is a right *in rem* which is available against the whole world.

(1) According to Austin, the *first attribute* of ownership is that it is indefinite in point of user because the thing owned may be used by the owner in very many ways. The owner of land may build a house on it. He may use it for cultivation. He may convert it into a garden. He may make any use of it he pleases. However, restrictions may be imposed on the use of the thing by means of an agreement or by the operation of law. The owner may mortgage the land to somebody for a specific period and also hand over the possession of the same. He may lease the land to somebody for a specified number of years. He may create an easement in favour of another person. The owner of the land cannot be allowed to use the same in a way which is injurious to others. Reference may be made to two maxims in this connection. The first maxim is: "So use your own property as not to injure your neighbours". The second maxim is: "It is not lawful to build upon your land to the injury of another." In the case of *Crowhurst* v. *Amersham Burial Board,* the Burial Board was held responsible for damages to the extent of the price of the horse which died on account of eating a portion of a yew tree planted by the Burial Board on its own land and about 4 feet from its boundary railings. The horse was grazing in a neighbouring meadow and died of the poison in the leaves of that tree. The owner of a piece of land cannot erect a building on his land in such a way as to interfere with the use of the adjoining property.[1]

(2) The *second attribute* of ownership is a right of transfer or disposition without any restriction. However, experience shows that in all

[1] (1878) 4 Ex. D. 5.

advanced legal systems, certain restrictions are imposed on the right of disposal of the owner. The transfer of property is not allowed if its object is merely to defeat or delay the creditors. In the case of France, certain restrictions are imposed on the right of alienation in the interests of the family. In the case of Germany, transfer or division of small farms is not allowed.

(3) The *third attribute* of ownership is the permanence of the right of ownership. This right exists so long as the thing exists. The right is extinguished with the destruction of the thing. Ownership is inherited by his successor.

Austin's view of ownership has been *criticized* on various grounds.

(1) It is pointed out that ownership is not a right but a bundle of rights. It is the aggregate or sum—total of the rights of user and enjoyment. Even if some of the rights are removed and given to another person, the person in whom vests the residue is still the owner. The owner of a piece of land may mortgage the same to another person. Although he has transferred a right, he is still the owner.

(2) Ownership is not merely a right but also a relationship between the right owned and the person owning it.

(3) The idea of the right of indefinite user is also attacked. Many limitations can be put upon that user. The owner must use his property in such a way as not to interfere with the rights of others. He may have to pay taxes to the State in connection with the property. He may not have the right to exclude the officers of the government who are entitled to enter upon it on certain grounds. In the case of joint ownership of property, the rights of each are controlled by those of others. Restrictions may be imposed upon ownership by encumbrances. Restrictions may also be imposed on the power of disposition of property by owners. An owner of property is not allowed to dispose of the same with a view to defeat or delay his creditors. There are certain disabilities imposed on infants and lunatics with regard to the disposal of property.

Holland

The view of ownership as given by Austin has also been followed by Holland. Holland defines ownership as "a plenary control over an object". According to him, an owner has three kinds of powers viz., possession, enjoyment and ownership. However, the same can be lost by means of a lease or mortgage. "The right of enjoyment implies a right of user and of acquiring the fruits or increase of the things as timber, the young cattle or soil added to an estate by alluvion. The right is limited only by the rights of the State or of other individuals" The right

of disposition implies the right of alteration, destruction or alienation of property,

Markby

Markby also holds similar views. To quote him: "If all the rights over a thing were centred in one person that person would be the owner of the thing; and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it and another right to till it; the owner of a piece of furniture has not one right to repair it and another right to sell it; all the various rights which an owner has over a thing are conceived as merged in one general right of ownership."

Hibbert

According to Hibbert, ownership involves four rights and those are the right of using the thing, excluding others from using it, the disposal of the thing and the destruction of the thing. Under the English Law, no one can have absolute ownership in land as land cannot be destroyed. One can have merely an estate in it. An estate means the legal interest of a party in land measured by duration and entitling the party to put the land to uses of an indefinite nature.

Paton

According to Paton, the rights of an owner are the power of enjoyment, the right of possession, the power to alienate *inter vivos* or to charge as security, and the power to leave the rest by will.

According to Hohfeld, ownership is a collection of rights, privileges and powers, some of which are frequently found to reside, either for a limited period or perpetually, in persons other than the owner. Ownership is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops. As we can take one drop or many drops from the bucket, likewise we can detach one or several rights from ownership.

According to Buckland, ownership is "the ultimate right to the thing or what is left when all other rights vested in various people are taken out".

According to Noyes, ownership is the magnetic core which remains when all present rights of enjoyment are removed from it and which attracts to itself the various elements temporarily held by others as they lapse.

According to Pollock: "Ownership may be described as the entirety of the powers of use and disposal allowed by law. This implies that

there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power at all, though we are familiar with 'limited owners' in recent usage. If we found anywhere a system of law which did not recognise alienation by acts of parties at all, we should be likely to say not that the powers of an owner were very much restricted in that system, but that it did not recognise ownership. The term, however, is not strictly a technical one in the Common Law... . We must not suppose that all the powers of an owner need be exercisable at once and immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment, and suspend his power of disposal, provided that he reserves for himself or his successors, the right of ultimately reclaiming the thing and being restored to his power. This is the common case of hiring land, buildings or goods. Again, the owner's powers may be limited in particular directions for an indefinite time by rights as permanent in their nature as ownership itself. Such is the case where the owner of Whiteacre has a right of way over his neighbour's field of Blackacre. As this example shows, what is thus subtracted from one owner's powers is generally added to another's. In short, the owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such powers when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere. In the same way, a ruler does not cease to be a sovereign prince merely because he has made a treaty by which he has agreed to forego or limit the exercise of his sovereign power in particular respects."[2]

Salmond

According to Salmond: "Ownership, in its most comprehensive signification, denotes the relation between a person and right that is vested in him. That which a man owns is in all cases a right. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right in the land, namely, the fee simple of it." Again, "ownership, in this generic sense, extends to all classes of rights, whether proprietary or personal *in rent* or *in personam, in re propria* or in *re aliena.* I may own a debt, or a mortgage or a share in a company, or money in the public funds, or a copyright or a lease or a right of way, or a power of appointment, or the fee simple of land.

[2] *Jurisprudence and Legal Essays*, pp. 97-98.

Every right is owned, and nothing can be owned except a right. Every man is the owner of the rights which are his." According to Salmond, ownership is a relation between a person and any right that is vested in him. That which a man owns is a right and not a thing. To own a piece of land means to own a particular kind of right in the land.

Criticism

(1) Salmond's view of ownership has been criticised by many writers. According to Duguit, ownership is a relationship between a person and a thing over which he is permitted, on account of this relationship, complete disposal, use and enjoyment. What is owned is a thing and not a right.

(2) According to Cook, there are many rights which a person may possess and to use the term 'owner' to express the relationship between a person and a right is to introduce unnecessary confusion. Ownership is the name given to the bundle of rights.

(3) According to Kocourek, ownership is a relationship of the owner and a right to a thing which can be economically enjoyed. The right of ownership is a matter of legal protection.

The apologists of Salmond point out that Salmond has defined ownership in two different senses. In the comprehensive sense, ownership denotes the relation between a person and any right that is vested in him. In this sense, it includes both corporeal and incorporeal ownership. In a narrow sense, ownership is a relationship between a person and a material thing. In this sense, corporeal ownership is included. To quote Salmond: "Although the subject-matter of ownership in its widest sense is in all cases a right, there is a narrow sense of the term in which we speak of the ownership of material things. We speak of owning, acquiring or transferring, not rights in land or chattels, but the land or chattels themselves. This was the original and still is the commonest meaning of the word 'ownership'. We call it by the name of corporeal ownership to distinguish it from the ownership of rights which may be called 'incorporeal ownership'".

Essentials of Ownership

(1) The first essential of ownership is that it is indefinite in point of user. It is impossible to define or sum up exhaustively the wide variety of ways in which the thing owned may be used by the person entitled to its ownership. Although this is commonly called a right to possess and use such things, these rights are, in fact, liberties. The owner has actually a liberty to use the thing. He is under no duty not to use it. Others are under a duty not to use it or otherwise interfere with it.

Those who are not owners may be entitled to possess or use a thing, but the period for which they are entitled to use is of a limited duration. In the case of an owner, it is of an indeterminate duration. The interest of a bailee or a lessee comes to an end when the period of hire or of the le e comes to an end. However, the interest of the owner is perpetual. It does not terminate even with his own death. In the case of death, the property goes to his legatee or heir or next of kin.

Under all mature legal systems, qualifications have been imposed on the user of prope Every owner must so use the object of ownership as not to injure e right of other persons. No landowner can accumulate manure on his land in such a way as to cause a nuisance to his neighbours. Officers of justice have a right to enter on the premises of anyone in pursuance of a warrant issued by a court of justice. Ownership may be subject to encumbrance in favour of others in which case the power of user of the owner is curtailed by the rights of the encumbrancers.

(2) Another essential of ownership is that it is unrestricted in point of disposition. The right of alienation is considered by Austin as a necessary incident of ownership. An owner can effectively dispose of his property by a conveyance during his lifetime or by will after his death. A person who is not the owner cannot normally transfer the right of ownership, even though he may have possession of the thing in question. This is based on the maxim that he who has not can give not.

However, restrictions are imposed by law on the power of disposal of an owner. Both in English and Indian law, transfers of property made with intent to defeat or delay creditors can be set aside. The power of disposition may be limited by the existence of the rights of encumbrancers. Hence, it cannot be said that an essential feature of ownership is the existence of an unrestricted power of disposition. Hindu jurists have explained a significant feature of the concept of ownership as fitness for free disposal. The *Viramitrodaya* gives the simile of a seed which contains within it the capacity to germinate and be converted into a sprout. Various causes may impede this capacity but it cannot be said that the capacity to germinate and take the shape of a young plant is not possessed by the seed. Likewise, although the power of an owner to deal with his property may be restrained by various considerations, it cannot be said that ownership does not connote fitness for free disposal.

(3) The owner has a right to possess the thing which he owns. It is immaterial whether he has actual possession of it or not. What matters is that he should have a right to possession. Even if the car of *X* is stolen by *Y*, *Y* has possession of the car but *X* remains the owner. Like-

wise, if *X* gives his car to *Y* on hire, *X* has neither possession of the car nor the immediate right to possess it, he is still the owner as he retains a reversionary interest in the car. He has the right to repossess the car on the termination of the period of hire.

(4) Another essential of ownership is that the owner has the right to exhaust the thing while using it, if the nature of the thing owned is such.

(5) Another essential of ownership is that it has a residuary character. An owner may part with several rights in respect of the thing owned by him. In spite of that, he continues to be the owner of the thing in view of the residuary character of ownership. *X*, an owner, may give a lease of his property to *Y* and an easement to *Z*. His ownership of the land still consists of the residual rights.

(6) Generally, the owner has the right to destroy or alienate the thing he owns.

Subject-Matter of Ownership

The primary subject-matter of ownership consists of material objects like land and chattels. The wealth of a man may also consist of other things such as interests in the land of other people, debts due to him by his debtors, shares in companies, patents, copyrights etc. *A* may have the right to walk over the land of *B*, or the right to catch fish in the pond of *C*, or a debt owing from *D*, shares in a limited company, various patents, copyrights etc. None of these is a physical or material thing. They are merely rights.

The view of Salmond is that the true subject-matter of ownership has to be a right in all cases. It will be a logical absurdity if the subject-matter of the ownership was sometimes a material object and at other times a right. The view of Salmond is supported by English Law. However, if the term is used as always applying to a right, it would not be in keeping with law and legal usage as it is usually said that a person owns land and chattels. As owning a chattel normally means having certain rights in respect to it, to describe this as owning rights in respect of the chattels would lead to rather complicated conclusion that owner would be said to have rights to rights in respect of such chattels. Normally a man is said to have a right and not to own a right. A man does not own a right to his reputation. That is a right which he has. It is therefore preferable to speak both of owning things in the sense of material objects and of owning rights. What thing can form the subject-matter of ownership will depend upon the rules of each system of law. Broadly speaking, certain things qualify as capable of being owned but as not in fact being owned. Islands outside the territory of a State and

wild animals in a jungle cannot be owned. There are things which by nature are incapable of being owned. The living persons, corpses other than anatomical specimens, the air and the sea, the sun, the moon and the stars cannot be owned. However, if English Law were to permit slavery, living persons could be owned. Law may provide that the air and the sea might be owned, sold, bought, rented etc.

Right of Ownership and Ownership of a Right

Corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. In this sense, the corporeal ownership or the right of ownership is not so much one right as a bundle of rights, liberties, powers and immunities. Pollock writes: "Ownership may be described as the entirety of the powers of use and disposal allowed by law."

The ownership of right describes the jural relation between a person and a right. In this sense, it denotes that he is neither a possessor nor an encumbrancer, but the owner of the right. This right has to be distinguished from the right of ownership which is the complex pattern of the bundle of rights, liberties, powers and immunities. In the case of ownership of a right it only suggests that there is a particular legal relationship between a person and a right. The ownership of a right is also known as incorporeal ownership.

In English Law, the interest which is by way of a perpetual ownership is called a fee simple in which ownership passes to the heir by devolution. A life interest or an interest for a specified number of years is not considered as a right of ownership because it is not perpetual.

Modes of Acquisition of Ownership

There are two modes of acquisition of ownership and those are *original* and *derivative.* There are three kinds of original modes of acquisition. Ownership is absolute when the same is acquired over previously ownerless objects. Ownership is extinctive if the ownership of a previous person is finished on account of adverse possession by the acquirer. It is accessory if the ownership is acquired as a result of accession. Absolute ownership can be acquired in two ways and those are by means of occupation and 'specification'. The rule in the case of an ownerless thing is that the first occupier becomes the owner. The physical control of the thing is essential in the case of occupation. Such an ownership is acquired in the case of wild animals, birds, fish in rivers, precious stones, gems, etc. The English Law on the subject is that fish and wild animals are in the possession of the person on whose land they are found. The landowner is their owner even if the fish are captured or the wild animals are killed. In the case of hidden treasures, the same belong to the Grown in England. Under the Roman law, the

treasure was divided equally by the finder and owner of the place. In the case of specification, materials belonging to one person are given a new shape. Clay may belong to one person but the sculptor may make a statue out of it.

Original ownership may be acquired by long and continuous and undisputed possession of a thing as owner. The principle of adverse possession works in this connection. The ownership of one person is extinguished and that of another is created. Original ownership can also be acquired by means of accession. The owner of a tree has the right to the fruits of the tree. Likewise, the owner of land has the right to the crop grown on it. The owner of an animal has the right to its offsprings. If some land is added on account of a change in the course of the river, the same is acquired by the owner of the property adjoining it.

Different Kinds of Ownership

Experience shows that there are many kinds of ownership and some of them are corporeal and incorporeal ownership, sole ownership and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, co-ownership and joint ownership and absolute and limited ownership.

Corporeal and Incorporeal Ownership

Corporeal ownership is the ownership of a material object and incorporeal ownership is the ownership of a right. Ownership of a house, a table or a machine is corporeal ownership. Ownership of a copyright, a patent or a trade mark is incorporeal ownership. The distinction between corporeal and incorporeal ownership is connected with the distinction between corporeal and incorporeal things. Incorporeal ownership is described as ownership over intangible things. Corporeal things are those which can be perceived and felt by the senses and incorporeal things are those which cannot be perceived by the senses and which are intangible. Incorporeal ownership includes ownership over intellectual objects and encumbrances.

Trust and Beneficial Ownership

Trust ownership is an instance of duplicate ownership. Trust property is that which is owned by two persons at the same lime. The relation between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The ownership is called beneficial ownership. The ownership of a trustee is nominal and not real, but in the eye of law the trustee represents his beneficiary. In a trust, the relationship between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other.

The former is called the trustee and his ownership is trust ownership. The latter is called the beneficiary and his ownership is called beneficial ownership. The ownership of a trustee is in fact nominal and not real although in the eye of law, he represents his beneficiary. If property is given to *X* on trust for *Y*, *X* would be the trustee and *Y* would be the beneficiary or *cestui que trust*. *X* would be the legal owner of the property and *Y* would be the beneficial owner. *X* is under an obligation to use the property only for the benefit of *Y*.

A trustee has no right of enjoyment of the trust property. His ownership is only a matter of form and not of substance. It is nominal and not real. In the eye of law, a trustee is not a mere agent but an owner. He is the person to whom the property of someone else is fictitiously given by law. The trustee has to use his power for the benefit of the beneficiary who is the real owner. As between the trustee and the beneficiary, the property belongs to the beneficiary and not the trustee. As between the trustee and other persons, the trustee is deemed to be the legal owner of the property as a result of a fiction. The trustee is clothed with the rights of his beneficiary while dealing with the world at large.

Trust and Bailment:—A distinction has to be made between trust and bailment. If a trustee sells trust property in breach of a trust, a *bona fide* purchaser for value without notice of the trust takes good title from the trustee. If a bailee makes an unauthorised sale of the goods, a *bona fide* purchaser for value without notice of the rights .of the bailor gets no title to the goods. The reason is that the bailee from whom he purchased the property was not the owner of the goods. A rule of common law is that a vendor cannot give a better title than what he possesses himself.

If a bailee converts the goods to his own use, he is guilty of larceny (theft). The reason is that the goods do not belong to the bailee as owner. If a trustee misappropriates trust property, he is not guilty under common law as a person cannot steal what he himself owns and possesses. However, law now provides that the trustee will be liable criminally although not for larceny.

Trust and Executorship:—There is also a distinction between trust and executorship. The position of an executor resembles that of a trustee as the executor becomes the full owner of the goods after all the debts have been paid off. However, the executor is bound to use his rights in such a way that he conveys the surplus of the assets to those persons who are entitled to the property of the deceased. An executor or administrator is not a trustee for the legatee or next of kin, although he may become a trustee for them under certain circumstances. In a given

case, it may be hard to conclude whether a man has been merely an executor or administrator or a trustee. This question is of great practical importance. The reason is that the law of limitation draws a distinction between an action by a legatee against an executor and an action by a beneficiary against his trustee. An action by a legatee against an executor to recover a legacy is barred after the lapse of 12 years, but a trustee cannot take up the plea that the case against him is time-barred in the following cases:

(*i*) Where the trustee has been guilty of fraud.

(*ii*) Where the action is to recover trust property retained by the trustee or converted by him to his own use.

If an executor makes himself an express trustee of legacy within the meaning of the Trusts Act, his position is that of a trustee.

A trust is to be distinguished from a mere contractual obligation to deal with one's property on behalf of someone else. A trust is more than an obligation to use one's property for the benefit of another. It is an obligation to use it for the benefit of another in whom it is already concurrently vested. A beneficiary has more than a mere personal right against his trustee to the performance of the obligations of the trust. He himself is an owner of the trust property.

Trust and Contract:—A trust differs from a contract. In the case of a contract, the person who is not a party to the contract which purports to confer a benefit upon him, cannot enforce the contract. In the case of a trust, the beneficiary can enforce the trust although he is not a party to the contract creating the trust. Historically, contracts were enforceable in common law but trusts were under the exclusive jurisdiction of the court of chancery. Equity did not enforce the trust as an agreement but as a matter of confidence.

Ordinarily, a trust is created by an agreement between two persons but a trust may also be created by a unilateral act. A man becomes bound by a trust by his own declaration or conduct although the beneficiary knows nothing about it.

Even when a trust is created by an agreement between two parties, no formal offer or acceptance between the parties is necessary as is the case in a contract.

In a contract, a party which is a stranger to a contract acquires neither rights nor liabilities under the contract but this rule does not apply to trusts. In a trust, the beneficiary is not a party to the contract but he has still an equitable remedy against the testator.

A contract creates a *right in personam* which is available against the promisor. The right of a beneficiary is like a *right in rem* as it can be

enforced against all concerned parties except a *bona fide* purchaser for value.

Trust and Agency:—There is some resemblance between a trust and an agency. Both a trustee and an agent administer property on behalf of another. Neither of them is the beneficial owner of that property. However, there are many differences between trust and agency. In the eye of law, a trustee is the owner of the trust property, but the agent is not the owner of the property which actually belongs to the principal. The result is that outside the sphere of his authority, an agent cannot pass a legal title to a third person even if the latter is a *bona fide* purchaser for value without notice. However, a *bona fide* purchaser for value without notice of the trust from a trustee obtains a valid title against the whole world.

In the eye of law, a trustee is the legal owner. Hence he is personally liable for all the contracts entered into by him on behalf of the trust. If an agent enters into a contract as agent, the contract is with the principal and the agent is not liable personally.

The authority of a trustee is derived from the trust deed and the wishes of the beneficiary may have nothing to do with it. The authority of the agent to deal with the property depends upon what has been delegated to him. He has to act for the principal. A beneficiary can follow the trust property in the hands of the trustee. Likewise, the principal has the right to follow the property in the hands of the agent if the latter uses his power in an unauthorised manner. In spite of this, there is no trust relationship.

An agency arises from an express or implied contract to act for some other person and property need not be involved at all. A trust arises when a person receives or holds property in such circumstances that he ought to employ it for the benefit of the beneficiary or an object other than his own.

Trust and Mortgage:—There is also a distinction between a trust and a mortgage. The relation between a mortgagor and mortgagee is purely contractual, but it has some analogy to trust relationship. The reason is that the mortgagor has, in equity, a beneficial interest in the property which is the equity of redemption. In the eye of law, a mortgagee has an absolute estate after the time fixed for redemption has passed. However, the mortgagee is not a trustee for the mortgagor. He does not hold the legal estate for the benefit of the mortgagor as a trustee holds for the beneficiary. The mortgagee has not only the legal interest in the property mortgaged, but also a beneficial interest in it adverse to that of the mortgagor.

Ashburner writes that the mortgagee becomes a trustee only after he has been paid. His right in the property does not go beyond what is necessary to secure the repayment of the money due to him. If the mortgagee has sold the mortgaged property and reimbursed himself his money out of the proceeds of sale, he becomes a trustee of the surplus proceeds for the person entitled to the equity of redemption.

Legal and Equitable Ownership

Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rules of equity. In many cases, equity recognises ownership where law does not recognise ownership owing to some legal defect. This fact can be illustrated by an example. *X* is the owner of shares in a company. He transfers those shares to *Y* who pays him the amount of the consideration but a proper transfer deed, as required by the rules of the company, is not executed with the result that the company refuses to recognise *Y* as the holder of those shares. In such a case, law may give no relief to *Y* as the legal requirements of transfer have not been complied with, but equity may step in to provide that though *X* is still the legal owner of the shares, he holds them as a trustee for *Y* and must give *Y* all the dividends and other amounts realised on account of those shares.

Legal rights may be enforced *in rem* but equitable rights are enforced *in personam* as equity acts *in personam*.

One person may be the legal owner and another person the equitable owner of the same thing or right at the same time. When a debt is verbally assigned by *X* to *Y*, *X* remains the legal owner of it but *Y* becomes its equitable owner. There is only one debt as before though it has now two owners.

The equitable ownership of a legal right is different from the ownership of an equitable right. The ownership of an equitable mortgage is different from the equitable ownership of a legal mortgage.

Before the passing of the Judicature Acts of 1873 and 1875, there were two kinds of courts in England with separate jurisdictions. Those courts were known as common law courts and the chancery or equity courts. The rights recognised and protected by the common law courts were called legal rights and those recognised and protected by equity courts were called equitable rights. The courts of common law refused to recognise equitable ownership and maintained that the equitable owner was not an owner at all.

Keeton writes: "Equitable ownership always predicates an outstanding legal ownership, the legal owner being restrained by the rules of equity from using his legal ownership to the detriment of the equitable

owner. On the other land, legal ownership does not necessarily imply the existence of an equitable owner. The property legislation of 1925 has made use of this conception of dual ownership in order to facilitate the transfer of real property in England. Many interests which may exist with regard to land and otherwise would tend to impede the disposition of it, are now permitted to exist as equitable interests only, and it is enacted that a purchaser of a legal estate, provided that the requisite formalities are observed, may obtain a clear title, from most equitable interests, which operate upon the purchase money. A good example is the life interest. Formerly, this could exist both as a legal and as an equitable estate. Now it may exist as an equitable interest only. The most common example of equitable ownership is that which exists under a trust."

There is no distinction between legal and equitable estates in India. Under the Indian Trusts Act, a trustee is the legal owner of the trust property and the beneficiary has no direct interest in the trust property itself. However, he has a right against the trustees to compel them to carry out the provisions of the trust.

Vested and Contingent Ownership

Ownership is either vested or contingent. It is vested ownership when the title of the owner is already perfect. It is contingent ownership when the title of the owner is yet imperfect but is capable of becoming perfect on the fulfilment of some condition. In the case of vested ownership, ownership is absolute. In the case of contingent ownership, it is merely conditional. In the case of vested ownership, the investitive fact from which he derives the right is complete in all its parts. In the case of contingent ownership, it is incomplete on account of the absence of some necessary element which is nevertheless capable of being supplied in the future. In the meantime, his ownership is contingent and it will not become vested until the necessary condition is fulfilled. For example, a testator may leave property to his wife for her life and on her death to *X* if he is then alive, but if *X* is then dead, to *Y*. *X* and *Y* are both owners of the property in question, but their ownership is merely contingent. The ownership of *X* is conditional on his surviving the widow of the testator. The ownership of *Y* is conditional on the death of *X* during the lifetime of the widow.

In English Law, an estate may be vested even though it does not give a right to immediate possession. On a devise to *X* for life with remainder to *Y* in fee simple, the interest of *Y* is vested because there is nothing but the prior interest of *X* to stand between him and the actual enjoyment of the land. Technically speaking, the interest of *Y* is vested

in interest, though not vested in possession. It becomes vested in possession only on the death of X.

If a Hindu widow adopts a son but there is an agreement postponing the estate of the son during the lifetime of the widow, the interest created in favour of the adopted son is a vested right. It does not depend upon any condition precedent. If it is to take effect on the happening of an event which is certain (the death of the widow), the adopted son has a present proprietary right in the estate, the right of possession and enjoyment being deferred. He can transfer the property even during the lifetime of the widow.

Under a deed of gift, a donee is not to take possession of the gifted property until after the death of the donor and his wife. The donee is given a vested interest subject only to the life interest of the donor and his wife. The donee can transfer the property during the lifetime of the donor and his wife.

Under a compromise decree, it was settled that X was to hold an estate till his death after which it was to go to Y, The interest acquired by Y under the decree is a vested interest as it was bound to take effect from the death of X which was a certain event. A vested interest is regarded as a property which is divisible, transferable and heritable.

Contingent Interest:—Where on the transfer of property, an interest is created therein for the benefit of an unborn person, the latter acquires, upon his birth, a vested interest in that property.

Where on a transfer of property, an interest is created therein in favour of a person to take effect only on the happening or not happening of a specified uncertain event, such a person acquires a contingent interest in the property. That interest becomes a vested interest on the happening of the event or when the happening of the event becomes impossible, as the case may be. A contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at present, but both depend upon future uncertain events.

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

An estate is bequeathed to X until he shall marry and after that event to Y. The interest of Y in the bequest is contingent as it depends upon a condition precedent which is the marriage of X, an event which may or may not happen. Y has, at present, no proprietary interest in the estate and he cannot alienate it. As soon as X marries, the contingent interest

of *Y* becomes a vested interest because of the happening of marriage of *X* on which it was contingent. In a contingent interest, the transfer is not complete until the specified event happens or does not happen.

Distinction between vested and contingent interest:—There are six points of distinction between a vested interest and a contingent interest.

(1) If on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or specifying that it is to take effect at once, or on the happening of an event which must happen, that interest is called vested interest. If that interest is to Take effect only on the happening of a specified uncertain event or if a specified uncertain event shall not happen, the interest acquired is contingent interest.

(2) A vested interest does not depend upon the fulfilment of any condition. It creates an immediate right though the enjoyment may be postponed to a future date. A contingent interest is solely dependent upon the fulfilment of the condition. The result is that if the condition is not fulfilled, the interest falls through.

(3) A vested interest is not defeated by the death of a transferee before he obtains possession. A contingent interest cannot take effect in the event of the death of the transferee before the fulfilment of the condition.

(4) A vested interest is transferable and heritable. A contingent interest is neither transferable nor heritable.

(5) If the transferee of a vested interest dies before actual enjoyment, that vested interest passes on to his heirs. In the case of contingent interest, the interest does not pass on to his heirs because such an interest is inalienable and incapable of descending to his heirs.

(6) A vested interest is a present immediate right, even though its enjoyment is postponed. A contingent interest is not a present right. There is merely a promise for giving such right and such a promise may be nullified by the failure of the condition.

In *Sashi Kantha* v. *Pramodachandra*, the Calcutta High Court pointed out the distinction between a vested interest and a contingent interest in these words: "An estate or interest is vested as distinguished from contingent either when enjoyment of it is presently conferred or when its enjoyment is postponed, the time of enjoyment will certainly come to pass; in other words, an estate or interest is vested which there is immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen. In other words, an estate or interest is contingent when

the right of enjoyment is to accrue on an event which is dubious or uncertain."[3]

Condition Precedent and Subsequent:—A condition precedent is one the fulfilment of which completes an inchoate title. A condition subsequent is one the fulfilment of which extinguishes a title already completed. A condition precedent always comes before the creation of an interest. A condition subsequent always follows the vesting of an interest which is already complete. The right is contingent in the case of a condition precedent. It is already vested in the case of a condition subsequent. If the condition precedent is satisfied, the vesting of the right becomes complete" although the same was being held conditionally before. A condition subsequent completes the loss of a right already lost conditionally. A condition precedent involves an inchoate or incomplete investitive fact. A condition subsequent involves an incomplete or inchoate divestitive fact. He who owns property subject to a power of sale or power of appointment vested in someone else, owns it subject to a condition subsequent. His title is complete but there is already in existence an incomplete divestitive fact which may one day complete itself and cut short his ownership. A testator may bequeath his property to his son *Y* but at the same time may leave a residuary power of alienation to his widow *X*. In case *X* chooses to exercise her power, the son is deprived of the property. The ownership of *Y* is already vested but liable to premature determination by completion of a divestitive fact which is already present in part.

X wills his property to *Y*, his wife, on the condition that on her marriage, the same would be passed on to his sons *A* and *B*. When *X* dies, the ownership of the property vests in *Y* and *A* and *B* have contingent ownership. If *Y* remarries, she is divested of her vested ownership and the contingent ownership of *A* and *B* becomes vested ownership. What is a condition subsequent for *Y* is a condition precedent for *A* and *B*.

There are four characteristics of a condition precedent. A condition precedent is one which must happen before the estate can vest. The estate is not in the grantee until the condition is performed. In the case of a condition precedent being or becoming impossible of performance or being immoral or opposed to public policy, the transfer will be void. A condition precedent is deemed to be fulfilled if it is substantially complied with.

There are four characteristics of a condition subsequent. An existing estate is defeated by the happening of a condition subsequent. In the case of a condition subsequent, the estate immediately vests in the grantee and remains with him till the condition is broken. In the case of

[3] AIR 1932 Cal 690.

an impossible, unlawful and immoral condition subsequent, the estate becomes absolute and the condition has to be ignored. Where a gift was made with a condition that the donee should marry a particular person on or before he attained the age of 21 and the person named died before she attained the age of 21, it was held that as the fulfilment of the condition subsequent had become impossible, the estate became absolute. A gift to which an immoral condition is subsequently attached remains a good gift, though the condition is void. A condition subsequent has to be strictly complied with.

Distinction between condition precedent and subsequent

1. A condition precedent comes before the creation of the interest. In the case of condition subsequent, the interest is created before and the condition subsequent can operate and divest it afterwards.

2. In the case of condition precedent, the vesting of the estate is postponed till the performance of the condition precedent. In the case of condition subsequent, vesting is complete and not postponed.

3. In the case of condition precedent, an interest once vested can never be divested by reason of non-fulfilment of the condition. In the case of condition subsequent, interest, even though vested, is liable to be divested by reason of the non-fulfilment of the condition.

4. In the case of condition precedent, an estate is not in the grantee until the condition precedent is performed. In the case of condition subsequent, the estate immediately vests in the grantee and remains in him till the condition is broken.

5. In the case of condition precedent, transfer will be void if the condition precedent is impossible of performance, or immoral, or opposed to public policy. In the case of condition subsequent, the transfer becomes absolute and the condition will be ignored if that condition is impossible of performance or immoral or opposed to public policy.

6. In the case of condition precedent, the condition precedent must be valid in law. In the case of condition subsequent, it need not be so and the invalidity of the conditions can be ignored.

7. In the case of condition precedent, the doctrine of *cypres* applies and the condition precedent is fulfilled if it is substantially complied with. As regards condition subsequent, it must be strictly fulfilled. The doctrine of *cypres* does not apply.

Sole Ownership and Co-ownership

Ordinarily, a right is owned by one person only at a time. However, duplicate ownership is as much possible as sole ownership. Two or more persons may have the same right vested in them. That may be

done in many ways and one of them is that of co-ownership. The right is an undivided unity. By means of a partition, the co-ownership can be ended and the parties concerned can have their own separate shares. The members of a partnership are co-owners of the partnership property. When the right of ownership is vested exclusively in one person, it is called sole ownership. Salmond writes: "Co-ownership, like all other forms of duplicate ownership, is possible only so far as law makes provision of harmonising in some way the conflicting claims of the different owners *inter se*. In the case of co-owners, the title of one is rendered consistent with that of the others by the existence of the reciprocal obligations of restricted use and enjoyment."

Partners are co-owners of the chattels which constitute their stock-in-trade. Their right is not a divided right, each of them owning a separate part. The right is an undivided unity which is vested at the same time in more than one person. If two partners have in their bank a credit balance of Rs 4000, there is one debt of Rs 4000 due from the bank to both of them at once and not two separate debts of Rs 4000 due to each of them individually. Each party is entitled to the whole sum of Rs 4000 just as each would owe to the bank the whole of the firm's overdraft. Co-ownership involves the undivided integrity of the right owned.

Co-ownership and Joint Ownership

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

If a property belongs to *X* and *Y* in equal shares and if it is a case of ownership in common, half the property will pass to the heirs of *X* on his death and the other half will remain with *Y*. However, if *X* and *Y* are joint owners, *Y* would be entitled to the whole property and the heirs of *X* would get nothing. Each owner in common is interested in a part or in a share but not in the whole of the property.

Common ownership is familiar to Hindu law. Joint ownership of the English Law type is rather foreign to Hindu law and the presumption usually made where the grantees are Hindus, is that they hold in common. The joint ownership familiar to Hindu law is the special kind of which the joint holding by the members of an undivided Mitakshara joint family is the type. The distinguishing feature of a Mitakshara

coparcenary is the right of survivorship possessed by its members. It resembles the joint tenancy of English Law. However, a Mitakshara coparcenary is liable to be enlarged by the birth of male issue to the coparceners. Invested with a right by birth, the male issue also becomes a coparcener. This feature is absent in the joint ownership of English Law.

Absolute and limited ownership

An absolute owner is one in whom are vested all the rights over a thing to the exclusion of all. This means that excepting the absolute owner, there is no other person who has any claim whatsoever to the thing in question. However, this does not mean that he can use his property in any way he likes. Restrictions can be imposed both by law and also by voluntary agreement.

When there are limitations on the user, duration or disposal of rights of ownership, the ownership is limited ownership. An example of limited ownership in English Law is life tenancy when an estate is held only for life. Before 1956, the estate of a woman in the Hindu law was a limited ownership. If a Hindu woman inherited property from a male or a female, it was called woman's estate. She held the property only for her life and she had only a limited power of disposal. After her death, the property went to the heirs of the last holder of the property.

POSSESSION

According to Salmond, "in the whole range of legal theory, there is no conception more difficult than that of possession." According to Bentham: "To define possession is to recall the image which presents itself to the mind when it is necessary to decide between two parties, which is in possession of a thing and which is not. But if this image is different with different men; if many do not form any image; or if they form a different one on different occasions, how shall a definition be found to fix an image so uncertain and variable. Defining the concept of possession in law is like defining the geometric conception of roundness. Absolute roundness cannot be defined and is nowhere to be found. We may say that a thing is round when it is round enough for practical purposes; in other words, a thing is round when it is so nearly round that one is not conscious that it is not round. Thus, for practical purposes a ping-pong ball is taken as round although it is not absolutely round. Similarly legal possession cannot be defined absolutely and perfectly, but for practical purposes certain conditions and rules of legal possession can be laid down for the guidance of the courts."

Importance

Possession is one of the most important concepts in the whole range of legal history. According to Holland: "The ascertainment of the nature of legal possession is, in fact, indispensable In every department of law. It is as essential to the determination of international controversies arising out of the settlement of new countries, or to the conviction of a prisoner for larceny, as it is to the selection of the plaintiff in an action of trover or trespass."

Many important legal consequences flow from the acquisition and loss of possession. Possession is the *prima facie* evidence of the title of ownership. Transfer of possession is one of the chief modes of transferring ownership. The first possession of a thing which as yet belongs to no one, is a good title of right. Possession is so important that a possessor may *in* many cases confer a good title on another even though he has none himself. If a property is already owned, its wrongful possession is a good title for the wrongdoer as against all the world except the true owner.

In *Hannah* v. *Peel,* the plaintiff was serving in the Royal Artillery. He was stationed in a house requisitioned by the government and he accidentally found a brooch in an upstairs room occupied by him. The brooch was handed ove to the police. The police were not able to find out the rightful owner and delivered it to the defendant who was the owner of the house. The defendant sold the jewel for £.66. A suit was brought for recovery of the brooch or its jewel. The plaintiff claimed the jewel as the finder. The contention of the defendant was that he was entitled to it as the owner of the property on which it was found. The defendant was never in possession of the house and had no knowledge of the brooch until it was brought to his notice. It was held that the defendant had neither *de facto* control nor the *animus* of excluding others and as such had no possession. The plaintiff was entitled to the brooch or its value since his claim as finder prevailed over all but the rightful owner.[4]

In *Bridges* v. *Hawkesworth,* the plaintiff found a bundle of banknotes on the floor of a shop. The notes had been dropped there by a stranger by accident. The party who lost them could not be found. It was held that the plaintiff as the finder had property in the notes as against everyone but the true owner. The defendant had no prior possession which could prevail over the claim of the plaintiff. About this case, Salmond says that the shopkeeper (defendant) had not the requisite *animus* for possession. Pollock is of the view that *corpus possessionis* was itself lacking as the shopkeeper had no *de facto* control. Goodhart

[4] (1945) 2 All ER 288: (1945) 1KB 509.

and Glanville Williams are of the opinion that this case was wrongly decided. The shopkeeper had a general *animus* and sufficient control requisite for legal possession as the thing was in his shop.[5]

In *South Staffordshire Water Co.* v. *Sharman,* the defendant was cleaning out a pool of water on their land under the orders of the plaintiffs and he found two rings. He declined to deliver them to the plaintiffs but failed to discover the true owner. An action was brought for the recovery of the ring. It was held that the plaintiffs were entitled to the rings. Lord Russel of Killowen G.J. observed: "Where a person has possession of a house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in uno.*" It is contended that the possession of land may not necessarily confer possession of all chattels attached to or under the land. To have possession of the chattel, the *corpus* and the *animus possidendi* should co-exist. If a chattel is unattached and lying loose upon the land, it is more than doubtful whether possession can be claimed by the owner of the land without showing that he had the necessary *animus* and *corpus possessionis* with reference to the chattel.[6]

In *Merry* v. *Green,* the plaintiff purchased a bureau at an auction and got possession of it. In a secret drawer, there was money belonging to the vendor. As the plaintiff had no *animus* in regard to that money when he took possession from the vendor, he did not acquire possession of it. The possession of the vendor was continuing in the eye of law as to the money in the secret drawer. The plaintiff subsequently found the money and appropriated it. In doing so, he was depriving the vendor unlawfully and without his consent of possession which in law was still with him. It was held that the plaintiff had committed the offence of larceny or theft by appropriating the money.[7]

In *Akumella Panchayat Board* v. *Venkata Reddi,* a public latrine was under the control of the Panchayat Board. While carrying out certain repairs, the Board was obstructed by the defendant who had no title to the latrine. It was held that the Panchayat Board were entitled to a declaration of their possession and an injunction restraining the trespasser from interfering with the work of the Board in carrying out the repairs. The fact that the Panchayat Board had no legal title to the site on which

[5] (1851) 21 LJQB 75.
[6] (1896) 2 QB 44.
[7] (1841) 7 M and W 623.

the latrine stood, was immaterial as the defendant himself was not the owner of that site.[8]

Development of the Concept of Possession

As in the case of ownership, the concept of possession also has grown gradually in the course of many centuries. As civilization began to progress, the people started taking possession of certain objects and thus the idea of ownership began to grow. The straggle for existence was so bitter that individuals began to take possession of certain objects and considered them as their own. They began to take pride in the possession of those things and were not prepared to allow outsiders to interfere with them. They were determined to exercise continuous control to the exclusion of all others. From a humble beginning, the concept of possession and ownership began to grow and much progress has been made in this connection.

A distinction has to be made between *jus possessionis* or the right of possession and *jus possidendi* or the right to possess. *Jus Possessionis* is the right of the possessor to continue to possess. It is a right to remain in possession except against a person who has a better title. Even a robber has the right of possession and only the true owner can interfere with his possession. If I give something to my servant to be kept in custody on my behalf, he has physical possession of the thing but he has no legal right to it. He has the *jus possessions* and not *jus possidendi.* This is due to the fact that my servant has merely the *corpus* of possession and not the *animus* or the intention of exercising control over it.

Possession in Fact and in Law

Possession is divided into two categories, *viz.*, possession in fact and possession in law. Possession in fact is actual or physical possession. It is a physical relation to a thing. Possession in law means possession in the eye of law. It means a possession which is recognised and protected by law. There is sometimes a discrepancy between possession in fact and possession in law, although usually possession exists both in fact and in law in the same person. A person who is in *de facto* possession of a thing also comes to have *de jure* possession.

However, sometimes possession may exist in fact and not in law. If a servant holds certain things in his custody on behalf of the master, he has the actual possession of those things but in the eye of law, the possession is with the master. In certain cases, possession may exist in law and not in fact. This is so in the case of constructive possession. A tenant may be occupying a particular building but the landlord has

[8] (1945) 2 MLJ 176.

the constructive possession of the same. The same is the case with the things in the possession of servants, agents and bailees.

The fundamental element both in possession in fact and in law is the same. That element is the possibility of excluding every person other than the possessor from the use or control of the thing. According to Keeton. "Possession in law and possession in fact are not invariably coterminus, although very frequently they are."

The Roman lawyers made a distinction between possession in fact as *possessio naturalis* and possession in law as *possessio civilis.* In consequence of this divergence, pardy intentional and avowed and partly accidental and unavowed, between the law and the fact of possession, it is impossible that any abstract theory should completely harmonise with the detailed rules to be found in any concrete body of law. Such harmony would be possible only in a legal system which has developed with absolute logical rigour, undisturbed by historical accidents and unaffected by any of those special considerations which in all parts of the law prevent the inflexible and consistent recognition of general principles.

Elements of Possession

There are two elements of possession and those are the *corpus* of possession and *animus* or the intention to hold possession. The two elements must be present in the case of possession and neither of them alone is sufficient to constitute possession. According to Holland: "A moment's reflection must show that possession in any sense of the term must imply firstly some actual power over the object possessed and secondly some amount of will to avail oneself of that power. Neither the mere wish to catch a bird which is out of my reach nor the mere power which I have without the least notion of exercising it, to seize a horse which I find standing at a shop door, will suffice to put me in possession of the bird or the horse. The Romans by whom this topic was treated with great fullness or subtlety describe these essential elements of possession by the terms *corpus and animus* respectively."

Corpus of Possession

By corpus is meant that there exists such physical power or physical contact of the possessor in relation to the thing possessed so as to give rise to the reasonable assumption that other people will not interfere with it. The corpus of possession can be considered under two heads: the relation of the possessor to the other persons and the relation of the possessor to the thing possessed.

Relation of the Possessor to Other Persons:—When I possess a thing it means that others shall not interfere with the use of that thing. Accord-

ing to Pollock, the reality of *de facto* dominion is measured in inverse ratio to the chances of effective opposition, A person is in possession of a thing when the facts are such as to create a reasonable expectation that he will not be interfered with in the use of it. He must have some sort of security for the acquiescence and not interference by other persons. The security for noninterference may vary from a mere chance to moral certainty. The measure of security is that which normally and reasonably satisfies the *animus domini.* The following are the sources from which such measure of security can be derived:

(1) The first source is the physical power of the possessor. I am in possession when I lock up my money in a safe and thus realise my *animus possidendi.* Writers like Savigny are of the view that possession means an intention coupled with the physical power to exclude all persons from the use of that material object. But I may own a farm hundreds of miles away or I may inherit a fortune during my infancy and may not be in a position to prevent trespass or misuse of my fortune and yet I am in possession of the same. The assumption of physical power to exclude aliens is no better than a fiction. The true test is not the physical power of preventing interference but the improbability from interference from whatever source it may arise.

(2) Another source is the personal presence of the possessor. The physical power of the possessor and the personal presence of the possessor, though they commonly coincide, are not necessary. The respect shown to the person of a man will commonly extend to all things claimed by him that are in his immediate presence. Presence itself is protection. Bolts, bars and stone walls will give me the physical power of exclusion without any personal presence on my part. There may also be personal presence without any real power of exclusion. A little child has no physical power as against a grown-up man, yet it possesses the money in its hands. A dying man may retain or acquire possession by his personal presence but not by any physical power left in him.

(3) Another measure of security may be secrecy. If a man wants to keep a thing safe from others, he may hide it. In that case, he will gain a reasonable guarantee of enjoyment which is just as effectively in possession of the thing as a strong armed man keeps his goods in peace.

(4) Another measure of security is custom. There is a tendency among human beings to acquiesce in established usage and this is an important source of *de facto* security and possession. If I ploughed and sowed and reaped the harvest of a field last

year and the year before, then unless there is something to the contrary I can reasonably expect to do it again this year and I am in possession of the field.

(5) Another measure of security is respect for rightful claim. Rightfulness of the claim or rather a public conviction of its rightfulness is an important element in the acquisition of possession. A rightful claim will readily obtain that general acquiescence which is essential to *de facto* security. A wrongful claim will not be respected. The two forms of security, *de facto* and *de jure,* tend to coincide. Possession tends to draw ownership after it and ownership attracts possession. An owner will possess his property on much easier terms than those on which a thief will possess his plunder.

(6) Another measure of security is the manifestation of the *animus domini.* The visibility of the claim is another element in the *de facto* security of its enjoyment. A manifested intent is much more likely to obtain the security of general acquiescence than on which it has never assumed a visible form. Open use of a thing carries with it a *prima facie* rightmindedness with it.

(7) Another measure of security is the protection afforded by the possession of other things. The possession of a thing tends to confer possession of any other thing that is connected with it or accessory to it. The possession of land confers a measure of security regarding the possession of chattels situated upon it. The possession of a house may confer possession of chattels inside it. The proposition that the possession of land necessarily confers possession of all chattels that are on or under it does not appear to be true. Whether the possession of one thing necessarily carries with it the possession of another depends upon the circumstances of each case. In the case of cattle straying on the land of neighbours, the owner of the land has neither the *animus* nor the *corpus* to possess it. A man effectually gives delivery of a load of bricks by depositing them on my land even in my absence, but he could not deliver a roll of bank notes by laying them upon my doorsteps.

The view of Pollock and Wright is that the possession of land carries with it in general possession of everything which is attached to or under the land. The defendant employed by the company to clean a pond upon their land found certain gold rings at the bottom. It was held that the company, and not the defendant, had the first possession of it. The defendant lessee company discovered a pre-historic boat six feet below the surface of the land while excavating it for the purpose of

erecting gas works. It was held that the lessor and not the lessee had first possession of the boat.

In *Bridges* v. *Hawkesworth*, a parcel of bank notes dropped by another person on the floor of the shop of the defendant was found by die plaintiff-customer. It was held that the plaintiff had a good title to it and not the defendant.[9]

In *N. N. Muzumdar* v. *State*, it was held that corpus without the animus is ineffective.[10]

Relation of possessor to the thing possessed:—The second element in the *corpus possessionis* is the relation of the possessor to the thing possessed. All that is necessary is that the possessor must have the physical power of dealing with the thing exclusively as his own. Savigny writes: "The physical power of dealing with the subject immediately and of excluding any foreign agency over it is the factum which must exist in every acquisition of possession. This minimum physical power is not necessary to continue the possession as was required to give rise to it and continuing possession depends rather on the constant powers of reproducing the original relationship at will. For this reason, we do not lose possession by mere absence from the subject which we have once appropriated to ourselves, although the physical relation in which we now stand to it would not have sufficed in the first instance to obtain possession." Markby observes: 'Corporeal contact is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like and of excluding others. If we consider the various modes in which possession is gained and lost, we shall recognise this very clearly.

I put some money in a box and lock up the same with the key. Although I have no physical contact with the box, the box is in my possession as the key of the box is in my possession. A person has some money in his pocket and some of it is dropped on the road. He continues to be the possessor of the money fallen on the road till the same is picked up by somebody else. When a person gives a dinner, his silver forks while in the hands of his guests are still in his possession. In the case of tamed animals like a cow, a dog, a horse, a bullock, etc., the owner does not lose his possession even if he loses physical control over them. A master may be away but he still maintains his possession of his dog or horse. In the case of wild animals like fish, bird and other animals which are *ferae naturae*, if the owner loses physical contact with them, he also loses their possession. They become the property of the person who captures them. In the case of India, if a bull is set free,

[9] (1851) 21 LJQB 75.

[10] AIR 1951 Cal 140.

according to Hindu usage, he is not the property of any individual and no person can be guilty of theft. However, it has been held in certain cases that if a bull is dedicated to an idol and allowed to move about at will, the trustee of the temple is in possession of that bull. The fish in a creek or in an open irrigation tank are not in the possession of the person who has right of fishery. They become the possession of the person who catches them. However, the fish in a closed tank are in the possession of the owner of the tank.

Animus Possidendi

Animus possidendi or the subjective element in possession is the intent to appropriate to oneself the exclusive use of the thing possessed. The *animus possidendi* is the conscious intention of the individual to exclude others from the control of an object. Markby writes: "In order to constitute possession in a legal sense, there must exist not only the physical power to deal with the thing as we like and to exclude others, but also the determination to exercise that physical power on our own behalf." The view of Savigny is that "every case of possession is formed on the state of consciousness of unlimited physical power". Holland observes: "To some possibility of physical control, there must, at any rate for the commencement of possession, be superadded a will to exercise such control." Kant says: "There must be the empirical fact of taking possession *apprehensio* conjoined with the will to have an external object one's own."

There are certain aspects of *animus possidendi* which have to be considered.

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

(2) The claim of the possessor must be exclusive. He must intend to exclude other persons from the use of the thing possessed. A mere intent or claim of use cannot amount to the possession of the material thing itself. However, the exclusion need not be absolute. One may possess his land notwithstanding the fact that some other person or the public at large possess a right of way over it. Subject to this right of way, the *animus possidendi* is still a claim to the exclusive use or control of the land.

(3) The *animus domini* need not amount to a claim or intent to use the thing as owner. A tenant or borrower may have possession. Any degree or form of intended use or control, however limited in extent or in duration, may, if exclusive for the time being, be sufficient to constitute possession. The *animus possi-*

dendi need not be a claim to the use of the thing at all as in the case of a pledge or a bailee with a lien.

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

(5) The *animus possidendi* need not be specified but may be merely general. A general intent with respect to a class of things is sufficient (if coupled with the necessary physical relation) to confer possession of the individual object belonging to that class even though their individual exercise is unknown. A fisherman is in. possession of all the fish secured in his net. Likewise, I possess all the books in my library even though I may have forgotten the existence of many of them.

It may be thought that when a person has possession of a receptacle such as a box, a cabinet or envelope, his possession of the receptacle gives him possession of its contents.

Savigny's Theory of Possession

According to Savigny, both the *corpus* of possession and the *amimns possidendi* must be present to constitute possession. As regards the *corpus* of possession, it is necessary that in every acquisition of possession there must exist in the possessor a physical power of dealing with the subject immediately and of excluding others. When the possession of a thing has been acquired and that possession is intended to be continued, the possessor must have the ability to bring forth physical power to exclude others if they try to interfere with him in any way. However, immediate physical power of the possessor over the thing is not necessary.

As regards the second element, Savigny remarks thus: "*Animus possidendi* must be explained by *animus domini* or *animus sibi habendi,* and he only is to be looked on as in possession who deals as owner with the subject of which he has the detention. That is to say, he must contemplate dealing with it practically just as an owner is accustomed to do by virtue of his right and consequently not as one recognizing anybody better entitled than himself."

Critics point out that there are certain shortcomings in the theory of possession of Savigny. Possession is one conception and there are no separate aspects of it with regard to its acquisition and possession. But it can be pointed out that the acquisition of possession differs from its continuance. Reasonable expectation of non-interference by others is essential for the acquisition of possession and not for its continuance. X snatches away the book of Y. X does not acquire the posses-

sion of the book as Y or anybody else may snatch away the same from him. He comes to have possession when there is expectation of non-interference.

Moreover, physical power to exclude others is not essential to the concept of possession. It is not always possible to exclude others. It is not always necessary to exclude others whether in acquiring or retaining possession. This is due to the fact that there are certain objects which cannot be physically possessed. This is particularly so in the case of incorporeal possession. X may have the right of way over the land of another person but this does not mean that I have physical possession of the same. Thus, *the theory of Savigny does not apply to incorporeal possession.* A child or a weak person has not the power to exclude others from possession as the other parties are physically stronger. Moreover the same thing may be possessed by many persons at the same time. In the case of joint possession, the possession by one party cannot be exclusive.

About Savigny's theory, Lightwood points out that the requirements of a power to exclude foreign agency goes too far. To quote him: "It is the absence and improbability of foreign interference that constitutes the physical element and not the existence of any power of exclusion." Salmond points out that a little child may have no physical power as against a strong man and may yet possess the money in its hand. The view of Savigny that the *corpus possessionis* is of two kinds according as it relates to the acquisition or the retention of possession, is criticized by Salmond and Holmes. Salmond contends that there is no reason why possession which represents a certain relation between a person and a thing, should be one thing at its commencement and another in its continuance. The view of Holmes is that when once a right is acquired, there is no ground on which the law need hold that right at an end except in the clear manifestation of some fact inconsistent with its existence. On this principle, "it is only a question of tradition or policy whether a cessation of the power to reproduce the original physical relations shall affect the continuance of the rights." Possession may continue in law even if the ability to reproduce the physical power of exclusion does not exist.

According to Dias and Hughes, the theory of Savigny as an explanation of Roman law is demonstrably wrong. In the first place, Savigny overlooks the shift in the meaning of the word "possession". He seems to have fallen into the common fallacy that words must necessarily correspond to facts and hence his desire to find factual content for possession. Secondly, he based his statement of this factual content on the utterances of Paul, the jurist. Academic speculation was never the

strong point of the Romans and Paul was no exception to it. In the third place, it was erroneous to assume that *corpus* and *animus* which were only conditions sometimes required for the acquisition and loss of possession, constituted possession itself. Fourthly, Savigny's idea of *animus domini,* the intention to hold as owner, fails to explain the cases of the pledgee, Emphyteuta, Sequester and Precario, Tenens, who had possession but did not intend to hold at owners. He first condemned them as anomalous, hinted at "historical reasons" and then suggested that they were cases of "derivative possession" or possession derived from the owner. The view of Savigny that the temporary loss of one ingredient of possession did not matter provided there was the ability to reproduce it at will, is also inconsistent with the texts. It does not explain the continued possession of a fugitive slave despite the owner's inability to reproduce the *corpus* element at all. The only conclusion is that the theory of Savigny completely misrepresents Roman law.

It is not necessary that the possessor must intend to use the thing as owner. It is also not necessary that he should recognize no one as having a better title to the thing than himself. A bailee recognizes the title of the owner but he has still the possession of the thing. The same is the case with the hirer of an article or a pawnee or a pledgee. Thus, Savigny's theory of possession is not accepted in modern times.

It is generally agreed that Ihering was able to demolish the theory of Savigny. He approached the idea of possession as a sociologist. He tried to answer the question as to why Roman law protected possession by means of interdicts. His view was that interdicts were devised to benefit owners by protecting their holding of property and so placing them in the advantageous position of defendants in any action as to title. Persons who held property would in the majority of cases be owners and possession was attributed to such persons in order to make interdicts available to them. The view of Ihering was that whenever a person looked like an owner in relation to a thing he had possession of it unless possession was denied to him by rules of law based on practical convenience. The *animus* element was simply an intelligent awareness of the situation.

Critics point out that the view of Ihering is unduly coloured by the angle of his approach, i.e., the interdicts. The special reasons of policy that lay behind the interdicts require that the person in control should be protected. To that extent the idea of possession for purposes of interdicts had a factual basis. The shift in the meaning of possession occurred outside that sphere and their factual basis ceased to be true. The view of Ihering seems appropriate as an explanation of interdictal

possession. But as a general description of possession, it is needlessly narrow. However, it is infinitely superior to the view of Savigny.

The view of Markby is that possession is "the determination to exercise physical control over a thing on one's own behalf coupled with the capacity to do so". This definition is criticised *on* the ground that it puts emphasis on the animus or the mental element of possession and ignores the corpus or the objective part. It applies only to material objects and not to incorporeal objects or rights. Moreover, the capacity to exercise physical control is not absolutely necessary to acquire possession.

Holmes who started by refuting *a priori* philosophical ideas, perceived that less facts are required to initiate possession than to acquire it. What constitutes possession can be best studied only when possession is first gained. Accordingly, he pointed out that "to gain possession, then a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which we are in search". Holmes suggested that English Law does not require the *animus domini* element, but merely the intent to exclude others. For instance, the tenant desires not to hold as owner of the land but only to exclude the landlord.

According to Salmond: "The possession of a material object is the continuing exercise of a claim to the exclusive use of it." Again, it is a continuing *de facto* relation between a person and a thing which is known as possession". Possession is a relation of fact and not one of right. It may be, and commonly is, a title of right, but it is not a right itself. Possession is the *de facto* relation between the possessor and the thing possessed.

Critics point out that the view of Salmond is not correct. Holland says that a right is "the capacity residing in a person of controlling with the assent and assistance of the State, the action of others".

Pollock has given his own view of possession. According to him: "In common speech, a man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others." Pollock lays stress not on animus but on *de facto* control which he defines as physical control. A general intent is sufficient. The reduction of possession to a general criterion such as *de facto* control has led Pollock to face certain difficulties. His theory does not explain how servants have custody for some purposes and possession for others. Physical control to exclude others might be an important factor in a primitive and lawless society but the more settled the community is, the less important is actual physical

power in the acquisition of possession. A child has not the physical power to exclude the ruffian but he still has possession unless the ruffian actually takes it away from him.

It is clear from the above theories of possession that in English Law emphasis is laid on animus or intent. The intent which constitutes possession is the intent to exclude others. According to Holmes: "Such an intent is all that the common law deems needful and that on principle no more should be required." Shartel writes: "I want to make the point that there are many meanings of the word possession, that possession can only be usefully defined with reference to the purpose in hand and that possession may have one meaning in one connection and another meaning in another."

Salmond writes: "Of all divergences between legal and actual possession, this is the most notable, viz., that outside the law, possession is used in an absolute sense, whereas within the law it is employed in a relative sense. Ouiside the law, we do not speak of a person having possession as against someone else; we say that he either has or has not got possession. In law we talk rather of possession as something which one person has against another."

Methods of Transfer of Possession

Transfer or acquisition of possession can be done in three ways, viz., by taking, by delivery and by the operation of law.

(1) As regards the acquisition or transfer of possession *by taking*, it is done without the consent of the previous possessor. This also may be done in two ways. One is called the rightful taking of possession and the other the wrongful taking of possession. A shopkeeper is entitled to get some money from a customer and the shopkeeper takes possession of the things of the customer. This is an example of the rightful taking of possession. If a thief steals something from an individual, his acquisition of possession is wrongful. However, if a person captures a wild animal which does not belong to anybody, the possession is called original.

(2) Another way of acquisition of possession is *by delivery* or *traditio*. In such a case, a thing is acquired with the consent and cooperation of the previous possessor. Deliveiy is of two kinds, viz., actual and constructive. In the case of actual delivery immediate possession is given to the transferee. There are two categories of actual delivery. According to one category, the holder retains mediate possession and according to the other the holder does not retain mediate possession. If I lend a book to somebody I retain the mediate possession of the book but if I sell the same, I do not retain any mediate possession.

Constructive delivery is that which is not direct or actual. There are certain things which cannot actually be transferred by the owner to the purchaser or by the transferor to the transferee. In such cases, constructive delivery alone is possible. There are three kinds of constructive delivery and those are *traditio brevi manu, constitution possessorium and attornment.* In the case of *traditio brevi manu,* possession is surrendered to one who has already immediate possession. In such a case, it is only the *animus* that is transferred as the *corpus* of possession is already with the transferee. I have already lent a book to somebody, if I sell the same book to him, it is a case of *traditio brevi manu.* In the case of *constitution possessorium* it is only the mediate possession that is transferred and the immediate possession is retained by the transferor. I may sell my car to somebody but I may retain the physical possession of the same for some time in spite of the payment of price to me. In such a case, the *animus* is lost and I keep the car on behalf of the purchaser. It is to be observed that in all cases of constructive delivery, there is a change of *animus* alone and *corpus* of possession remains where it was before.

(3) Transfer of possession can be made by the *operation of law* as well. This happens when, as a result of law, possession changes hands. If a person dies, the possession of his property is transferred to his successors and legal representatives.

Res nullius: According to this principle, the first finder of a thing has a good title to that thing against all but the true owner. It is immaterial if the tiling is found on the property of another person. However, there are certain exceptions to this general rule. The rule does not apply if the owner of the property on which the thing is found is in possession of the thing itself and the property. The same is the case if the finder finds the thing as the servant or agent of another person. The rule also does not apply if the possession of the thing was got through trespass or other wrongful act.

X wounds a hare in the forest and *Y* catches it on his own field. *Y* has the better right to the animal. A parcel of bank notes is found by *X*, a customer, at the floor of the shop of *Y*. *Y* had no knowledge of the existence of those hank notes. *X* acquires a better title to the bank notes as the first possessor than *Y*. As the shopkeeper was not aware of the existence of the bank notes, he could not be presumed to be in their possession. In another case, a bank note was dropped in the shop of *X*. The shopkeeper picked up the note and although he knew the owner of that note, he did note return the same and converted it to his own use. He was held guilty of theft. In another case, it was held that the first finder did not become the owner as he was merely an agent. In

still another case, it was held that the finder did not become the owner as his action of removing the boat was a trespass.

Kinds of Possession

(*1*) *Immediate and Mediate*: Immediate possession is also called direct possession and mediate possession is also known as indirect possession. If the relation between the possessor and the thing possessed is a direct one, it is a case of immediate possession. When that relation is through the intervention or agency of some other person, it is called mediate possession. If I go to the bazar and buy a thing personally, it is a case of immediate possession. If I send an agent to the bazar to buy something and he does make the purchase, his possession is mediate and the possession of the agent is mediate. When the agent hands over the thing to me, my possession also becomes immediate.

There are three categories of mediate possession. In the case of the first category, the owner has possession through an agent or servant who acquires and retains possession of a thing entirely on behalf of the owner without claiming any interest for himself. I send my servant *to* the bazar on a bicycle to buy for me a pair of socks. In this case, I have mediate possession of the bicycle and the socks. Likewise, if I deposit certain goods in a warehouse or in a store, the latter holds those goods on my behalf and I retain their mediate possession. In the second case, the immediate possession is with a person who holds the thing on his own behalf and on my behalf and who is bound to hand over the direct possession of the same whenever I desire. This is the case of a hirer, tenant at will or a borrower. They all recognise the superior title of another person. In the case of third category, the immediate possession is with one person but he is bound to return the same after a certain period or on the fulfilment of certain conditions. If I owe some money to somebody and pledge certain things to my creditor, the pledgee has immediate possession of the thing pledged but is bound to return the same to the pledgor or on the payment of the debt.

The threefold classification of mediate possession has been criticised by certain writers. It is pointed out that in the case of an agent or servant, he does not possess the thing but has merely the custody of the thing. The *animus possidendi* is lacking. Even if a thing is given to a servant for sale, he merely acquires the custody of the thing in possession. The reason is that if he had immediate possession of the thing, he could not be held guilty of theft in case of misappropriation. It is also pointed out that it is the bailee and not the bailor who can sue for interference with the possession of the bailee. It is the bailee who has the possession and not the bailor. In the case of a bailee at will, both the

bailor and the bailee have possession of the thing and both of them can sue for interference with their possession.

It is also pointed out that two persons cannot be in possession of the same thing at the same time adversely to each other. The reason is that if one person has both the *corpus* of possession and the *animus possidendi*, he has full possession of the thing and no other person can have possession to the same thing. The case is different in the case of co-owners. They are joint owners and neither of the two has any right to exclude the other. In the case of bailment at will, the bailor and bailee are both in possession of the same thing at the same time.

(2) *Corporeal and Incorporeal*: Corporeal possession is the possession of a material object and incorporeal possession is the possession of anything other than a material object. I have corporeal possession of my car and books, but I have incorporeal possession of a trade mark, a patent and a copyright. Corporeal possession is the possession of a thing and incorporeal possession is the possession of a right. According to the Italian Civil Code: "possession is the detention of a thing or the enjoyment of a right by any person either personally or through another who retains the thing or exercises the right in his name." According to Burns: "Just as corporeal possession consists not in actual dealing with the thing but only in the power of dealing with it at will, so incorporeal possession consists not in the actual exercise of a right but in the power of exercising It at will; and it is only because the existence of this power does not become visible as an objective fact until actual exercise of the right has taken place that such actual exercise is recognised as an essential condition of the commencement of possession."

(3) *Representative possession*: Representative possession is that in which the owner has possession of a thing through an agent or a servant. The real possession is that of the actual owner and not that of the representative. I put some money in the pocket of my servant to buy certain things from the bazar. Money in the pocket of the servant is not in his possession. It is a case of representative possession. The essence of representative possession lies in the fact that the master has the *animus* to exercise control over the thing in the hands of his servant or agent.

(4) *Concurrent possession*: In the case of concurrent possession, the possession of a thing may be in the hands of two or more persons at the same time. Claims which are not adverse and which are not mutually destructive, admit of concurrent realisation. In the case of concurrent possession, mediate and immediate possession may exist in respect of the same thing. The possession of my servant over a thing of mine may be immediate but my mediate possession is also there. Two or more

persons may possess the same thing jointly. Corporeal or incorporeal possession may exist with regard to the same material thing. I may possess a piece of land and another person may have the right of way on the same land.

(5) *Derivative possession*: In the case of derivative possession, the holder of the thing combines in himself both the physical and mental elements which constitute legal possession. A creditor has a derivative possession of the thing pledged to him. Likewise, a watchmaker has a derivative possession of a watch entrusted to him for repairs so long as the repair charges are not paid. A bailee has a derivative possession of the goods bailed to him. In these cases, the title of the holder of the thing is derived from the person who entrusts the thing. It is pointed out that if the owner of the watch takes away the watch forcibly without making the payment, he is guilty of theft.

(6) *Constructive possession*: Constructive possession is not actual possession. It is a possession in law and not possession in fact. The goods sold by me are lying in a warehouse and if I hand over the keys of the warehouse to the purchaser, the latter comes to have the constructive possession of the thing. If I hand over the key of a building to a tenant, I give constructive possession of the building to the tenant. The handing over of the key shows that possession has changed in law although not in fact.

(7) *Adverse possession*: The possession of property by a person is adverse to every other person having or claiming to have a right to the possession of that property by virtue of a different title. To be adverse, possession must be an invasion of the ownership of another. It should be actual, exclusive and adequate in continuity and publicity. The acts of possession must be exercised without violence, without stealth and without permission. When these conditions are present, possession is considered to be adverse. The conception of adverse possession is very important in law because when it is had for the period laid down by law, it extinguishes the title of the true owner and creates a title in the adverse possessor.

(8) *Duplicate possession*: Possession is a right to exclusive use and it is not possible for two persons to have independent and adverse claims to possession of the same thing at the same time. The possession of a thing by one person is compatible with its possession by another only when the two claims are not mutually adverse. Claims to possession which admit of concurrent realisation give rise to duplicate possession.

The possession of co-owners is a case of duplicate possession and is usually called *compossessio*.

Corporeal and incorporeal possession may coexist in respect of the same object. One person may possess a land and another person can have a right of way over that land. This is another illustration of duplicate possession.

The most important case of duplicate possession is what is called by Salmond as mediate and immediate possession. Possession may be held on account of someone else. The person for whom possession is held has mediate possession of property while the person holding the thing directly has immediate possession. Examples of duplicate possession are furnished by the possession of landlord and tenant, bailor and bailee and master and servant. The tenant, the bailee and the servant have immediate possession. They recognise the right to possession of the landlord. The landlord and the bailor have mediate possession which avails against all the world except the immediate possessor. The servant can claim no interest of his own and holds solely for his master. The possession of the master is mediate possession and avails even against the immediate possessor.

Why possession is protected?

There are many reasons for the protection of possession.

(l) Protection of possession aids the criminal law by preserving the peace. According to Savigny, the protection of possession is a branch of protection to the person. Possession is protected in order to obviate unlawful acts of violence against the person in possession. Interference with possession inevitably leads to disturbance of peace. Order is best secured by protecting a possessor and leaving the true owner to seek his remedy in a court of law. Justice Holmes writes: "Law must found itself on actual facts. It is quite enough therefore for the law than man, by an instinct which he shares with the domestic dog and of which the seal gives the most striking example, will not allow himself to be dispossessed either by force or by fraud, of which he holds, without trying to get it back again. To obviate the violence resulting from this, possession is protected by the law."

According to Ihering, possession is ownership on the defensive. The possessor must be protected and he must not be asked to prove his title. Most of the possessors are the rightful owners and it is desirable that they should be protected. Possession is the evidence of ownership. Possession is patent to all. Possession is the nine points of law and hence protection should be given to possession.

According to Holland: "The predominant motive was probably a regard for the preservation of the peace." The view of Windschield is that protection to possession is given in the same way as protection is given against *injuria* or the violation of a legal private right.

(2) Possession is protected as a part of the law of tort. Law protects possession not only from disturbance by force but from disturbance by fraud. The protection thus afforded is a part of the law of tort.

(3) According to the philosophical school of jurists, possession is protected because a man by taking possession of an object has brought it within the sphere of his will. The freedom of the will is the essence of personality and has to be protected so long as it does not conflict with the universal will which is the State. As possession involves an extension of personality over the object, it is protected by law. As the reputation of a person is protected against defamatory attack, his possession is protected as he has projected his personality over the object of possession.

Kant says that men are born free and equal. Freedom of will is the essence of man and it must be recognised, respected, protected and realised by all governments. Possession is the embodiment of the will of man. By taking possession of a thing, a person incorporates his will and personality in that thing. Possession is the objective realisation of free will and the will of a person as expressed in possession must be protected. Puchta writes: "The will which wills itself, that is, the recognition of its own personality, is to be protected." The view of Cans is that "the will is of itself a substantial thing to be protected and this individual will has only to yield to the higher common will."

(4) Possession is protected as a part of the law of property. Cairns writes: "Possession was originally protected to aid the Law of Crime and Tort; it came at length to be protected in order to aid the law of property."[11] In the early stages of the development of the law of property when proof of title to property was difficult, it was considered to be unjust to cast on a person whose possession was disturbed the burden of proving a flawless title. Therefore, the law presumed that the possessor was the owner until a superior title was shown to exist in someone else. In this way, possession came to be protected by law.

The view of Salmond is that distinct possessory remedies are not required and the punishments of criminal law and the sanctions of the Law of Tort are sufficient to prevent the evils of violent self-help. An owner who has dispossessed a trespasser need not be required to deliver possession to the trespasser and recover it back in an independent proprietary action. As for assistance rendered to the law of property, the modern law of evidence can adjust the burden of proof suitably and avoid the duplication of proprietary and possessory remedies. While these considerations are entitled to great weight, expediency requires that possession as such must be protected. In India, a compro-

[11] *The Social Sciences*, p. 65.

mise has been made between proprietary and possessory remedies. If the dispossessed owner brings his suit promptly within six months, he is allowed to succeed merely on proof of possession even against the true owner. If he brings his suit beyond that period, he is non-suited if the defendant proves a superior title in himself.

Possessory Remedies

Possessory remedies are those which exist for the protection of possession even against ownership. Proprietary remedies are those which are available for the protection of ownership. In many legal systems, possession is provisional or temporary title even against the true owner. Even a wrongful possessor who is deprived of his possession can recover it from any person whatsoever on the ground of his possession. Even the true owner who retakes his own, must first restore possession to the wrongdoer and then proceed to secure possession on the ground of his ownership.

There are many reasons why possessory remedies are recognised.

(1) Possession often amounts to evidence of ownership. A finder of goods becomes its owner against the whole world except the true owner. This is on the ground that he is in possession of it. If a person is in adverse possession of a property for 12 or more years, he becomes the legal owner of that property and the right of the original owner is extinguished.

(2) The evils of violent self-help are very serious and in all civilised countries, those are prohibited. Experience shows that there can be better conditions in society if the use of force is avoided by the real owners. Lawful methods are always to be preferred and no one should take the law into his own hands.

(3) Another reason for possessory remedies is to be found in the serious imperfection of early proprietary remedies. Those were cumbersome, dilatory and inefficient. Every claimant had to undergo many hardships. The position of the plaintiff was a very difficult one and no person was to be allowed to occupy the advantageous position of the defendant. It was under these circumstances that it was provided that the original state of affairs must be restored first. Possession must be given to him who had it first and then alone the claims of the various persons could be settled. Under the old legal systems, it was extremely difficult to prove one's ownership and recover the property on the ground of title. Very often, small technicalities resulted in the defeat of one's title to property.

(4) Another reason for possessory remedies is that it is always more difficult to prove ownership than to prove possession. Hence it is unjust that a person who has taken possession of property by violence should not be allowed to transfer the heavy burden of proof from his own shoulders to that of his opponent. He who takes a thing by force must restore it and he is free to prove that he is the owner.

Possessory Remedies and Doctrine of Jus Tertii

Possessory remedies have been rejected by English Law but other provisions have been made to protect possession. There are three rules in this connection. Prior possession is *prima facie* proof of title. He who is in possession first in time has a better title than the one who has no possession. A defendant is always at liberty to rebut that presumption by proving that he has a better title. A defendant who has violated the possession of the plaintiff is not allowed to set up the defence of *jus tertii* which means that he cannot plead that though neither the plaintiff nor he has the title, some third person is the true owner but the plaintiff is not. This defence is not valid under English Law as prior possession is always a *prima facie* proof of title. Though the title of a third person is not a good defence, English Law considers *jus tertii* as a good defence under the following circumstances:

(*i*) When the defendant defends the action on behalf of and by the authority of the true owner.

(*ii*) When he committed the act complained of by the authority of the true owner.

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

Distinction between Possession and Ownership

According to Ihering: "Possession is the objective realisation of ownership." It is the external realisation of ownership. It is a valuable piece of evidence to show the existence of ownership. It is in fact what ownership is in right. It is the *de facto* exercise of a claim while ownership is the *de jure* recognition of that claim. Possession is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves.

By ownership in law is meant the right of an individual or a body corporate or incorporate to possess a thing to the exclusive use of it, to alienate it, and even to destroy it in such a manner that he does not disturb the rights of other people. In the strict sense of the term, ownership is a right to the enjoyment of the uses of the subject-matter, with a right to deal with it in any manner the owner pleases. It is not necessary that the owner of the corpus should enjoy all the rights or uses at

the same time. He may either use it or keep it locked in the house. He may use it everyday or sparingly. He may exclude strangers or outsiders from using it. He may gift it away to anybody. He may even destroy it. His right is against the whole world. Nobody can disturb him in the peaceful enjoyment of the thing owned by him. In the case of incorporeal rights such as a copyright, trade mark or patent, he can use all those rights to the exclusion of all others.

According to Austin, ownership in its wider sense is a right "indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". The right of alienation of property is a necessary incident to the right of ownership, but there are many restrictions with regard to the alienation of property today.

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

According to Salmond, possession "is in fact what ownership is in right. Possession is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me when my claim to it is maintained by the will of the State as expressed in the law; it is possessed by me when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts." Again, "possession, therefore, is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves. The separation of these two things is an exceptional incident, due to accident, wrong or the special nature of the claims in question. Possession without ownership is the body of fact, uninformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. The two things stand mutually to coincide. Ownership strives 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."

Ownership and possession have the same subject-matter. Whatever can be owned can also be possessed and whatever can be possessed

can also be owned. However, there are certain claims which can be realised and exercised in fact without receiving any recognition or protection from law. There is no right vested either in the claimant or in anyone else. There is possession without ownership. Man may possess copyrights, trade marks and other forms of monopoly though law may refuse to defend the same. There are many rights which can be owned but hot possessed. There are transitory rights which do not admit of continuing exercise and possession. They cannot be possessed as they are destroyed after their fulfilment. A creditor does not possess a debt as it is a transitory right. However, a person can possess an easement over a piece of land as its continued existence is possible. A right *in rem* can both be owned and possessed but a right *in personam* can be owned but it cannot be possessed.

Possession and ownership differ in their mode of acquisition. The transfer of possession is comparatively easier and less technical, but the transfer of ownership in most cases involves a technical process of conveyancing.

The distinction between possession and ownership on the basis of fact and right is not tenable. Fact and right are not quite separate and independent ideas. One cannot exist without the other. To say that one is a fact and the other is a right is not correct. Though there may be a difference of degree, both the things (fact and right) are present in both the concepts.

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Chapter Fifteen

Persons

Definition

THE WORD "person" is derived from the Latin word *'persona'*. This term has a long history. To begin with, it simply meant a mask. Later on, it was used to denote the part played by a man in life. After that, it was used in the sense of the man who played the part. In later Roman law, the term became synonymous with *caput*. A slave had an imperfect *persona*. Last of all, the term is used in the sense of a being who is capable of sustaining rights and duties.

Many definitions of persons have been given by various writers. According to the German writers, "will is the essence of a personality. A legal person is one who is capable of will. Zitelmann writes: "Personality is the legal capacity of will. The bodiliness of men is for their personality a wholly irrelevant attribute." Meurer observes: "The juristic conception of the juristic person exhausts itself in the will and the so-called physical persons are for the law only juristic persons with a physical *super fluim.*" Karlowa says: "The body is not merely the house in which the human personality dwells; it is together with the soul which now for this life is inseparably bound with it, the personality. So, not only as a being which has the possibility of willing, but as a being which can have manifold bodily and spiritual needs and interests as a human, centre of interests, is a man, a person."

A person is not necessarily a human being. There may be human beings who are not persons. Slaves are not persons in the legal sense as they cannot have rights. In the same way, there may be persons who are not human beings, e.g., a corporation. According to Hindu law, idols are legal persons. Although they have a personality in the eye of law, they are not human beings. The term personality has a wider significance than humanity. Under the Indian Penal Code, the word per-

son includes any company or association, or body of persons, whether incorporated or not.

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

Legal Status of Lower Animals

The only natural persons are human beings and beasts are not persons, either natural or legal. They are merely things. They are often the objects of legal rights and duties, but never the subjects of them. Like men, beasts are capable of acts and possess interest, but their acts are neither lawful nor unlawful. They are not recognised by law as the appropriate subject-matter either of permission or of prohibition.

A beast is as incapable of legal rights as of legal duties. His interests are not recognised by law. Law is made for men and allows no fellowship or bonds of obligation between men and lower animals. If they possess moral rights, those are not recognised by any legal system. If a beast is hurt, it is a wrong to the owner of the beast or the society of mankind but not to the beast. No animal can be the owner of any property, even through the medium of a human trustee. Even if a testator vests property in trustees for the maintenance of his favourite horses or dogs, he will not create thereby a valid trust enforceable in any way by or on behalf of these non-human beneficiaries. The only effect of such provisions is to authorise the trustees, if they think fit, to spend the property or any part of it in the way so indicated. Whatever part is not so spent will go to the representatives of the testator as undisposed of.

According to some writers, animals are persons. They point out that "law prohibits cruelty towards them and English Law enforces trusts of property in their favour, the obligations which the law enforces in these respects seem to co-relate with rights vested in the animals".

Keeton writes: "In Greek law, we hear of animals and trees being tried for offences to human beings, and obviously, therefore, they are considered capable of having duties, even if they possessed no rights. Even in the Middle Ages, trials of animals continued. In Germany, a cock was solemnly placed in the prisoner's box and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client and the unfortunate bird was accordingly ordered to be destroyed. In 1508 the caterpillars of Contes,

in Province, were tried and condemned for ravaging the fields, and in 1545 the beetles of St. Julien de Maurienne were similarly indicted. So late as 1688, Gaspard Bailly of Chamberg in Savoy was able to publish a volume including forms of indictment and pleading in animal trials. In all these cases, the animal is considered to be capable of sustaining duties and is therefore to this extent a legal person. The same idea is reflected in Jewish law where it is provided that the ox that gores must not be eaten."

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

However, there are two cases in which beasts may be thought to possess legal rights:

(*i*) Cruelty to animals is a criminal offence.

(*ii*) A trust for the benefit of particular classes of animals, as opposed to one for individual animals, 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.

The view of Salmond is that these duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries but to public rights vested in the community at large. The community has a rightful interest in the well-being even of the dumb animals which belong to it. However, where the interests of animals conflict with those of human beings, the latter are preferred.

Legal Status of Dead Persons

The personality of a human being commences its existence on birth and ceases to exist at death. Dead men are no longer persons in the eye of law. They have laid down their legal personality with their lives and they are destitute of rights and liabilities. They have no rights because they have no interests. They do not even remain the owners of their property until their successors enter upon their inheritance. The goods of an intestate befo the grant of letters of administration were formerly vested in the Bishop of the Diocese. Now they are vested in England in the judge of the Court of Probate rather than left to the dead until they are acquired by the living.

Without conferring rights upon the dead, law recognises and takes account after the death of a person of his desires and interests when alive. There are three things in respect of which the anxieties of living men extend even after their death. Those are his body, his reputation and his estate. A living man is interested in the treatment to be given to his own dead body. A corpse is the property of no one. It cannot be disposed of by will or any other instrument and no wrongful dealing with it can amount to theft. However, criminal law secures a decent burial for all dead men and the violation of a grave is a criminal offence. The directions of a man in his will regarding the disposal of his dead body are without any binding force. However, by statute he is given the power of protecting it from the indignity of anatomical uses. A permanent trust for the maintenance of his tomb is illegal and void as no property can be permanently devoted for this purpose. Even a temporary trust for this purpose is not obligatory as property is for the uses of the living and not of the dead.

The reputation of a dead person receives some degree of protection from criminal law. A libel upon a dead man is punished as a misdemeanour when its publication is an attack on the interests of living persons, As a matter of fact, this right is in reality not that of the dead person but of his living descendants.

In *Williams* v. *Williams*, it was laid down- that a person cannot during his lifetime make a will disposing of his body, e.g., giving his brain to the museum or giving any part of his body to the medical college. However, the trend is changing today and it is perfectly legal to donate one's eyes after death.

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

It has been held in *Jamshedji* v. *Soonabai* that *muktad* ceremonies of the Parsees tend to advance the religion of the followers of the Prophet Zoroaster and therefore trusts and bequests for the purpose of such ceremonies are valid.[1]

[1] 33 Bom 122.

In *Advocate-General* v. *Yusufali*, it was held that a gift for the perpetual upkeep of the tomb of St. Chandabhai was a charitable gift, and therefore valid, even though perpetual.[2]

For years after a man is dead, his hand may continue to regulate and determine the enjoyment of the property which he owned while he was alive. The law of succession permits the desires of the dead to regulate the actions of the living. Moreover, whatever he has left behind to be distributed as gifts or given in charity will be respected by law and enforced according to his wishes laid down in a proper document.

Status of Unborn Person

Though the dead possess no legal personality, the case is otherwise with the unborn persons. There is nothing in law to prevent a man from owning property before he is born. His ownership is contingent as he may never be born at all, but it is a real and present ownership. A man may settle property upon his wife and the children to be born of her. Even if he dies intestate, his unborn child will inherit his estate. However, many restrictions have been imposed in this connection. No testator can direct his fortune to be accumulated for a hundred years and then distribute among his descendants..

A child in the womb of his mother is for many purposes regarded by a legal fiction as already born. In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth." To what extent an unborn person can possess personal and proprietary rights is a somewhat unsettled question. It has been held that a posthumous child is entitled to compensation under Lord Campbell's Act for the death of his father. Wilful or negligent injury inflicted on a child in the womb, by reason of which it dies after having been born alive, amounts to murder or manslaughter. A pregnant woman condemned to death is respited as of rights 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 before he dies. 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. The case will be otherwise if he lived for an hour after his birth. If some of the benefici-

[2] 24 Bom LR 1060.

aries of a trust are unborn persons, the trust cannot be varied without obtaining the consent of the court on their behalf.

Legal status of Idol

Idol is a juristic person and as such can hold property, but it is treated as a minor and the *pujari* or somebody else acts on its behalf as the guardian.

In *Pramatha Nath Mulliick* v. *Pradyumna Kumar Mullick,* it was held by the Privy Council that an idol is a juristic person. The will of the idol as to its location must be respected. The suit was remitted in order that the idol might appear by a disinterested next friend to be appointed by the court.[3]

In *Yogendra Nath Naskar* v. *Commissioner of Income Tax,* the Supreme Court of India held that the Hindu idol is a juristic entity capable of holding property and of being taxed through its *shebaits* who are entrusted with the possession and management of its property. A Hindu deity falls within the meaning of the word individual under the Income Tax Act, 1922 and can be treated as a unit of assessment capable of being taxed through its *shebaits.* Neither God nor any supernatural being can be a person in law, but so far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person and in that capacity alone the dedicated property vests in it. There is no principle why a deity should not be taxed if it is allowed in law to own property.[4]

Legal status of Mosque

A mosque is not a juristic person. In *Maula Buksh* v. *Haftz-ud-din,* it was held by the Lahore High Court that a mosque was a juristic person and could sue and be used [AIR 1926 Lah 372]. In the *Masjid Shahid Ganj* case, it was decided by the Privy Council that suits cannot be brought by or against mosque as they are not artificial persons in the eye of law. However, the Privy Council left the question open whether a mosque could for any purpose be regarded as a juristic person.[5]

Kinds of Persons

Two kinds of persons are recognised by law and those are *natural person* and *legal persons.* Legal persons are also known as artificial, juristic or fictitious persons.

(1) According to Holland, a *natural person* is "such a human being as is regarded by the law as capable of rights and duties—in the lan-

[3] 1925 LR 52 Indian Appeals 245.

[4] (1969) 3 SCR 742.

[5] (1940) 67 Indian Appeals 25.

guage of Roman law, as having a status." According to another writer, natural persons are "living *human* beings recognised as persons by the State". The first requisite of a normal human being is that he must be recognised as possessing a sufficient status to enable him to possess rights and duties. A slave in Roman law did not possess a personality sufficient to sustain legal rights and duties. In spite of that, he existed in law because he could make contracts which under certain circumstances were binding on his master. Certain natural rights possessed by him could have legal consequences if he was manumitted. Likewise, in Roman law, an exile or a captive imprisoned by the enemy forfeited his rights. However, if he was pardoned or freed, his personality returned to him. In the case of English Law, if a person became an outlaw, he lost his personality and thereby became incapable of having rights and duties. The second requisite of a normal human being is that he must be born alive. Moreover, he must possess essentially human characteristics.

(2) *Legal persons* are real or imaginary beings to whom personality is attributed by law by way of *fiction* where it does not exist in fact. Juristic persons are also defined as those things, mass of property, group of human beings or an institution upon whom the law has conferred a legal status and who are in the eye of law capable of having rights and duties as natural persons.

Law attributes by legal fiction a personality of some real thing. A fictitious thing is that which does not exist in fact but which is deemed to exist in the eye of law. There are two essentials of a legal person and those are the *corpus* and the *animus*. The *corpus* in the body into which the law infuses the *animus*, will or intention of a fictitious personality. The *animus* is the personality or the will of the person. There is a *double fiction* in a juristic person. By one fiction, the juristic person is created or made an entity. By the second fiction, it is clothed with the will of a living being. Juristic persons come into existence when there is in existence a thing, a mass of property, an institution or a group of persons and the law attributes to them the character of a person. This may be done as a result of an act of the sovereign or by a general rule prescribed by the government.

A legal person has a real existence but its personality is fictitious. Personification is essential for all legal personality but personification does not create personality. Personification is a mere metaphor. It is used merely because it simplifies thought and expression. A firm, a jury, a bench of judges or a public meeting is not recognised as having a legal personality. The *animus* is lacking in their case.

Kinds of Legal Persons

There are three kinds of legal persons, *viz., corporations, institutions* and *fund or estate.*

(1) A *corporation* is an artificial or fictitious person constituted by the personification of a group or a series of individuals. The individuals forming the *corpus* of the corporation are called its members. A corporation is either a corporation aggregate or a corporation sole.

Three conditions are necessary for the existence of a corporation. There must be a group or body of human beings associated for certain purposes. There must be organs through which the body or the group acts. A will is attributed to a corporation by a legal fiction. The corporation is distinguished from the individuals who constitute the corporation. A corporation has a personality of its own which is different from the personalities of the individuals. A corporation can sue and be sued. Even if the members of a corporation die, the corporation continues. A corporation is recognised by law as a permanent and continuous legal entity. It is not affected by the deaths of its members. A corporation can enter into contracts with its members as it has a personality distinct from that of the members. A corporation can have property and rights and duties. Unlike natural persons, a corporation can act only through its agents. It does not die in the way natural persons die. Law provides special procedure for the winding up of a corporation.

(2) In some cases, the corpus or the object personified is not a group or succession of individuals but an institution itself. Examples of institutions are a college, church, library, mosque, hospital, an idol, etc.

(3) In some cases, the *corpus* or the object personified is some *fund* or *estate* reserved for a particular purpose. Examples of this kind of legal persons are the property of a dead man, the estate of an insolvent, a fund for charity, an estate under a trust, etc. According to Roman law, the estate of a dead person was regarded as having a legal personality by the notion of *hereditas jecens* till it was vested in the legal heirs. Likewise, the *Stiftung,* an unincorporated fund for charitable purposes, was vested with rights and duties and was itself personified.

Corporation Aggregate:—Corporations are of two kinds, corporation aggregate and corporation sole. According to *Halsbury's Laws of England'.* "A corporation aggregate is a collection of individuals united into one body, under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual, liberty of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of expressing a variety of political rights, more or less extensive,

according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." A corporation aggregate is an incorporated group or body of coexisting persons united for the purpose of advancing certain ends or interests. The number of corporations aggregate is very large and they are of various kinds. Their importance is also very great in the field of law. Thus, we have a very large number of limited companies having millions of shareholders spread in different parts of the world. It is to be observed that a limited company is something different from its shareholders. It has a personality of its own which is different from its shareholders. The property of the company is not the property of the shareholders. The assets and liabilities of the company are different from those of its members. A company can contract with its shareholders. It is liable for torts. Even if the number of shareholders is reduced to one, the shareholder and the company are two distinct persons.

Corporation Sole:—Corporation sole is an incorporated series of successive persons. It is a corporation which has one member at a time. It is a body politic having a perpetual succession. It is constituted in a single person who, in right of some office or function, has the capacity to take, purchase, hold and demise land and hereditaments. A corporation sole is perpetual but there may be and mostly are periods in the duration of corporation sole, occurring irregularly, in which there is vacancy or no one in existence in whom the corporation resides and is visibly represented. Examples of corporations sole are the offices of the Postmaster-General, the Minister of Health, the Minister of Agriculture, the Public Trustees, Secretary of State for War, the Solicitor to the Treasury, the Comptroller and Auditor-General of India, the President of India, etc. A corporation sole does not require a seal but a corporation aggregate can act or express its will only by a deed under the common seal. The existence of a common seal is the evidence of incorporation and the non-existence of a common will is an evidence against incorporation. A corporation can change its seal at will.

According to Dias and Hughes, the main purpose of the corporation sole is to ensure continuity. It avoids an abeyance *in seisin.* Moreover, the occupant of the office can acquire property for the benefit of his successors. He may contract to bind or benefit them. He can sue for injuries to the property while it is in the hands of his predecessor.

A corporation sole is an example of *dual personality.* If a single human being has in one capacity legal relations with himself in another capacity, there arises a case of dual personality. The King of England exercises the function of the Crown and in his capacity as the constitutional head, he can confer rights and duties on himself as an indi-

vidual. The natural person may owe a duty to the legal person. He may have rights against the legal person. The same is the case with the President of India. The trustee as an individual may owe money to or enter into contracts with himself in his capacity as a trustee.

According to Dias and Hughes: "A question that is also asked is whether a corporation can survive the last of its members. Professor Gover mentions a case in which all the members of a company were killed by a bomb while at a general meeting, but the company was deemed to survive."[6]

Essential Features of a Corporation:—Reference may be made to the essential features of a corporation. A corporation has in law a different existence and personality from that of its members or shareholders. Its personality is fictitious. The incorporation of a firm brings about a fundamental change in its legal position. It comes to be invested with a personality of its own.

The distinction between a corporation and its members is fundamental. The property of a corporation is not considered to be the property of the shareholders. No shareholder can claim that a particular part of the property of a corporation belongs to him. Likewise, a corporation cannot lay any claim to the property of its shareholders. The shareholders of a corporation may be perfectly solvent but the corporation may become insolvent. As a corporation has a separate personality and existence of its own, there is no difficulty in a member entering into a contract with the corporation.

A corporation can survive the last of its members. It does not die with the death of its shareholders. The law of a country lays down the conditions according to which a corporation can be brought into existence and also ended. The successor of a shareholder does not become a shareholder. He has to get himself registered as such. If he does not do so, he does not automatically become a shareholder. It is possible that one shareholder may purchase all the shares of the rest of the shareholders. In this way, he can become the sole shareholder. In case he dies and his successor or successors do not register themselves as shareholders, the company continues to exist even without a shareholder.

Corporation and Firm:—It is interesting to point out the difference between a corporation and a firm. A corporation has an existence and a personality of its own which is different from that of its members or shareholders. That is not the case with a firm. A firm is not considered to be a legal person. As a corporation has a separate personality of its own different from that of its members, it is possible for a corpora-

[6] p. 290, *Jurisprudence*.

tion to enter into a contract with its members. However, that is not the case with a firm. No firm can enter into a contract with its members. A corporation can possess properly and have rights and duties different from that of its members. Such a thing is not possible in the case of a firm. The property of the firm is the property of the members. A corporation can exist even with one member. It can even survive a sole member. This is not possible in the case of a partnership firm. There must be more than one member of a partnership firm. Moreover, a partnership firm comes to an end with the death of the partners. A corporation has a permanent existence.

Corporation and Natural Persons:—There is also a fundamental distinction between a corporation and natural persons. A natural person is born as a result of the working of law of nature and also dies in the same way. However, when a corporation has to be created, an application has to be made to some office set up for that purpose by law. In the case of a joint stock company, the application is made to the Registrar of Joint Stock Companies. A corporation can also be created by means of a Royal Charter or an Act of Parliament. This was done in the case of the English East India Company. In the same way, municipal corporations can be set up. A corporation also comes into existence by prescription. The same is the case with regard to the dissolution of corporations. A corporation can be declared defunct when it stops doing its business. Its charter can be forfeited. It can voluntarily surrender its charter or the privileges granted to it.

A natural person can act himself. It is not binding on a natural person to get his work done through others. However, in the case of a corporation, it is absolutely essential that it must act through its agents. Moreover, a natural person can do whatever he pleases. There is no restriction on what he can do and what he cannot do. However in the case of a corporation, its powers are defined in the instrument when the corporation is created. A limited company cannot go beyond the terms of its memorandum of association. Even if all the shareholders of a company agree, they cannot do a thing which is beyond the terms of the memorandum of association. However, the memorandum of association itself can be changed.

Theories of Corporate Personality

There are many theories with regard to the nature of corporate personality and those are the fiction theory, the realistic theory, the concession theory and the bracket theory.

(1) Fiction theory.—The fiction theory was pronounced by Savigny. According to him, a personality is attached to corporations, institutions, and funds by a pure legal fiction. The personality of a corpo-

ration is different from that of its members. There is a double fiction in the case of a corporation. By one fiction, the corporation is given a legal entity. By the second fiction, the corporation is clothed with the will of an individual person. The fictitious personality of the corporation comes to have a will of its own which is different from that of its members.

Savigny writes: "The essential quality of all corporations consists in this, that the subject of the right does not exist in the individual members thereof (not even in all the members taken collectively) but in the ideal whole: a particular, but specially important result whereof is, that by the change of an individual member, indeed, even of all the members, the essence and unity of a corporation is not affected." Sir John Salmond is of the view that a corporation is so far distinct from its members that it is capable of surviving even the last of them. A company incorporated by an Act of Parliament can be dissolved only as provided therein or by another Act of Parliament. The fact that all the members of the company have ceased to exist does not affect the existence of the company. What survives all its members is only a fictitious creature of law.

Sir Frederick Pollock maintains that the common law of England does not recognize the fiction theory of corporate personality. In English Law neither collective liabilities nor collective powers can be incurred or claimed by a body of individuals unless it can satisfy the requirements of incorporation. Unincorporated bodies are not treated as legal persons in English Law. Before a body of persons can have rights and duties in their corporate character, they have to be incorporated according to law. An ordinary social club has no recognition as a legal person in its collective capacity. The club can neither sue nor be sued in its own name unless it has formally submitted to an act of incorporation according to law. Corporate personality is a mere creature of law and depends entirely upon the fiat of the State. Dr. Jenks writes: "There would, it may be suggested, be little practical difficulty in the working out of the more liberal view of the collective person than that adopted hitherto by English Law."

(2) *Realistic theory.*—This theory was propounded by Gierke, the great German jurist. He has been followed by Maitland, Beseler, Lasson, Bluntschli, Zitelmann, Miraglia, Sir Frederick Pollock, Geldart, Pollock, Jethrow Brown, etc. According to Gierke, every group has a real mind, a real will and a real power of action. A corporation has a real existence independent of the fact whether it is recognised by the State or not. The corporate will of the corporation expresses itself through the acts of its servants and agents. The existence of a group

person goes beyond the aggregate of the individualities of persons forming the group. There is no legal fiction about the personality of a group person. It is independent of its recognition by the Slate. According to this theory, every group comes to have a personality of its own whether that group is a social one or a political one.

It is pointed out that a group or an association of persons has a will of its own which is different from the individual wills of the members. The wills of the members react on one another to produce a new and distinct will and that will is possessed by the group person.

Psychological research has shown that the association of many persons produces a will which is different from the wills of its members. The group or corporate will inspires the action taken by the group just as an individual will of a man inspires his action. In the words of Dicey: "When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a bond which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted." In individual consciousness an individual will invests an individual with personality, group consciousness and group will invest the group with a personality as real as the corresponding personality of the individual. To quote Miraglia: "The corporation is in a certain aspect more real than the individual because it possesses greater complexity of parts and represents a higher form of evolution." When it is said that corporate personality is a reality, it is not suggested that a corporation is an actual person. All that is meant is that a corporation is a representation of psychical realities that exist independently of the fiat of the State and are recognized rather than created by it. The concept of group personality belongs to the world of the psychical realities and not of material realities. Prof. Gray denies the reality of collective will. To quote him: "A collective will is a figment. To get rid of the fiction of an attributed will by saying that corporation has a real general will is to drive out one fiction by another." The view of Sir John Salmond is that even if the group will is a reality, it is not possible to concede that "the reality of the unitary notional entity which may in law survive the last of its members." He maintains that the realist theory is inapplicable to a corporation sole. The attribution of personality to the succession of the holders of certain offices where there can be no pretence to psychological unity, is regarded by him as destructive of the realist theory of corporate personality. Gray writes: "A corporation sole is not a fictitious or juristic person; it is simply a series of natural persons some of whose rights are different and devolve in a different way from those of natural persons in general." There is a tendency in English Law to accord recognition to collective persons as real persons. In the

case of *Willmott* v. *London Road Car Co.*, a lessee covenanted not to assign or underlet without the consent of the lessor which was not to be withheld in respect of "a respectable and responsible person". It was held that the word "person" in the covenant included a corporation.

It is contended that the difference between the fiction theory and the realist theory is merely verbal. To quote Prof. J. C. Gray: "Whether the corporation is a fictitious entity or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the State are the same and the persons on whose actual wills those duties are enforced are the same."[7] Glanville Williams is also of the view that the controversy has no real significance. However, it is maintained that the two theories are capable of leading to radically different legal conclusions. To quote Prof. Geldart: "Take the case of a society, neither incorporated nor bound by a charitable trust, but formed and existing for a common object. The purpose ceases or the members refuse to carry it out. Can they dissolve and divide the society's property among themselves? Yes, if we can see nothing but co-ownership and contract. No, if we can see here a body which is more than the sum of its members, with a life which should be preserved, if possible, from self-destruction, with property which in the worst case will be *bona vacantia* and as such available for the public benefit." It is not proper to belittle the importance of the two rival theories regarding corporate personality.

(3) *Concession theory.*—According to this theory, the only realities are the sovereign and the individual. The other groups cannot claim recognition as persons. They are treated as persons merely by a concession on the part of the sovereign. Legal personality is conferred only by law.

(4) *Bracket theory.*—According to this theory, the members of a corporation are the bearers of the rights and duties which are given to the corporation for the sake of convenience. It is not always practicable or convenient to refer to all the innumerable members of a corporation. A bracket is placed around them to which a name is given. That bracket is the corporation. The weakness of this theory lies in the fact that it is not able to indicate when the bracket may be removed and the mask lifted for the purpose of taking note of the members constituting the corporation. The bracket theory is associated with the name of Ihering, a German jurist. Hohfeld, an American jurist, has also advocated a variant of this theory. His view is that a corporate personality is the creation of arbitrary legal rules designed to facilitate proceedings by and

[7] *The Nature and Sources of the Law*, p. 55.

against a corporation in a court. The jural relations actually decided by the courts are those which relate to the members of the corporation and they alone are real persons.

(5) *Purpose theory.*—Brinz, the German jurist, has propounded the purpose theory of corporate personality. In Germany, foundations or *Stiftung* are treated as juristic persons. A foundation is no more than a trust for a specific charitable purpose. Such trusts or foundations are not treated as persons in English Law. About the foundation or *Stiftung* in German law, Brinz observes that the juristic person in such a case is merely the property set apart for the foundation personified for facilitating legal transactions.

Salmond criticizes the theory of group-person on two grounds. It is not applicable to a corporation sole as we cannot have any group mind or group personality. Moreover, a corporation aggregate can exist even if there is only one surviving member or there is no member at all. Under the circumstances, it is not possible to talk of a group. Collective will is considered to be a fiction and it is pointed out that to replace the fiction theory by realistic theory is to drive out one fiction by another fiction.

According to Keeton, if corporations exist independently of State recognition, there must be a number of corporate personalities which have not yet received State recognition. The State may concede legal personality to associations or groups, which have no true corporate existence but which are united simply to achieve together limited ends.

According to Gray; "Whether the corporation is a fictitious entity or whether, according to Gierke's theory, it has a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the State are the same and the persons on whose actual wills those duties are enforced are the same."

According to Kelsen, legal personality is itself nothing but a fiction. Legal order can attribute legal personality at will. If it wishes to do so, it can personify things, institutions or groups. "Juristic and physical persons are essentially on the same plane. The physical person is the personification of the sum-total of legal rules applicable to one person. The juristic person is the personification of the sum-total of legal rules applicable to a plurality of persons."

According to Prof. Friedmann: "In its pure form the fiction theory is politically neutral. Its offspring, the concession theory, is, however, an eminently political theory; its principal purpose has been to strengthen the power of the State to deal as it pleases with group associations inside the State. The State alone, though itself a juristic personality, is placed on the same level as the individual. Its personality is really be-

yond question, and it bestows on or withdraws legal personality from other groups and associations within its jurisdiction as an attribute of its sovereignty. It is not surprising that the theory was found handy, for example, to justify the confiscation of Church property in the French Revolution and that it underlies the claim of any political dictatorship to prohibit freedom of association. The concession theory is, in fact, the necessary concomitant of any theory of unfettered State sovereignty."[8]

According to the same writer: "While each of these theories contains elements of truth, none can, by itself, adequately interpret the phenomenon of juristic personality. The reason is that corporate personality is a technical legal device, applied for a multitude of very diverse aggregations, institutions and transactions which have no common political or social denominator, whereas each of the many theories has been conceived for a particular type of juristic personality. None of them foresaw the extent to which the device of incorporation would be used in modern business."

Dias and Hughes have made certain observations about the theories of corporate personality. Their view is that no single theory takes into account all the aspects of the problem of personality. We should at all times keep clear in our minds two questions. The first question is, what does any given theory set out to explain? The second question is, what do we ourselves want a theory to explain? The theories that have been considered are philosophical, political or analytical. We must remember that the law has been dealt upon empirically, and on a functional basis. English Law has not committed itself to any theory. There is undoubtedly a good deal of theoretical speculation, but it is not easy to say how much of it affects even single decisions. Authority can be found in the same case to support different theories.

Two linguistic fallacies appear to lie at the root of too much of theorising. The first is that similarity of language form has masked dissimilarities in the ideas behind it. We speak of corporations in the same language that we use for human beings. However, the ideas which the language expresses differ in the two cases. The other fallacy is the persistent belief that words stand for things, whereas they only represent ideas. That has led to a lot of confusion. A glance at the development of the word '*persona*' shows progressive shifts in the ideas represented by it. It meant originally a mask, then the character indicated by a mask, the character in a play, someone who represents the character, a representative in general, a representative of the church, a parson. It is not easy to trace precisely how the word '*persona*' acquired its technical meaning of an entity with rights, etc. It is true that the law can

[8] p. 513, *Legal Theory*.

only take account of the human beings in this way which in Roman law meant to bear, to sue as well as own property. The development of these capacities in bodies such as the municipium, collegium, etc, may have helped to abstract the idea. However, it would be wrong to suppose that the word *persona* was used technically in this sense. There was only a tendency in that direction in late law. Some such idea of *persona* seems to have been present in the mind of Tertullian who brought his legal ideas to bear on the interpretation of the "person" of Christ. He gave the word another shift in meaning as the possessing of the "properties" of divinity and humanity. In English Law, the extension of the term from human beings to corporations and the like represents another shift.

Nationality of Corporation: As a corporation has no physical existence, the question of its nationality and domicile is a difficult one. Broadly speaking, a corporation incorporated in accordance with the requirements of Indian law is an Indian corporation and a corporation incorporated according to foreign law is a foreign corporation. The latter is recognized as a legal person by Indian law and as such can sue and be sued in Indian courts. In normal times, the question of nationality may be taken to be conclusively settled by the place of incorporation but difficult problems arise in times of war. The courts are called upon to decide as to whether a particular corporation is an enemy corporation or a friendly one. On this decision depends the fate of the assets of a corporation.

The general principle with regard to the domicile of the corporation is that it is domiciled where its office or head office is registered provided it carries on its business there. In the case of Daimler (1916), it was held that even if a corporation is registered in England and carries on business in England, it has an enemy domicile if all its shareholders are enemy aliens. It is possible for a corporation to have more than one domicile. In the case of *Swedish Central Co.* v. *Thompson*, it was held that a corporation may have one domicile where its registered office is situated and another domicile where the controlling influence in the corporation is situated.

Liabilities of a Corporation: A corporation is not a natural person and has to act through its agents. The law provides that a corporation owes both civil and criminal liability for the acts done by its agents within the scope of their employment.

As regards *civil liability*, a corporation is liable for the tortious acts of its servants or agents if the act was done within the scope and course of employment and the act was within the powers of corporation. This is so if the act would be a tort if done by a natural person. This is the

rule of *vicarious liability*. The old view was that as a corporation had no mind of its own, it could not be held responsible for torts. However, that view has been given up in modern times.

In the sphere of contracts, it has been held that generally a corporation contracts under a seal and the presence of the seal is an evidence of the assent of the corporation. However, there are certain exceptions to the general rule. It has also been held that the relation of the corporation to its agents falls within the ordinary law of master and servant and consequently an agent is bound to act within the scope of his authority if he wishes the act to bind the corporation. The capacity of a corporation to act may be limited by the terms of its charter or by the statute creating it. In these cases, any attempt to perform an act beyond those powers would be *ultra vires* so far as the corporation is concerned and consequently would have no legal effect.

In the case of *Abrath* v. *North Eastern Railway Company*[9], the railway company prosecuted Dr. Abrath, a surgeon, on the ground that he had given a false certificate to a passenger who was alleged to have received injuries in a railway accident. However, the surgeon was acquitted. After that the surgeon filed a suit against the railway company for damages for the tort of malicious prosecution. It had to be proved by the plaintiff in that case that the malicious prosecution was made with an improper motive. However, it was held by Dr. Bramwell that "a corporation is incapable of malice or motive." The personality of a corporation is only a fiction and it is not possible to attribute any mind to it, whether guilty or otherwise. Only those acts can be attributed to the corporation which are within the scope of the charter of incorporation of the corporation. Illegal acts are *ultra vires* and cannot be attributed to the corporation. Neither criminal liability nor tortious liability can be attributed to a corporation.

However, in the case of *Citizens Life Assurance Company* v. *Brown*[10], a superintendent of the company sent a circular letter to its policyholders containing certain allegations against an ex-employee of the company. The ex-employee brought a suit against the company for damages. The question that arose for determination was whether a corporation was liable or not. It was held by Lord Lindley that the corporation was liable for the tort of defamation on the ground that it was liable for the torts of its servants committed in the course of their employment.

As regards the *criminal liability* of a corporation, it cannot have a guilty intention necessary for a crime as a corporation has no mind

[9] (1886) 11 AC 247.
[10] 1904 AC 423.

of its own. To begin with, corporations were exempted from criminal liability, but that is not the case today. They can now be punished for the offences of non-feasance and even misfeasance. This is so when a statutory duty is not performed by a corporation or the same is performed badly. In these cases, punishment is usually by way of fine.

According to Keeton: "In crime, the concurrence of three elements is necessary before liability can be properly attributed to the corporation:

(1) The crime must be one in which it is not necessary to prove a guilty state of mind in the person charged.
(2) The offence must be of a kind that the act or omission of the agent may also be said to be the act or omission of the corporation.
(3) The punishment must be a fine, at least as an alternative, or some other punishment which may be inflicted on the corporation.

Critics point out that it is not desirable to punish corporations. If we punish a corporation, it really amounts to punishing the beneficiaries. It is not proper that the agents should do the wrongful acts and the beneficiaries should suffer. This is against natural justice. Moreover, a corporation cannot do or authorise any wrong and consequently should not be made liable for the wrongful acts of its agents outside the limits of their authority. However, it is maintained that the agents of a corporation are in reality the agents of the beneficiaries and consequently there is nothing wrong if the beneficiaries are made to suffer for the acts of omission and commission of their agents. The liability of a corporation is as much logical as the liability of any other ordinary employer. A corporation is held responsible on the ground that it should not have selected careless and dishonest agents.

State as a Corporation.—The State is a legal person in international law. Recognition is one of the methods by which an international personality is conferred on a State. Recognition is a matter of fact and formal recognition is merely a matter of course. The United Nations also has a legal personality.

In the U.S.A. the State is recognised as a person. The federation is a person in law and the same is the case with the States. Legal proceedings are started in the name of the State of "New York" or "the people". In the case of India, the Union of India is recognised as a legal person. Suits can be filed against the Union of India and also by the Union of India. Likewise, the suits can be filed against the State Government in India and also by the State Governments against others.

For a long time, the Law of England did not recognise the State as a corporation or a legal person. That was partly due to the monarchical form of government in the country. The King is a corporation sole and he holds all the powers and prerogatives of the government. The public property in the eye of law belongs to the King. The actions of the government are the actions of the King.

According to Holland, the Slate is a greater juristic person and enjoys many *quasi*-rights against individuals as is liable to many *quasi*-duties in their favour. The State is usually a great landed proprietor. As such, it is entitled to servitudes over the estate of individuals and subject to servitudes for the benefit of such estates.

According to Jethrow Brown: "The personality of the State has not been recognized either by the poverty of our ideas or by the conservatism of our temperament and we are driven to the device of attributing privileges and responsibilities to the King which are not really his." Again, "the legal recognition of the State as a collective real person is simply a matter of time".

It is to be observed that by the passing of the Crown Proceedings Act, 1947, the responsibility of the State has been recognized in England also. This is particularly so in the case of torts. It is true that the State has not been put on the same footing as other natural legal persons but a good beginning has already been made.

Uses and Purposes of Incorporation.—There are many advantages of a corporation.

(1) Collective ownership and collective actions are cumbersome in law. Law always prefers to convert a collective owner ship into an individual ownership. This it does in two ways, viz., by trusteeship and by incorporation. A trust can be created in the interests of the beneficiaries. The trustees are given the power to act, sue or be sued on behalf of the beneficiaries. In the case of incorporation, a fictitious person is brought into existence and given the power and authority to act on behalf of its members. In this way, it is not necessary to make all the shareholders parties in the case. Incorporation secures permanence, uniformity and unity.

(2) When a large number of individuals have a common interest vested in them and have to act commonly in the management and protection of that interest, incorporation serves a useful purpose. It is impossible for the large multitude of individuals, scattered over vast distances, to act in a concerted manner in the management of their common interest. In such circumstances, incorporation enables the fictitious personality of the corporation to act promptly and decisively in the best interests of the management and protection of the com-

mon interest. A modern commercial venture with the capital of a large number of people is impossible without the device of incorporation.

(3) Independent corporate existence is one of the most important advantages of incorporation. Unlike a partnership which has no existence apart from its partners, a corporation is a distinct legal person in the eye of law. By incorporation, a company is vested with a distinct corporate personality which is distinct from the members who compose it.

(4) If a series of persons, not all existing at the same time, but having successive existence one after the other, have a common interest and if their need be the continuity of management and protection of interest, incorporation is a useful device. Perpetual succession is another advantage of incorporation. Members may come and members may go but the corporation goes on for ever.

(5) Another advantage is that a company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The shareholders are not the private and joint owners of the property of the company. Incorporation helps the property of the company to be clearly distinguished from the property of the shareholders, while in a partnership, the distinction between the joint property of the partnership firm and the private property of its partners is often not clear and distinct.

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

The special purpose of incorporation is that it helps commerce. No individual is prepared to invest millions in a risky enterprise. He is always afraid of becoming a pauper. However, dangerous enterprises can be undertaken only by a corporations. This is due to the limited liability of its members. Thousands of shares of a nominal value can be sold and the required money can be collected. If I have bought a share of Rs. 10 only, my liability is to the extent of Rs 10 and nothing more. If the worse comes to the worst, I lose Rs 10 and nothing more. My liability is merely a limited one. If the liability were an unlimited one, the whole of my assets could be snatched away to pay for the losses. It is obvious that even if millions are lost by a corporation, the shareholders suffer only to the extent of their shares. It goes without saying that one of the factors which has helped the growth of industry in modern times is the development of corporations.

According to Keeton: "The advantages of incorporation have been the primary reasons for the creation of corporate bodies. In the first

place, incorporation greatly simplifies legal procedure, enabling a person to proceed against one individual, instead of against a great number of persons. Conversely, the corporation proceeds as a single person. In addition, the death or withdrawal of a member occasions no inconvenience to the remaining members of the group through the necessity to withdraw also some portion of the common property, or even to terminate the association altogether—as would be the position if no corporation existed. Thus, in a partnership, death of one member automatically terminates it, and on the withdrawal of a member, he takes his share of the property and profits with him. In a corporation, on the other hand, a member has a share in the corporation, and not a right to any particular portion of the corporation's assets, and the existence of the corporation itself is unaffected by his death or withdrawal, his share being transferred to some other person, who replaces him as a member. Thus, 'a corporation never dies'. It exists indefinitely unless brought to an end in one of certain specified ways. Lastly, a beneficial development of modern law has resulted in the limitation of the financial liability of a member of the corporation. Although limited partnerships are now possible in most modern systems of law, a member of a partnership is more frequently liable to the full extent to his property, not only for his own actions, but for those of his partners as well, if committed in the furtherance of the partnership's activities. In a corporation, a member is only liable to the value of the interest he holds."

Judicial Decisions

In *Saloman* v. *Saloman and Co.*, a trader sold a solvent business to a limited company which consisted of the vendor, his wife and children only. In payment of the purchase money, the company issued debentures to the vendor. Later on, the company went into liquidation. The question for decision was whether this debenture holder was entitled to be paid in preference to the unsecured creditors. The question was answered in the affirmative. It is clear from this case that a man may become his own preferred creditor by taking debentures from a company of which he holds practically all the shares. This is due to the fact that the company has a legal personality different from that of the shareholders. This case also shows that one can seek shelter behind this legal person without one's real connection with the corporation being unmasked.[11]

In *Daimler Company Ltd.* v. *Continental Tyre and Rubber Co. Ltd.*, the respondent company was incorporated in England for the purpose of selling in England tyres made in Germany by a German company. Most of the shareholders of that company were Germans. After the outbreak of war in 1914 between England and Germany, an action was

[11] 1897 AC 22.

started in the name of the respondent company for the recovery of a trade debt. The action was resisted on the ground that the plaintiff was an "alien enemy" at war with England and hence the suit was not maintainable. The contention of the plaintiff was that the nationality of the company was distinct from that of its shareholders and as it was registered in England, the declaration of war had no effect on it. The decision was given against the company by the House of Lords. Lord Parker observed:"What is involved in the decision of the Court of Appeal is that for all purposes to which the character and not merely the rights and powers of an artificial person are material, the responsibilities of natural persons who are its corporators, are to be ignored. An impassible line id drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it." The House of Lords held that the enemy character of individual shareholders and their conduct could be material on the question whether the company's agents and persons in *de facto* control of the company were adhering to the enemy. If the persons in control of the company were resident in an enemy country or were adhering to the enemy, that company would assume an enemy character. The House of Lords *pierced the veil* sought to be drawn over the physiognomy of the company for the purpose of ascertaining who were the corporators behind the company.

In *Wurzel* v. *Houghton Main Home Delivery Service Ltd.* and in *Wurzel* v. *Atkinson,* the difference between an incorporated and an unincorporated association with regard to legal consequences was brought out. Under the Road and Rail Traffic Act, 1933, the holder of a private carrier's licence known as "C" licence, was forbidden from using the vehicle for the carnage of goods for hire or reward. A group of miners incorporated a company to get cheap delivery of coal from the colliery. motor goods vehicle in respect of which the company held "C" licence was used for making delivery of coal at the houses of its members and charges for delivery were deducted from the wages of the members. It was held that as the society was an incorporated one, it was a legal entity distinct from its members and there was breach-of conditions under which "C" licence was held as the vehicle was used for carriage of goods for hire or reward. Another group of miners formed an association without incorporating it. They made use of the vehicle of the association for delivery of coal at the house of its members. It was held that each member was a part-owner of the vehicle and as co-owners could not be said to be carrying their own goods for hire or reward by contributing to the running expenses, there was no breach of the conditions of "C" licence.

Ordinarily, only an incorporated body can sue or be sued and an unincorporated body cannot sue or be sued in its own name. This rule was very useful for trade union organizations which were usually not incorporated associations. In the case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants,* the House of Lords decided in 1901 that a trade union could be sued for damages arising out of the wrongful acts of its officials. The union concerned had to pay £ 2300 in damages and legal expenses in addition. The trade unions carried on an agitation against the decision and ultimately the Trade Disputes Act of 1906 gave complete protection against judgments like the *Taff Vale Railway Company.*

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