the effect of payments.

sion by which an indirect admission,[2] by a part-payment on account of principal or interest, was allowed to renew the period of limitation, in the same way as a direct admission in writing that a debt or legacy or any part thereof was due. But on the motion of Mr. Peacock (now Sir Barnes Peacock) this provision was omitted. Mr. Peacock said:—"This part of the section is in accordance with the English law, but I object to the rule laid down by the English law respecting the effect of a part-payment. That rule proceeds on the principle that a part-payment operates as an acknowledgment from which a new promise to pay may be implied. It seems to me that in this country proof of part-payment should not have this effect."[3]

The English law as to payments.

Before the Statute 9 Geo. IV, c. 14, the decisions of the Courts had established two modes whereby a case might be taken out of the operation of the English Statute of Limitations.[4] These were, *first*, acknowledgments, or express promises to pay; and *secondly*, part-payments. The Statute of Geo. IV required that acknowledgments and promises to have that effect must be in writing, but it expressly reserved the

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[2] Generally speaking, payment is *a mode* of acknowledgment or admission. But sec. 40 of 3 & 4 Will. IV, c. 27 (like sec. 21 of Act IX of 1871, and sec. 20 of Act XV of 1877) treats payment as *distinct* from acknowledgment, while the Limitation Bills of 1855—1859, following sec. 5 of 3 & 4 Will. IV, c. 42, proposed that there should be not merely a payment, but an *admission or acknowledgment by payment*. See Brown, pp. 589, 590; and Whitby *v.* Lowe, 2 DeG. & J., 712.

[3] See the Proceedings of the Legislative Council of India for the year 1859, p. 58; and sec. 16 of the Bill of 1855; and sec. 19 of the Amended Bill of 1859.

[4] In modern times, Statutes of Limitation are construed more strictly, and Judges do not introduce exceptions to their operation.

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effect of part-payments. Again, the Statute 3 and 4 Will. IV, c. 42, sec. 5, expressly puts acknowledgments by writing, and acknowledgments by part-payment on the same footing, and gives a new period of limitation from the one, as well as from the other. The Statute 9 Geo. IV was extended to the Supreme Courts in the Presidency-towns by Act XIV of 1840.

Under Act XIV payments did not renew the period of limitation, except in three cases.

But sec. 4, Act XIV of 1859, expressly provided for the single case of an acknowledgment in writing, giving to that the same effect which it has by the English law, and impliedly excluded every other acknowledgment—an acknowledgment by part-payment, just as much as an acknowledgment by words only.[5] In *Gorachand Dutt* v. *Lokenath Dutt*,[6] it was held that a part-payment, even when it was proved by a memorandum signed by the defendant, was not such an acknowledgment in writing as was required by sec. 4, Act XIV of 1859. What sec. 4 required was an acknowledgment in writing that the debt or a part of it was due, not a mere acknowledgment of a fact from which it might be *presumed* that the debt or a part of it was unpaid or due.

There were, however, three specified cases in which Act XIV allowed payments on account to renew the period of limitation. These were, *first*, the case of suits for shares in joint family property (sec. 1, cl. 13); *secondly*, the case of suits in the Supreme Courts by mortgagees to recover immoveable properties mortgaged (sec. 6); and *thirdly*, the case of

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[5] See Raja Icvara Das *v.* Richardson, 2 Mad., 84.

[6] 8 W. R., 335.

proceedings for enforcing the judgments, decrees or orders of the Supreme Courts (sec. 19).[7]

Amendments introduced by Acts IX and XV. Difference between payments of interest and part-payments.

Section 21 of Act IX of 1871 gave a new starting point in every case of payment (before the expiry of the period of limitation)[8] of *interest* on a *debt or legacy*. In case of *payment of part* of the principal of a *debt*, the same section of Act IX renewed the period of limitation, but only when the debt arose from a contract in writing, and the fact of payment appeared in the handwriting of the person making the same on the instrument, or in his own books, or in the books of the creditor.[9] Act XV of 1877 repealed the first half of this proviso, and extended the effect of part-payment to all debts whether arising out of a contract in *writing or not*. "Why," asked Mr. Wilkinson, the Recorder of Rangoon,

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[7] Sec. 6, Act XIV of 1859, corresponds to No. 149 of Act IX of 1871 and No. 146 of Act XV of 1877. Sec. 19, Act XIV, corresponds to No. 169 of Act IX and to No. 180 of Act XV.

[8] The "prescribed period" in sec. 21 (corresponding to sec. 20, Act XV) is the period of *limitation*, not the period of payment of the money advanced. See Ramsebuck *v.* Ramlall, I. L. R., 6 Calc., 815.

[9] An account stated is not a contract in writing within the meaning of this proviso. (Amritalall *v.* Maniklal, 10 Bom., 375.) A tradesman's bill is not such a contract. (Thompson's Act IX of 1871, p. 21.)

The reason of the proviso as to part-payments "will be found in the wholly different mode in which the inference of an unsatisfied debt is raised by the payment of *part* of the *principal* and the *interest* respectively." (See Savigny Sys., Vol. V, § 315; and Tippets *v.* Heane, 1 Cr. M. & R., 252, cited by Holloway, J., in Valia *v.* Vira, I. L. R., 1 Mad., 228.) A payment of money *as interest* is not liable to be construed as a payment in full discharge of the debt. The reason of the proviso in sec. 21 of Act IX was probably this:—If the debt did not arise out of a contract in writing, the amount of the debt might not be easily determined at the time of payment, and the debtor might easily contend that the payment was in *full discharge* of all that he admitted to be due. See Darby and Bosanquet, p. 72.

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"should a part-payment endorsed on a promissory note by the payor, or one admitted as such, in his own handwriting in the payee's bill-book, be entitled to more consideration than when a customer signs to a payment on account of principal in a shopkeeper's book or on the bill which he has made out in respect of articles that were purchased over the counter?" And the Legislature, in 1877, thought it would suffice to provide that the fact of part-payment should appear in the handwriting of the person making it. The ordinary case of a debtor making a part-payment by letter has thus been provided for.[10]

Receipt of the produce of mortgaged land when a payment.

Act IX of 1871 did not provide that the receipt of the produce of mortgaged land by a mortgagee in possession should be deemed a payment either of the principal or the interest of the mortgage debt. Where land was mortgaged to the plaintiff with possession for a term of years, and the mortgagor took a lease of the land from the plaintiff, some years after the execution of the mortgage, and paid rent under it even after the expiry of the mortgage term, it was held that the case being governed by Act IX of 1871, the payment of rent under an agreement *entirely independent* of the original mortgage could not be regarded as a payment of interest *as such*. The Court observed:—"It is pleaded that the suit is barred by limitation, to which the plaintiff replies that the receipt of rent was in fact a payment of interest, and that from the date of the payment of rent a new period of limitation is given for the recovery of the debt. Under the present law (Act XV of 1877) this may be so,

[10] See Proceedings of the Legislative Council of the 19th July 1877.

if it be held that payment of rent by the mortgagor is such a receipt of produce in virtue of a usufructuary mortgage as is deemed equivalent to a payment of interest, but this provision is not to be found in Act IX of 1871; and although, if the payment of rent had, as part of the original agreement or otherwise, been *agreed on as a provision for the interest* on the debt, we might have held it fell within the narrower terms of Act IX of 1871, yet, in the circumstances of the present case, it is impossible in our judgment to hold that the payment of rent under an agreement *entirely independent* of the original mortgage can be regarded as a payment of interest as such."[1]

Section 20, Act XV of 1877, expressly provides, that "where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section." Independently of any express stipulation to that effect, the receipt of the rents and profits of the mortgaged land (supposing the mortgagee is in possession) is constructively a payment either of the principal or the interest, as the case may be. The mortgagee is supposed to pay, for (or as the agent of) the mortgagor, to *himself* as the creditor.[2] Where the receipt exceeds the amount of interest due, or is

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[1] Ummer *v.* Abdul, I. L. R., 2 Mad., 165. In Brocklehurst *v.* Jessop (7 Sim., 438) it was held in England, that the receipt of rents by an equitable mortgagee in possession might be taken, *primâ facie*, as a payment either of the principal or the interest of the debt, so as to prevent time running against his claim for the money. See Brown on Limitation, pp. 588, 662; and Banning, p. 77.

[2] Brown, p. 600. See Brocklehurst *v.* Jessop, cited above.

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otherwise a part-payment of the *principal*, it is apprehended that the fact of the rents and profits having been received, must, according to the general proviso to sec. 20, appear in the handwriting of the mortgagee or his agent.

Payments by one of several joint debtors how far effective.

Act IX of 1871, like 9 Geo. IV, c. 14, did not provide that *payments of interest* or *part-payments* by one of several partners or executors should not renew the period of limitation as against the *others*. But following sec. 14 of the Mercantile Law Amendment Act (19 & 20 Vict., c. 97) and the Massachusett's Revised Statutes, Act XV of 1877 extends to payments the rule applicable to *acknowledgments* of liability, and enacts that one of several joint contractors, partners, executors or mortgagees shall not be chargeable by reason of an acknowledgment *or a payment* made by another of them.[3]

Payment of *part* of a *legacy* not provided for.

As a legacy is not necessarily payable in full, but is liable to be reduced in proportion to the assets available for satisfying it, a payment by the executor of a part of a legacy does not imply an admission on the part of the executor that a larger amount is

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[3] See sec. 21, Act XV; Lecture X, p. 301; and Angell, para. 281. After the passing of 9 Geo. IV, c. 14, in Wyatt *v.* Hodson, it was held in England that, although an *acknowledgment* by one of several joint contractors could not prevent the *others* from taking advantage of the Statute of Limitation, the effect of a *payment* was not confined to the individual making it. And before the enactment of 9 Geo. IV, c. 14, even an *acknowledgment* by *one* of two joint contractors took the *whole* case out of the Statute of Limitation. See Whitecombe *v.* Whiting, and Angell, paras. 248 and 275. There is, however, a difference between an Acknowledgment and a Payment, "inasmuch as the latter is a benefit to *all* persons liable to the debt, as it relieves them from so much of their liability." Act XV of 1877, like 19 and 20 Vict., c. 97, does not attach any importance to this difference.

payable. This is probably the reason why Act IX of 1871 was, and Act XV of 1877 is, silent as to the effect of a payment of a part of a *legacy*.

Payment of *part* of a debt, or of *interest* on a debt or legacy.

The payment of *interest* on a "debt or legacy," or of a *part* of the principal of a 'debt,' if made before the suit is otherwise barred, gives the plaintiff a new period of limitation, according to the nature of the original liability.

What is a debt?

Servant's wages are a 'debt' within the meaning of this rule. Money due for goods sold is also a 'debt.'[4]

"In general," says Blackstone, "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money, or an implied promise to pay for goods supplied, so much as they shall be reasonably worth), a *debt* is then said to exist between these parties; while, on the other hand, if the demand be of uncertain amount, as where an action is brought against a bailee for injury done through his negligence to an article committed to his care, it is described not as a *debt*, but as a claim for damages." The *debt*, however, is not a contract, but the result of a contract.[5] There is nothing in sec. 20, Act XV of 1877,

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[4] Nobin *v.* Kenny, 5 W. R., S. C. Ct., 3.

[5] See Stephen's Blackstone, Vol. II. Under English law, contracts are either simple contracts, or contracts by specialty or by matter of record. Judgment-debts are debts of record. In Kally Prosunno *v.* Heeralal, I. L. R., 2 Calc., 468, it was held, that although a sum due under a decree may sometimes be properly called a 'debt,' the provisoes to sec. 21 and article 169 of Act IX of 1871 shewed that, in that Act, 'debt' meant a liability to pay money for which a suit could be brought, and not one for which judgment had been obtained. The soundness of this ruling was doubted by Stuart, C. J., in I. L. R., 3 All., 247, F. B.

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to prevent its application to debts secured by a mortgage or a judgment.[6] Sections 20 and 21 expressly refer to mortgages and mortgagees.

Debt includes *liquidated* damages, but not unliquidated damages which cannot be ascertained except by the decision of a properly constituted Court. "Where a bond was conditioned for the replacing, by a certain time, of stock which the plaintiff had sold out for the defendant's benefit, and for the payment in the meantime of such sums as would be equal to the dividends of the stock, a payment on account of such last-mentioned sums was held not to have the effect of keeping alive the right of action for not replacing the stock, as the damages recoverable for such a breach were *unliquidated*."[7]

The principle on which the exception as to payments is based.

Payments, whether of interest or of part of the principal, are seldom made without deliberation. They are (generally speaking) *acknowledgments* of the subsistence of the debt,—not by words but by *conduct*.[8] The principle upon which a part-payment in England takes a case out of the Statute of James I is, that it admits a greater debt to be due at the time

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And now, that the proviso as to part-payments has been considerably modified, it is apprehended that sec. 20 of Act XV applies to judgment-debts as well as to other debts. The proviso to art. 180, Act XV, however, still applies to *some* judgment-debts.

[6] As to judgment-debts see the preceding note. As to mortgage-debts, it is observable, that, under art. 146, Act XV, in suits in Courts established by Royal Charter in the exercise of its ordinary original civil jurisdiction, to recover from the mortgagor the *possession* of immoveable property mortgaged, the last payment of interest or part-payment is the starting point of limitation. As to the effect of payments in suits in *other* Courts for *possession* of the mortgaged property, see 16 W. R., P. C., 33, 35. In suits to recover the *debt* or *charge* in *any* Court, payments under sec. 20 will give the plaintiff a new starting point.

[7] Darby and Bosanquet, p. 106. [8] Brown, p. 587.

of the part-payment.[9] The payment of interest *qua* interest, is evidence of the existence of the debt, and a payment made *as part-payment* raises the implication that the residue of the principal sum is due. The Indian Legislature, while expressly requiring that the interest paid must be paid *as interest*, does not enact that payments of parts of the principal sum due must be shewn to be payments made *as part-payments*.

Interest must be paid as such, part-payments need not.

It would seem that, under sec. 20, Act XV of 1877, if the fact of payment of a part of the principal of a debt appeared in the handwriting of the debtor or his agent, and the period of limitation had not expired at the date of the payment, the creditor would be entitled to a fresh period of limitation, although the debtor *intended* the payment as a payment of the whole debt *in full*. The statutory exception in 3 and 4 Will. IV, c. 42, sec. 5, requires not merely a payment, but an *acknowledgment by payment*. The Indian Act does not require the implication of a *promise* or even an *acknowledgment* by payment.

In the case of payment of *interest*,[10] although it is

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[9] Tippets *v.* Heane, 1 C. M. & R., 252. From the admission of the existence of the debt the law raises an implication of a *promise* to pay, and where this implication is rebutted by the circumstances of the case, the payment is not sufficient to take the case out of the Statute of James I.

[10] 'Interest' means not merely that which is reserved by the original *tamasook*, note, or mortgage, as recompense for the use of the money advanced, and payable *before* the principal amount becomes due, but all interest recoverable for the non-payment of money *already* due. "Interest, in its ordinary sense," says Markby, J., "means something paid for money overdue." (Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 301.) *Primâ facie*, a debt which carries interest appears to import a

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not necessary that the fact of the payment should appear in the handwriting of the person making the same, it must be shewn that the payment was *qua* interest. It has been held[1] that where payments are made in reduction of a general balance of accounts, without any intimation by the debtor that they are on account of interest, such payments are not payments of interest *as such* within the meaning of sec. 20. Appropriation of the payment to interest by the *creditor* is not sufficient. Interest for the delay of payment *post diem*, in the *absence* of an express or implied *contract*, is not interest properly so called. It is payable only *as damages* for breach of contract.[2]

Appropriation of payment to interest by creditor not sufficient.

Payment of interest on a note which does not carry interest on the face of it, and on which no demand is proved to have been made, is sufficient to take the case out of the English Statute of Limitation. It is apprehended that, under the Indian law, if a debt properly carries interest, so that the principal and interest constitute one demand or claim, part-payments *or* payments of interest will keep alive the *whole* claim to principal *and* interest.[3]

A payment saves the *whole* claim.

The payment of interest or part of the principal need not necessarily be made in actual money.

Payment need not be in money.

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debt already due. (Angell, sec. 95.) Payment of interest *before* the principal sum becomes due is of little importance for the purposes of sec. 20, Act XV of 1877. In common parlance, *interest* includes *damages* for non-payment. See Brown, pp. 669, 670; Forsyth *v.* Bristowe, 8 Ex., 716.

[1] Hanmantmal *v.* Rambabai, I. L. R., 3 Bomb., 198. See also Naronji *v.* Mugnirum, I. L. R., 6 Bomb., 103, 106; and Surju *v.* Khawhish, I. L. R., 4 All., 512, 514.

[2] Cooke *v.* Fowler cited at p. 90 of 25 W. R. But the payment of such damages, *as interest*, will probably keep alive the debt.

[3] See Darby and Bosanquet, pp. 70, 71; Banning, pp. 65, 66.

Anything received which the parties *agree* should go to reduce the debt or pay the interest, is a payment sufficient to take the debt out of the statute.[4] Payment in *goods*, or even affording maintenance to the creditor's child, may, upon agreement, be a good payment. So, upon agreement between the parties, the payment by the debtor of money owing by the creditor to a third person may be a good payment.[5]

Test of a good payment.

The correct test as to what transactions between the debtor and creditor are equivalent to payments for the purpose of avoiding the statute is laid down in *Maber* v. *Maber* (L. R., 2 Exch., 153). All the Judges of the Court of Exchequer seem to have agreed that any facts which would prove a plea of payment, if the debtor were subsequently sued for the sum alleged to be paid, would be sufficient to bar the statute.[6]

Constructive payments.

It has been held in England that where a tenant for life, of an estate subject to a charge, is entitled to the interest of the charge, he will be *deemed* to have kept down and paid the interest, and thus preserve the right to the capital of the charge.[7] But as one particular case of *constructive* payment, *viz.*, that relating to the receipt of produce of mortgaged land, is expressly mentioned in sec. 20, Act XV of 1877, it may be said that *other* cases of constructive payments are impliedly excluded.

Sums *realized* by

It has been held that sums not voluntarily paid, but

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[4] See Banning, p. 72; Hooper *v.* Stevens, 4 A. and E., 71; Bodger *v.* Arch, 10 Exch., 333. As to part-payments by bills, see Banning, p. 74.

[5] Brown, p. 588; Banning, p. 73.

[6] Darby and Bosanquet, p. 80; Banning, p. 73.

[7] Brown, p. 588; Burrowes *v.* Gore, 6 H. L. C., 907.

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realized by a private sale of the debtor's goods in the possession of the creditor, or by an execution-sale of the defendant's property, are not sums *paid* by the debtor or the defendant within the meaning of the Act.[8]

Creditor, by sale of debtor's property, not sums *paid*.

Payment *by* and *to* whom.

It is necessary that the payment should be made by the "person liable to pay," or his agent duly authorized in this behalf. A payment by a mere stranger without the knowledge of the debtor, or by an agent after the termination, or beyond the scope, of his authority,[9] is of no avail. The payment may be made to the creditor or to his agent, or by agreement between the parties to any person on his account. Such agreement may be express or implied. The course of dealing between the parties, or even subsequent ratification, may be sufficient to prove the agreement.[10] Section 20, Act XV, it may be observed, expressly states *by* whom the payment is to be made, but it says nothing as to the person *to* whom the payment must be made. (Cf. art. 180, Sched. II.)

Person liable to pay debt or legacy.

In the case of a debt, the "person liable to pay" is the original debtor, or any other person who derives his liability from such debtor, or who for the time being represents his estate.[1] Payment of interest by a tenant for life has been held to be

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[8] See Rughoonath *v.* Ranee Shiromonee, 24 W. R., 20; Ramchandra *v.* Devba, I L. R., 6 Bomb., 626; Fuckoruddeen *v.* Mohima, I. L. R., 4 Calc., 529, 531; Narroaji *v.* Mugniram, I. L. R., 6 Bomb., 103. In this last case it was held that moneys received (by a commission agent) by surplus proceeds of goods (belonging to his customer) sold in England, subsequent to an adjustment of accounts between the parties, were not *payments* within the meaning of sec. 20, Act XV of 1877.

[9] As to duly authorized agents, see pp. 303 *et seq.*, *supra*.

[10] Darby and Bosanquet, p. 77.

[1] See Brown, p. 613; Banning, p. 186; Darby and Bosanquet, p. 91.

sufficient to preserve a debt, charged upon the land, against the remainderman.[2] In the case of a legacy, the "person liable to pay" is primarily the executor or administrator.

Part-payment must be evidenced by the handwriting of the payor.

Payment of *interest* may be proved by *any* legal evidence,[3] but the fact of payment of a *part of the principal* of a debt must appear in the *handwriting* of the person making the same, *viz.* the debtor or his duly authorized agent. It has been held by the Madras High Court, that where there is a writing setting out the fact of payment, and the debtor affixes his mark or signature thereto, he adopts the writing and makes it his own, and by his signature causes the fact to appear in his own *handwriting*.[4] This interpretation is in accordance with the probable intention of the Legislature, but the language of the proviso, strictly construed, leads to a different conclusion. Where the memorandum of payment is in the *actual* handwriting of the debtor or his agent, it is not necessary that it should be *marked* or *signed* by the payor. If the writing is not forthcoming,

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[2] Brown, p. 612; Burrowes *v.* Gore, 6 H. L. C., 907.

Payment of interest by the executor of the debtor would keep alive the *debt* even against legatees who are bound to refund under sec. 321 of Act X of 1865. The suit to compel a refund must, however, be brought within the time allowed by art. 43 of Act XV of 1877. See Darby and Bosanquet, p. 86.

[3] When the *creditor* charges himself with receipt of *interest* by way of endorsement on a bond, if the entry is proved to have been written before the expiry of the period of limitation, when its effect was clearly in contradiction to the writer's pecuniary interest, such endorsement or entry is receivable as evidence of the payment after the death of the writer, under sec. 32, cl. 3, of the Indian Evidence Act, 1872. See Rose *v.* Bryant, and Searle *v.* Lord Barrington, cited in Norton's Law of Evidence, 9th Ed., pp. 182, 183.

[4] Ellappa *v.* Annamaloi, I. L. R., 7 Mad., 76, 79.

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secondary evidence of it will be of no use. The payor's written memorandum of payment is the only evidence of part-payment which the Court can look to for the purposes of sec. 20.

The case of a payment, where there is more than one debt, considered.

The *identity* of the debt on account of which a payment is made, like the *payment* of interest, may be proved by *any* legal evidence. "If," say Messrs. Darby and Bosanquet,[5] "more than one debt is shown to have been due at the time of the payment either of principal or interest relied on, a question arises whether such payment was made on account of all the debts, or was appropriated to any one or more, and if so, to which of them. This appropriation need not be proved by any express declaration of the debtor at the time of payment, but any expressions used by him, either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively, will be sufficient for this purpose. It must be observed that if the evidence shows that the payment is made on account of all, it will prevent any of the debts being barred by statute."

Appropriation of payments by creditors to *particular* debts sufficient.

The appropriation of a payment to a particular debt which a *creditor* makes, where none is made by the debtor,[6] may not (in the absence of proof of the *debtor's intention*) raise the implied promise to

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[5] Darby and Bosanquet, p. 73. See also Banning, pp. 68, 69.

[6] See sec. 60, Indian Contract Act, 1872. The appropriation of a payment to a *barred* debt will not revive the debt, for the payment must, under sec. 20, Act XV of 1877, be made *before* the expiry of the period of limitation.

pay the residue which the English law (in cases governed by 21 James I, c. 16) requires. But as payments of parts of the principal amount are, by sec. 20 of Act XV, sufficient to keep alive the debt, irrespective of any promise or acknowledgment, it is apprehended that a payment appropriated by the creditor to a particular debt or debts, under the power given by sec. 60 of the Indian Contract Act, is sufficient to take that debt or debts out of the statute, if such debt or debts were not barred by limitation at the date of the payment.[7] Where there are two debts *entirely distinct* from each other, a payment *not specifically appropriated* as payment to either is not sufficient to keep alive either of the debts.[8]

Other provisions of Act XV as to payments. Arts. 146 and 180.

Besides the provisions of sec. 20 for *renewing* the *ordinary* period of limitation by a payment in cases connected with the recovery of *debts* and *legacies*, Act XV of 1877, in art. 146, gives the mortgagee suing for *possession* of mortgaged immoveable property, before a Court established by Royal Charter in the exercise of its ordinary civil jurisdiction, a *new starting point* from the time of a *payment* on account of the mortgage debt. Under this article, the payment entitles the mortgagee not merely to a fresh period of twelve years, but to a *longer* period, *viz.*, thirty years from the date of the payment.[9]

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[7] Compare Darby and Bosanquet, pp. 74, 75; Banning, pp. 69, 70; Nash *v.* Hodgson, 6 D. M. and G., 474. The creditor, in appropriating the payment, might be *deemed* to be acting as the agent of the debtor, even if an implied *promise* to pay on the part of the debtor were necessary.

[8] Walker *v.* Butler, 6 E. and B., 506; and Burn *v.* Boulton, 2 C. B., 485. Banning, p. 69; Darby and Bosanquet, p. 73.

[9] Under sec. 6 of Act XIV of 1859, a payment in similar cases simply *renewed* the ordinary period of limitation. Under Act IX of

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The provision in the case of a payment in art. 180 of Act XV would seem to be unnecessary if the word 'debt' in sec. 20 includes a judgment-debt. But some effect may be given to these provisions as they stand, by holding that a payment under art. 180 must be made *to* the person entitled to the money secured by the judgment or to his agent, while a payment under sec. 20 is sufficient, if it is made on account of the debt without taking into consideration the question *to* whom the payment is made. Thus, it may be held (as in *Clark* v. *Hooper*, 10 Bing., 480) that, under sec. 20, a payment to a person *acting as, and supposed* to be, the rightful administrator of an intestate creditor, is a good payment to bar the statute in favor of the person who subsequently becomes his *proper* legal representative.

Having reviewed the general rules and exceptions laid down by the Limitation Act, I shall next consider the *effect* of limitation on the substantive rights affected by it.

A brief history of statutory and judiciary law on this subject will be found in Lectures I and III.[10]

1871, art. 149, such a payment gave the plaintiff sixty years from the date of payment. The only reason that can be assigned for giving a *longer* period is, that where some part of the principal or interest has been paid, there is not likely to be any dispute as to the original transaction of which payment operates as an acknowledgment. See Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 296, 303; 3 C. L. R., 336, 356. Under the English law (7 Will. IV, and 1 Vict., c. 28) the ordinary period is *renewed* by a payment.

[10] See Lecture III, pp. 64, 65, 69, 70; and Lecture I, pp. 13, 15 and 17.

The Indian Law Commissioners' views on the extinction and acquisition of rights by lapse of time.

The following sections of the Bill drafted by the Indian Law Commissioners in 1841-1842, shew that they proposed that the right to *legacies*, *debts* and *damages* should be *extinguished* by limitation, and that the right to *property* should not only be extinguished, but *acquired* by adverse possession for the prescribed period :—

"Section 1. It is hereby enacted, that, subject to the exception hereinafter mentioned, a *title* by prescription shall be *acquired* in respect of *property*, moveable and immoveable, and hereditary offices, by uninterrupted *possession*, mediate or immediate, as proprietor, for six years, in the case of moveable property, and for twelve years in the case of immoveable property and hereditary offices; provided that if any of her title be proved, the possession shall have been adverse thereto; and provided[1] that nothing herein contained shall be construed to affect any right arising from possession of moveable property now recognized by law."

"Section 25. And it is hereby enacted, that when, by the provisions of this Act, a person is *barred* from bringing a *suit* for the recovery of any *legacy*, *debt* or *damages*, his *right* to the legacy, debt or damages, for which a suit might have been brought by him but for those provisions, shall be *extinguished*, unless such right is secured by some mortgage, pledge or lien."[2]

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[1] The reason of this last proviso was given by the Commissioners in the following words: "As the mere fact of possession already gives a right in respect to moveable property until an adverse title shall be proved, and sometimes against an adverse title, we have introduced a proviso that the proposed prescription shall not be construed to affect rights now arising from periods of negative prescription." For the present law, see sec. 108 of the Contract Act.

[2] It may be added that the Indian Law Commissioners in 1841-42, and Sir James Colvile in 1855-59, proposed rules for the acquisition and extinction of *easements* also. See Lecture XII.

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Act XIV silent on this subject.

The Bills of 1855 and 1859 contained similar provisions.[3] But the Limitation *Act* of 1859 was wholly silent as to acquisitive and extinctive prescription. Notwithstanding this silence, it was held by the Courts that *easements*[4] could be *acquired* by long enjoyment; and the *right* to *immoveable property*[5] *extinguished* by limitation.

The provisions of Act IX.

Act IX of 1871 (besides laying down rules for the direct *acquisition* of rights to *easements*) provided for the *extinguishment* of rights to *land* and *hereditary offices*. (See sec. 29, Act IX of 1871.)

Sec. 28, Act XV, extinguishes rights to property.

And now sec. 28, Act XV of 1877, extends[6] the rule of extinctive prescription to *moveable* property. The section runs as follows:—"At the determination of the period hereby limited to any person for instituting a suit for possession of *any property*, his right to such property shall be extinguished."

Hereditary offices, which are often treated[7] as immoveable property in this country, are not expressly

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[3] See secs. 1, 2, and 23 of the Bill of 1855; and secs. 1, 2, and 26 of the Bill of 1859. Section 23 of the first Bill, and sec. 26 of the Amended Bill, further provided that the *right* to bring a *suit* for the recovery of a *debt* or *legacy* (but not the right to sue for *damages*) might be *revived* by an admission by payment or written acknowledgment.

[4] See p. 69 (note 5), *supra*. [5] See pp. 3, 14, and 42, *supra*.

[6] Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 297. Sec. 34 of 3 and 4 Will. IV, c. 27, corresponds to sec. 29, Act IX, and sec. 28, Act XV. Section 34 of the English Statute runs as follows: "And be it further enacted, that, at the determination of the period limited by this Act to any person for . . . bringing any . . . action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such . . . action or suit . . . might have been . . . brought within such period, shall be extinguished." By sec. 1 of the Statute, 'land' includes an interest in a corporeal hereditament. Sec. 34 of the English Statute, 1871, does not apply to moveable property.

[7] See Chhagganlal *v.* Bapubhai, I. L. R., 5 Bomb., 68, 70.

mentioned, probably because, whether rights to such offices are *immoveable* property or not, they are certainly included in the term 'property.'

Right to legacies, debts or damages not extinguished by sec. 28.

The law does not say that the right to pecuniary legacies, debts or damages shall be extinguished by the mere fact that the suit to recover them has been barred by limitation. We have already seen that when limitation bars the remedy it may leave the right *in esse*.[8]

Sec. 28 explained.

Section 28 of Act XV expressly provides, that when a person's *suit for possession* of *property* is barred by limitation under *the Act*, *his right* to such property shall be *extinguished*.

Suit not an application.

An *application*[9] for possession of property may be barred by limitation, but the applicant's right to the property is not extinguished by sec. 28. A suit for possession of property may be barred by efflux of time under a *special or local law*,[10] but the right in such a case is not extinguished by sec. 28.

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[8] As to *debts* not being *extinguished* by limitation, see pp. 3 and 4, *supra*. As to the right to recover unliquidated *damages*, see p. 15, *supra*. The Indian Law Commissioners and Sir James Colvile *proposed* that the right to *damages* should be *extinguished* by limitation, and that the right to sue for *damages* should not be *revived* by payment or written acknowledgment. See the Bills referred to in note (2).

As to the right to immoveable property being *practically extinguished* by limitation in favor of the party in possession, see p. 3 (note), pp. 13, 14 and p. 42 (note 10). The Madras High Court, however, held that Act XIV of 1859 did not extinguish the right. See Doe *v.* Kuppu Pillai, 1 Mad., 89.

As to Bombay Reg. V of 1827 and the effect of Act XIV in the Bombay Presidency, see p. 65, note (8), *supra*.

[9] Such as, an application under sec. 335 of the Civil Procedure Code, and art. 167 of Act XV of 1877.

[10] Such as a suit to recover the occupancy of any land, farm or tenure from which a ryot, farmer, or tenant has been illegally ejected. The

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Possession, not the *quasi*-possession of incorporeal rights.

The *quasi*-possession of an *easement*[1] is not the "possession of property" within the purview of sec. 28 of Act XV of 1877 (or sec. 29 of Act IX of 1871). An easement is hardly an interest in land,[2] and far less a *proprietary* interest. Besides, the *extinction* of easements is separately provided for by sec. 47, Act V of 1882. Section 28 of Act XV would, therefore, seem to refer mainly to corporeal property, moveable and immoveable.

'Rent' as an estate of inheritance is 'property.'

But many things which the law of England would class as "incorporeal hereditaments" fall within the category of "immoveable property." Thus *rent* as an *estate* of inheritance distinct from the land, and as distinguished from the conventional equivalent receivable under a lease, though an incorporeal hereditament, is such a proprietary interest or estate that a suit for 'rent' in *this* sense is a suit for "possession of property" within the meaning of sec. 28.[3] Where there are two persons, each of whom claims an estate in the 'rent' adverse to the other, or where the person in occupation of the land claims to hold it "free from rent," and a suit for such 'rent' is barred by limitation, the right to the 'rent' is extinguished by sec. 28. If *A* claims as against *B* to be the *malik* to whom the rent of a putnee or

period of limitation, one year, prescribed by sec. 27, Act VIII of 1869, B.C., is not a "period *hereby* limited" within the meaning of sec. 28, Act XV.

[1] Easements, however, *are extinguished* by disuse under sec. 47, Act V of 1882, in provinces to which the Act applies.

[2] Gale, p. 6. But see p. 202, note (7), *supra*, as to the meaning of "immoveable property" under Act XIV of 1859; and Sri Raja *v.* Sri Raja, I. L. R., 5 Mad., 253, 255. An easement *is* such an interest under the Statute of Frauds. See Lecture XII.

[3] See Abhoy *v.* Kally, I. L. R., 5 Calc., 949, 952. Darby and Bosanquet, p. 207.

other permanent tenure held by *C* is payable, and *B* proves that he has, for more than twelve years, received the rent from *C* adversely to *A*, *A's* suit against *B* for the 'rent' is barred by limitation, and his right to the 'rent' extinguished by the section under consideration. As between landlord and tenant, if a tenancy is proved or admitted, non-payment of rent for twelve years or more does not extinguish the landlord's right, and as the liability to pay rent recurs after fixed intervals, he may sue for such *arrears* of rent as are not barred by limitation.[4] But if no rent has been originally assessed on the land, and the person in occupation holds it rent-free for more than twelve years, the zemindar's suit for resumption or assessment being barred by art. 130, sched. ii, Act XV of 1877, his right to the 'rent' is *extinguished*[5] by sec. 28.

Possession of move-

Besides suits for possession of immoveable pro-

[4] Poresh *v.* Kashi, I. L. R., 4 Calc., 661; Premsukh *v.* Bhupia, I. L. R., 2 All., 517, F. B.; Tiruchurna *v.* Sanguvien, I. L. R., 3 Mad., 119.

[5] See Abhoy *v.* Kally, I. L. R., 5 Calc., 949; Keval *v.* The Talukdari Settlement Officer, I. L. R., 1 Bomb., 586; Ali Bux *v.* Roop, 2 N. W. P., 106.

Where it is not necessary for the plaintiff to establish his *title* to a periodically recurring right (*e. g.*, *malikana huqqs*, fees attached to hereditary offices, &c.), as where he has already obtained a declaratory decree on the subject against the defendant, there is nothing to restrict the plaintiff's right to recover the *arrears* falling due within the period of limitation. But when the plaintiff has (as he generally has) to establish his title before he can obtain a decree for arrears, he cannot be allowed to recover such arrears, if he come into Court too late to establish his *title*. (Chhaganlal *v.* Bapubhai, I. L. R., 5 Bomb., 68, 71.) Similarly, if the previous suit for assessment of rent is barred, the suit for rent must also be barred. Abhoy *v.* Kally, I. L. R., 5 Calc., 949, 952.

When there is a *covenant* to pay a rent charge, then, although the rent charge may be extinguished so far as the *and* is concerned, the subject-matter of the *covenant* is not destroyed thereby. (Darby and Bosanquet, p. 388.)

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perty, suits for possession of moveables which may be *specifically* recovered,[6] are "suits for *possession* of property" within the meaning of the section. A suit for the recovery of *money* is not a suit for "possession of property." But a suit for the *specific* recovery of a particular article of moveable property is a suit for the *possession* of such property.

ables which are specifically recoverable, is "possession of property."

Is a trademark property?

Though a trademark is *property* within the meaning of sec. 54 of the Specific Relief Act, it is not *property* within the meaning of every Act or Regulation.[7]

Summary suits under sec. 9, Act I of 1877, not "suits for possession."

Section 28 of Act XV cannot apply to suits to recover possession of immoveable property under sec. 9 of the Specific Relief Act. A person dispossessed, without his consent, of immoveable property otherwise than in due course of law, may omit to sue to recover possession thereof for six months from the date of the dispossession, but his right to the property is not extinguished thereby. The Specific Relief Act *expressly* provides that nothing in sec. 9 (which, as well as art. 3, sched. ii of Act XV of 1877, prescribes the six months' limitation for such a suit) shall bar any person from suing to establish his title to the property and to recover possession thereof. The object of sec. 9 of the Specific Relief Act (which corresponds with sec. 15 of Act XIV of 1859) is to provide a special remedy for a particular grievance. It puts an additional restraint upon illegal dispossession, with a view to prevent the disseizor from shifting from himself

[6] See secs. 8—11 of the Specific Relief Act.

[7] English lawyers now treat the sole right to a trademark as *property*. Broom and Hadley, Vol. II, 585; 11 H. L., 523.

the onus of proof to the party unlawfully dispossessed.[8] If a suit is brought under sec. 9 within six months, even the rightful owner of the land (if he happens to be the disseizor) is precluded from showing his *title*.[9] But it is not necessary to sue to *set aside* a decree passed under sec. 9. If a decree for possession on the strength of plaintiff's *title* be subsequently obtained, the effect of the decree under sec. 9 would by itself cease and determine.[10] A suit to establish *title* may be brought within the *ordinary* period of twelve years,[1] and an ordinary suit to recover possession is not barred at the expiration of six months.[2] Although there are no *words* in sec. 28, Act XV, to shew that a suit to recover possession of immoveable property under art. 3, sched. ii, is not a "suit for possession of property" within the meaning of the section, it could not have been *intended* by the Legislature that a summary suit for possession under art. 3, sched. ii, should, for the purposes of the section, be treated as a regular suit for possession.

What are suits for possession

A suit for the recovery (of possession) of a wife under art. 34 is *not* a suit for possession of *property*,

[8] Kalee *v.* Adoo, 9 W. R., 602. The object of the section is "to discourage people from taking the law into their own hands, however good their title may be." Krishnarav *v.* Vasudev, I. L. R., 8 Bomb., 371, 375.

[9] Khajah Enaetoollah *v.* Kishen Soonder, 8 W. R., 386, 389.

[10] Sreenath *v.* Bishonath, 6 W. R., 268.

[1] See sec. 15, Act XIV of 1859; Eshan *v.* Zumuduroonissa, 17 W. R., 468.

[2] There is a conflict of opinion as to the evidence of *title* required in a suit for ejectment brought *after* the six months allowed by art. 3 Act XV. See 8 W. R., 386; 9 W. R., 602; and 9 C. L. R., 164; *contra*, 7 Bomb., 82; I. L. R., 9 Calc., 39; 11 C. L. R., 393. According to the first three rulings, the general law on this matter is *not* affected by the provision of sec. 15, Act XIV of 1859. See also I. L. R., 8 Bomb., 371.

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and sec. 28 cannot extinguish the husband's marital rights.

of property, and what not.

A pre-emption suit is virtually a suit for possession.[3] But a suit to enforce a lien under art. 111, or a suit to enforce payment of money charged upon immoveable property under art. 132, is not, it is apprehended, a suit for *possession* of property.

A suit under art. 44 by a ward who has attained majority, merely to set aside a sale by his guardian, is not a suit for *possession*; but a suit under art. 94 by a person who has recovered his sanity, for property conveyed during his insanity, *is* a suit for *possession*.

A suit to establish *right* to the present possession of property under art. 11 is not a suit for *possession*.[4]

(Right extinguished when suit barred under arts. 46 and 47.)

A suit under art. 46 to recover property comprised in a survey award, or under art. 47 to recover property comprised in an order respecting possession, made under the Code of Criminal Procedure, is a suit for possession of property, and it is apprehended that possession for three years *under* such award or order gives the party in possession a title as against persons bound by such award or order. Under the Regulations and Act XIV of 1859, such possession for three years did *not* create a title by prescription.[5] Possession for three years, *notwithstanding* such award or order, does not give any title to the party in

[3] Sec. 214, Civil Procedure Code.

[4] If the one year's limitation practically extinguishes the right to the property, it does so independently of sec 28. See. p. 103, *supra*.

[5] Wise *v.* Ameerunnissa, 6 C. L. R., 249, P. C. See also Mohim *v.* Rajcoomar, 10 W. R., 22. Although the award or order does not determine the *title* to the property, sec. 28, Act XV, would seem to extinguish it after the prescribed period.

possession, for the suit to recover possession by the person in whose *favor* the award or order is made is not barred by the three years' limitation.

A suit for *specific* moveable property under art. 48 or art. 49 is a suit for possession of property, but a suit against an agent under art. 89 for moveable property not accounted for, is *not* necessarily a suit for *possession* of property.[6]

We have already observed that a suit for possession of an hereditary office, under art. 124, is a suit for possession of *property*.

A suit to enforce a right to share in joint family property, under art. 127, is also a suit for *possession* of property.[7] It has been already observed that a suit for the resumption or assessment of rent-free land under art. 130 is a suit for *possession of property*.

Suits under arts. 133 to 145 are suits for possession of property, but when a mortgagee's suit for possession *as mortgagee* is barred by limitation under art. 135, his right to foreclose the mortgage, or to recover the property as *absolute owner*, is not thereby extinguished.[8] The same remark applies to similar suits in Courts established by Royal Charter under art. 146.

A suit for foreclosure under art. 147, though it may lead to the payment of the mortgage money, is not a suit to recover *money*. It is strictly a suit to

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[6] If a *particular article* of moveable property is held by a person as the agent of the true owner, it may be *specifically* recovered. Sec. 11, Act I of 1877.

[7] See Sitaram *v.* Khanderav, I. L. R., 1 Bomb., 286.

[8] See Ghimarain *v.* Ram Monaruth, 7 C. L. R., 580. See also Lord Selborne's judgment in Pugh *v.* Heath, 6 Q. B. D., 345 ; and 7 App. Cas., 235.

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exclude a right given to the mortgagor, and according to Lord St. Leonards, it is a suit to *recover property*.[9]

A suit by a mortgagee for sale under art. 147, though a "suit for land," is not a suit for *possession* of land.

A suit to redeem a mortgage under art 148, is not necessarily a suit for possession of property.

Is the recovery of an interest in property *possession* within the meaning of sec. 28.

It may be here observed, that although some of the suits mentioned above are not, *strictly* speaking, suits for *possession of property*, such suits were covered by the general provisions of sec. 1, cl. 12, Act XIV of 1859, which applied to "suits for the *recovery* of an *interest* in immoveable property." Rights to such *interests* were *practically* extinguished by lapse of time under Act XIV of 1859. If the words "suit for possession of any property" in sec. 28, Act XV, be interpreted to include "suit for the recovery of an interest in property" when the property is immoveable, the section will exactly correspond to the English law on the subject, and to the law administered in Bengal before Act IX of 1871 was passed.

Right of private owners when extinguished.

As between *private* owners contesting *inter se* the title to land, the law has (in general) established a limitation of *twelve* years; after that time, it declares not simply that the remedy is barred, but that the title is extinguished. The owner's cause of action or his right cannot be kept alive longer than the ordinary

[9] Darby and Bosanquet, pp. 115, 116; Wrixon *v.* Vira, 3 Dru. and War., 104. A large number of cases on the meaning of the words "suit for land" in the Civil Procedure Code are referred to in the argument of Counsel in Delhi and London Bank *v.* Wordie, I. L. R., 1 Calc., 249.

period of limitation by the expedient of inducing the Government or the Secretary of State for India in Council to make common cause with him.[10]

Right of Government when extinguished.

Where the Government has a right to the *possession* of land or other property, and no suit is brought within *sixty years* (under art. 149) to enforce such right, the right of the Government is extinguished under sec. 28.

Sec. 28 how far retrospective.

Section 28 of Act XV of 1877 has introduced a *new* rule as regards the extinction of right to *moveable* property.[1] It is apprehended that if the period of limitation for instituting a suit for possession of such property expired *before* Act XV came into operation (and the party in possession quitted possession before that date), the *right* to the property would not be affected thereby.[2] But if the party in possession has continued to be in possession at the commencement of the Act, and the rightful owner's suit is barred by limitation under the Act, his right to the property is also *extinguished* by the Act. It is not necessary that the period of limitation should *begin* to run *after* the Act came into force,—it is sufficient if the period *ends* after that date.

As regards moveables (in the case of a conflict of laws) the term of the prescription, and the complete

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[10] Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21. The title of the Government in this case resembled a seigniory.

[1] I. L. R., 4 Calc., 297. Justice Markby was of opinion that the right to moveables and debts was extinguished by limitation even under the old law. See Markby's Elements of Law, p. 213; Krishna *v.* Okhilmoni, I. L. R., 3 Calc., 331, 333. For the opposite view, see I. L. R., 6 Calc., 355.

[2] On the retrospective operation of the analogous provision of 3 and 4 Will. IV, c. 27, see Banning, pp. 110 and 111.

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acquisition of the property must be judged by the law of the *place* at which the thing is *last* found, because it is only at the expiry of the *whole* period that the change of property takes place. When property has been acquired by prescription in one country, it must be recognized in every other country.[3]

The right extinguished is the right of a particular person or persons.

The right of the *particular* person, whose suit for possession of property (moveable or immoveable) is barred by limitation, is extinguished by sec. 28. If the right of a Hindu widow, or a tenant for life, is extinguished by limitation, it does not follow that the right of the persons entitled in *reversion* or *remainder* shall be so extinguished. So again, when one of several claimants entitled to the present possession of property is barred by limitation, it does not follow that the other claimants shall be also barred, or that *their* rights shall be extinguished by sec. 28.

Effect of the extinction of right.

When the right of a person (whose suit for possession of any property is barred by efflux of time) is extinguished, he is a wrong-doer if he attempts to exercise acts of ownership over the property as against any person who happens to be in possession. Section 28 does not *say* that the right extinguished by it shall be transferred to the possessor, but there can be no doubt that continuous possession for the prescribed period *practically* conveys the property to the party in such possession.[4] (See the Preamble.)

Where there has been *continuous* adverse possession.

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[3] Westlake, pp. 160-161 ; see p. 43 (note), *supra*.

[4] Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21, 23, cited in I. L. R., 3 Calc., 224. See pp. 4, 5, *supra*.

"It has been said that the effect of the Statute (3 and 4 Will. IV, c. 27, sec. 34) is to execute a conveyance to the party whose possession is a bar,

Where possession for the prescribed period has not been continuous, as, where there are *several* possessors holding adversely to the rightful owner and independently of one another, it is more difficult to say in whose favor the statutory conveyance is made.[5]

There was a section in the Draft Bill, which was based on the opinion apparently held by the late Lord Romilly in *Dixon* v. *Gayfere* on the subject of successive and independent trespassers. The section ran thus :—

"30. Where a series of trespassers, adverse to one another and to the rightful owner of any immoveable property or hereditary office, take and keep possession thereof for several periods, each less than the period so limited, but collectively exceeding such period, the person who is in possession of such property or office when the title of the rightful owner would have been extinguished, had the trespassers not been adverse to one another, shall have a right to such possession."

This section, however, was struck out, because the Select Committee were not sure that the proposed

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and that by its own force it not only extinguishes the right of the former rightful owner, but transfers the legal fee-simple to the party in possession. It is apprehended, however, that it may more strictly be said that its operation in giving a title is *negative*; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him." Darby and Bosanquet, 389. See Scott *v.* Nixon, 3 Dru. and War., 407; and Dixon *v.* Gayfere, 17 Beav., 421. Possession is *continuous* when it is held either by the *same* person (without intermission) or by several persons *claiming one from the other*.

[5] This difficulty cannot arise in cases falling under art. 144 of Act XV of 1877. See p. 170, *supra*.

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rule was right, and because they believed that such a rule would be of little or no practical utility.[6]

In the case of successive and independent trespassers.

Where the rightful owner has been out of possession for more than the prescribed period, and none of the independent trespassers has been in possession for the full period, the right may *possibly* vest in that one of the trespassers who has held the property for the *longest* period, or in the *first* or the *last* of the trespassers. Lord Romilly was of opinion that, as the last occupier can maintain his possession against all, including the true owner, whose right is *ex-hypothesi* extinguished, the *right* vests in such occupier.[7]

But it may be observed that if A, the party in possession at the time when the title of the rightful owner is extinguished, is himself dispossessed by another trespasser who holds the property for a much longer period than A, it would be hardly fair to declare the title in favor of A, simply because he happened to be in possession at the *end* of the period of limitation for the rightful owner's suit for possession.

In *Asher* v. *Whitlock*,[8] Cockburn, C. J., expressed an opinion in favor of the *first* trespasser. Messrs. Darby and Bosanquet would draw a distinction between cases where the first trespasser has been in possession for a very short time, and where he has been in possession for a very considerable time.

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[6] See Mr. Stokes' speech in the Legislative Council, 19th July 1877. The learned editors of Smith's Leading Cases make a suggestion similar to that made by the framers of the Draft Bill.

[7] Dixon *v.* Gayfere, 17 Beav., 421.

[8] L. R., 1 Q. B., 1. Priority of possession, it was held, was sufficient proof of title against a subsequent trespasser *whose* possession did not extend over the full period of limitation.

They ask whether the presumption of title of a succeeding trespasser ought not to prevail against a prior possessor, if the former has been in possession for a much longer period than the latter.[9] Mr. Banning, in his work on the Limitation of Actions,[10] says that whatever difficulties may exist in the theory countenanced by Lord Romilly, equal or greater difficulties will be found in any theory which gives back the title to the *first* of the trespassers at the expiration of the statutory period.

In British India, there is, at present, a conflict of opinion as to the sufficiency of mere prior possession (not extending over twelve years) in proving a title.[1]

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[9] Darby and Bosanquet, p. 392. Where it is proved that *A* was in possession for eleven years and *B* for nine years as successive trespassers, *B's* suit for ejectment against an assignee of the true owner who succeeded by some means in getting into possession, may be dismissed on the ground that there is *primâ facie* evidence of the title being in *A*, of which the defendant is entitled to take advantage. See Doe *v.* Barnard, 13 Q. B., 948, 953.

[10] Banning, p. 106. In Goodtitle *v.* Baldwin, 11 East., 488, a prior possessor sued a person who had been in possession for several years immediately before the suit, and it was held that the plaintiff must recover by the strength of his own title, and not by the weakness of that of the defendant.

[1] See Joytara *v.* Mahomed, 11 C. L. R., 399, 406.

Possession, if unexplained, is evidence of rightful ownership at the time (notwithstanding sec. 15, Act XIV of 1859). See 9 W. R., 602. Where the evidence does not disclose a better title in any person, the prior possession of the plaintiff is itself a title against a person who has wrongfully dispossessed him. Justice D. N. Mitter held that this rule is not affected by the provisions of sec. 15, Act XIV of 1859. Khajah Enaitoolah *v.* Kishen Soonder, 8 W. R., 386. Sir Richard Garth, C. J., also is of the same opinion. See Mohabeer *v.* Mohabir, 9 C. L. R., 164. Justices Prinsep, Tottenham, and O'Kinealy are of a different opinion—see Debi *v.* Issur, I. L. R., 9 Calc., 39; Erteza *v.* Barry, 11 C. L. R., 393. See also Jhoomuck *v.* Burral, 21 W. R., 52, and pp. 168 and 172 (note), *supra*. Sargent, C. J., and Kemball, J., have recently held, that the remarks of the Privy Council in Wise *v.* Ameerunissa, on this subject, must be read in conjunction with their finding that the evidence disclosed a better title in the defendants. Krishnarav *v.* Vasudev, I. L. R., 8 Bomb., 371, 376.

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Here, therefore, there are still greater difficulties in the theory propounded by Cockburn, C. J.

Continuous possession transfers the right and confers a good title.

But where there is *continuous* possession for the requisite period by or through the original disseizor, the law practically confers a good title on the possessor. The principle adopted in Bengal, even before Act IX of 1871 came into operation, was that the period of possession which was sufficient to bar the remedy was also sufficient to *transfer* the right. Sir L. Peel and Sir J. Colvile in 1 Boulnois' Reports, 70, Mr. Justice Markby in 17 W. R., 119, Sir Richard Couch in 20 W. R., 120, and Sir Richard Garth in 25 W. R., 282, and I. L. R., 3 Calc., 224, acted upon this principle.

Even in a suit for *declaration of title* and confirmation of proprietary right, the plaintiff is entitled to a decree, if he has been in possession of the land for the prescribed period, and the nature of the case and the state of the pleadings admit of the plaintiff's asking for a declaration of title by possession.[2] Possession for the prescribed period being a good title by itself, the Court cannot refuse to recognize that any more than it can refuse to recognize a conveyance from a previous owner.[3] But no decree can be given in favor of the plaintiff upon a ground which is not

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[2] Ram Lochun *v.* Ram Soonder, 20 W. R., 104. But where a tenant asks for a declaration of his title to a tenure, and failing to prove the particular title set up in the plaint, only shows nineteen years' possession, the Court is not justified in declaring that the plaintiff holds the *particular* tenure alleged by him; see 14 W. R., 109 (foot-note); 20 W. R., 104, 105. I. L. R., 3 Calc., 225, 227; and I. L. R., 4 Calc., 699, 703.

Tirumalasami *v.* Ramasami, 6 Mad., 420, is in direct conflict with Sir Richard Couch's decision in 20 W. R., 104.

[3] Shiro Kumari *v.* Govind Shaw, I. L. R., 2 Calc., 418, 421.

suggested in the plaint or in the issues tried.[4] The question of a possessory title should be properly raised in the plaint or in the issues, so that the defendant may have notice that such a point was going to be raised.[5]

Person in whose favor limitation is running has a transmissible interest.

It has been further held, that the title of the wrong-doer can be transferred to a third person whilst it is in *course* of acquisition and before it has been perfected by a possession for the full prescribed period.[6] The person in possession may waive whatever estate he may have acquired *before* the period of limitation has expired.[7] Where the full period has run out, and the right of the owner has been extinguished, a mere acknowledgment of the right by the adverse holder does not revive the right so extinguished.[8]

Sec. 28 gives a good title against the party whose suit is barred.

Section 28 of Act XV extinguishes the right and title of the person out of possession, and as *against him* gives to the title of the person in possession legal force and validity. A Court of Equity

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[4] Bhaygo *v.* Mahomed, 25 W. R., 315. As to specific *mokurrri* or *leasehold* titles, in a suit against the *landlord* or his representative, see Bijoya *v.* Bydonath, 24 W. R., 444, and Brindabun *v.* Dhananjoy, 4 C. L. R., 443.

[5] Shiro Kumari *v.* Govind Shaw, I. L. R., 2 Calc., 418. The question should be raised with sufficient clearness in the Court of first instance to enable the defendant to understand that the plaintiff claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. Krishna Churn *v.* Protab Chunder, I. L. R., 7 Calc., 560. Where the possession is referable to the alleged specific title, and to that *alone*, and the specific title is disproved, the possession avails nothing. 5 W. R., P. C., 69.

[6] Brindabun *v.* Tarachand, 20 W. R., 114; Gosain Dass *v.* Issur Chunder, I. L. R., 3 Calc., 224.

[7] Brown, 580; Doe *v.* Groves.

See p. 170, *supra*.

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would force upon a purchaser a title so acquired, and a purchaser may take that title with safety.[9]

Title gained commensurate with interest extinguished.

The title gained by possession being limited by right yet remaining unextinguished, is *commensurate* with the interest which the rightful owners have lost by the operation of the Act, and must have the same legal character.[10] If the person whose suit for possession has been barred by the Act had a leasehold interest only, the party in possession cannot have a higher interest.[1] Similarly, adverse possession against either a mortgagor *or* mortgagee does not necessarily give the possessor an absolute right against *both*.[2]

Title gained is sometimes gained on behalf of the landlord of the possessor.

When a person takes wrongful possession of land and keeps it for the prescribed period, claiming to be *absolutely* entitled to it, or *not* claiming a *limited* interest therein, he gains, for his *own* benefit, the whole estate in perpetuity as against persons whose suits for possession are barred by limitation.[3] But if a lessee, during the continuance of his lease, takes possession of contiguous lands belonging to a third person, and holds it *as part of the demised premises* for the prescribed period, he acquires the lands for the benefit of his *landlord*.[4]

The doctrine of estoppel may affect the transfer of the right.

A tenant-for-life affected to devise the estate to *B* for life, with remainder to *C*. The reversionary heir did not interfere, and *B* took and held possession for

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[9] Brown, 731; Scott *v.* Nixon, 3 Dru. and War., 388; Gunga Govind *v.* The Collector, 7 W. R., P. C., 21.

[10] Darby and Bosanquet, p. 390.

[1] See p. 154, *supra*.

[2] See pp. 162—164, *supra*.

[3] See Darby and Bosanquet, p. 394; see also pp. 139 (note 6), and 146, *supra*.

[4] Darby and Bosanquet, p. 395. See pp. 149, 150, *supra*, and I. L. R., 10 Calc., 820.

more than twenty years. *B* then conveyed the premises absolutely to the defendant, and died shortly after the transfer. The assignee of *C*, the remainderman, brought ejectment. It was held (in England), that *B*, who claimed only a *limited interest under the will*, did not acquire a title as against the remainderman under the same will, although the will itself was inoperative. *B* entering under the will was *estopped* from disputing the validity of the will, and setting up a possessory title as against the remainderman.[5]

Accessory rights extinguished with the principal.

When the principal right is extinguished by limitation, the extinction of an accessory right follows as a matter of course. When the right to an hereditary office is extinguished by limitation, the right to the profits of the office, whether accruing within the period of limitation or not, is also gone, in the same way as when the principal debt is barred by limitation, a suit for the interest on the debt is also barred.[6] Section 48 of Act V of 1882 expressly enacts that when an easement is extinguished by non-user or otherwise, the rights (if any) accessory to such easement are also extinguished.

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[5] Darby and Bosanquet, 394; Banning, 107; Board *v.* Board, 9 L. R., Q. B., 48. It seems that, if the will does not *purport* to pass the *specific* land in question, a possessory title may be gained against the remainderman. Paine *v.* Jones, 18 Eq., 320, cited in Banning on Limitation, p. 110.

[6] See Tammirazu *v.* Pontina, 6 Mad., 301; Valia *v.* Viraraya, I. L. R., 1 Mad., 228. Where the principal right created by a grant is extinguished by the *cancellation* of the grant, the accessory right to monies *already* due may survive the extinction. Morbhat *v.* Gungadhur, I. L. R., 8 Bomb., 234, 236. Cf. Chhaganlal *v.* Bapubhai, I. L. R., 5 Bomb., 68.

LECTURE XII.

EASEMENTS.[7]

Different significations of the term 'easement' — 1st sense — 2nd sense — 3rd sense — 4th sense — 5th sense — Easements should be distinguished from rights of property, natural rights, rights in gross, customs, licenses, and other incorporeal rights — Distinguished from rights of property — The nature of julkur rights — Party-walls — Easements distinguished from natural rights — Nuisances and disturbances of easements — Easements distinguished from licenses — Easements distinguished from customs — Easements distinguished from rights *in gross* — Public ways — Easements distinguished from other incorporeal rights — Monopolies, patent-rights, copy-rights, ferries, &c. (Highways, thoroughfares, and towing-paths) — Certain incorporeal rights how acquired — Trees encroaching on a neighbour's land — All restrictions are not servitudes or easements — No easement consists *in faciendo* — *Nullâ res sua servit* (*Hauts* and markets — Liability to repair walls and embankments) — Servient owner cannot require easement to be continued — No reciprocal easements — Artificial watercourses — Cross-easements — How far the causes of easements must be permanent — Indivisibility of easements — Easements affirmative or negative — There is no *purely* affirmative or negative easement — Easements continuous or discontinuous — Apparent or non-apparent — Urban or rustic — Inconsistent and subordinate easements — Every system of law recognizes servitudes — Mahomedan law — Hindu law — Servitudes recognized by the Civil law — Easements recognized by the English law — Profits a prendre recognized by English law — May easements not now known to the law be created? Right to prospect, privacy, &c. — Indian statutory law before 1882 almost wholly silent on the subject of easements — Points of difference between the English and the Indian law — The Indian Easements Act, 1882 — Easements have a *special* origin — Modes of origination: I. Express grant — II. Implied grant or reservation —

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[7] Besides the provisions relating to the extinction of the right to *property* treated of in the last Lecture, the law of prescription in British India includes some rules relating to the acquisition and extinction of the right to *easements* by prescription. This portion of the law of *prescription* is the *main* subject of the present Lecture. See pp. 11, 12, and 13, *supra*.

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Easements of necessity — *Quasi*-easements. Disposition of owner of two tenements — *Quasi*-easements when *impliedly* granted or reserved — Instances of easements of necessity — Instances of *quasi*-easements — Where *express* words are necessary — Effect of the words "appurtenances" and "easements enjoyed therewith" — III. Local custom — IV. Estoppel — V & VI. Prescription, and presumption of lawful origin — Prescription at Common Law — The fiction of a lost modern grant — Statutory prescription in England — Difference between a twenty and a forty years' user — The English prototype of the Indian Law of Prescription — Four ways of claiming easements by long enjoyment in England — The second recognized in British India — Statutory prescription in British India — The law is remedial, and neither prohibitory nor exhaustive — Presumption of a lawful origin — Duration of enjoyment required — Quality of enjoyment required — Enjoyment need not continue till within two years of suit — Otherwise under the statutory rule — 25 or 30 years' enjoyment, whether ending within two years of suit or not, will raise the *presumption* — The present statutory rule of prescription — A fluctuating body of persons cannot claim under the rule — Enjoyment must be peaceable — Enjoyment must be open, except in the case of light, air, and support — Enjoyment *as an easement* necessary — Unity of title and unity of possession — Enjoyment must be *as of right* — Enjoyment *by* whom? — What constitutes enjoyment — Proof of continuous enjoyment *for* the prescribed period — What is or is not an interruption — Effect of repeated adverse obstructions and voluntary discontinuances — Effect of interruptions in enjoyment as *an easement* and *as of right* — Computation of the prescriptive period — Conditional exclusion in favor of reversioner of servient heritage — Effect of the exclusion — The rule of prescription how far binding on Government — Prescription in British India does *not* imply a grant — The rule applies to negative as well as to affirmative easements — Interruption of enjoyment of easement need not be conveniently practicable — But enjoyment must be *capable* of interruption — What easements cannot be acquired by prescription: 1. Right destructive of servient heritage or of subject — 2. Right to free passage of light or air to open space — 3. Right to surface-water not flowing in a stream, and not permanently collected. 4. Right to underground water not passing in defined channel — Rights acquired by prescription are absolute and permanent — Prescription legalizes previous user — Extent and mode of enjoyment of prescriptive rights — How far mode and place of enjoyment may be altered — Extent of prescriptive right to receive light or air, or to pollute air or water — Implied acquisition of accessory or secondary easements — Extinction of prescriptive right: 1. When released. 2. When it becomes useless. 3. When there is increase of burden by permanent change in dominant heritage. 4. When there is permanent alteration of servient heritage by *superior force*. 5. When either heritage is completely destroyed. 6. When there is unity of title. 7. When the right has not been enjoyed for twenty years (Light prevented falling at an angle of 45 degrees) — Rules of extinctive prescription under Act V of 1882 — Analogous rules under the English and the old Indian law.

LECTURE XII.

Different significations of the term 'easement.'

THE term *easement* has scarcely any settled import.[8] It is sometimes used as almost synonymous with *servitudes*, which are certain rights *in rem*, *in re alieno solo*,—certain rights, availing against the world at large, over the land of another. These rights are rights of *definite and restricted user*. They are *definite* fractions subtracted from the owner's rights of *user and exclusion*.[9] An *easement*, in this sense, is a right over land other than ownership. Such a right may be either (1) real, prædial or appurtenant, or (2) personal or *in gross*.

1st sense.

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[8] See Austin, Lectures, 49.

[9] See Austin, Lectures, 51 and 52. The full rights and powers of using, of taking the produce or fruits of, and of disposing of, the subject of *dominium*, are designated *jus utendi*, *jus fruendi*, and *jus abutendi*, or shortly, *usus*, *fructus*, and *abusus*. Dominium or ownership consists of these rights and powers. Servitudes are fragmentary rights separated from the full rights of ownership. These fragmentary rights affect the owner's right of using the property and taking its produce. They are termed *servitudes*, because the property is under a kind of slavery or service, for the benefit of the person entitled to exercise such fragmentary rights. The serving property is called the servient tenement or heritage. If a servitude is appurtenant to any property, the property to which it is appurtenant is called the dominant tenement or heritage. The owner or occupier of the dominant heritage is called the "dominant owner." The owner or occupier of the servient heritage is called the "servient owner." Lands, houses, and other things permanently attached to the earth are tenements or heritages. *Land* includes land covered by water. (6 C. L. R., 269.) It also includes things permanently attached to the earth. (Sec. 4, Act V of 1882.)

The *nudus usus*, *usufructus*, *habitatio*, *superficies*, and *emphyteusis* of the Roman lawyers are not servitudes *properly* so called. In the language of the English law, they would be styled rights of *property*. Several other rights *in re alieno solo*, such as the rights of mortgagees in the property mortgaged, are also not servitudes proper, but rights of property modified by regard to the rights of the mortgagors.

The term servitude is used to express both the right and the corresponding duty. The term easement generally expresses the right only. (Gale, p. 2.) The servitude relating to tithes in England is never styled an 'easement.'

In a second and less extended sense, the term 'easement' is *restricted* to real or prædial servitudes,—*i.e.*, such as are appurtenant to some land or *prædium* of the person claiming them. In this sense, personal servitudes or servitudes *in gross* are *not* 'easements.' According to Lord St. Leonards, a dominant tenement is not necessary to the existence of an 'easement,' but later authorities (including Lord Cairns) are very distinctly of opinion that there can be no easement *properly* so called unless there be *both* a servient and a dominant tenement.[10] 2nd sense.

In a third and still more restricted sense, 'easements' mean such real servitudes as are acquired merely for the *ease* or *convenience* of the dominant owner, and not for any participation in the *profits* of the servient heritage, that is, such rights as do not entitle the dominant owner to take, out of the servient tenement, any corporeal thing except water. Messrs. Gale and Goddard[1] adopt this third sense of the term, 3rd sense.

[10] See Gale on Easements, 5th Ed., pp. 13 and 14.

[1] Gale's definition is as follows: "An easement is a privilege, without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged *to suffer or not to do* something on his own land for the advantage of the dominant owner."

Goddard's definition runs thus: "An easement is a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former."

The definition given in Tudor's Leading Cases on Real Property is as follows: "An easement is a privilege, without profit, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to compel the owner thereof to permit to be done or to refrain from doing something on such tenement for the advantage of the former."

These definitions are so far defective that they include natural, as well as conventional, easements. See Goddard, 2nd Edn., pp. 2 and 3.

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and restrict it to servitudes appurtenant, *exclusive* of (what in English law are called) profits *a prendre*.[2]

Easements, according to the definitions given by Messrs. Gale and Goddard, are of two kinds :— I. Natural Easements, better known as Natural Rights; and II. Artificial or Conventional Easements. But the term Easement is *commonly* used exclusively to denote the second class of easements. In Justice Innes' Digest of the Law of Easements, the term is defined in this its ordinary sense.[3]

4th sense. According to sec. 4 of the Indian Easements Act,[4] easements are *real* servitudes *including* profits *a prendre*. The context of the Act shows that the term is used to denote *conventional* servitudes only.

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[2] See p. 384, note, *infra*.

[3] In this Digest, Rights of vicinage, *acquired* for the use of a tenement, are called servitudes ; and servitudes, without a right to make a profit out of the substance of the neighbouring tenement, are called easements. Gale modifies his definition by saying that all easements originate in express, implied or presumed grants or agreements. Goddard also distinguishes easements created by the act of man from 'Natural Rights,' and throughout his work, *uses* the term in its ordinary restricted sense.

[4] The Indian Easements Act (V of 1882), sec. 4, enacts as follows : "An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own." This definition also includes what are called 'natural rights or 'natural easements,' but sec. 7 of the Act shews that 'natural rights, not being restrictions of *other* legal rights, are not 'easements' within the meaning of the Act.

It will be observed that Messrs. Gale and Goddard call an easement a *privilege*, and in their definitions, refer to the negative *duty* of the *servient* owner not to do something on his own land. Section 4, Act V of 1882, on the other hand, calls an easement a *right*, and refers to the *dominant* owner's *power* of doing something or preventing something being done on another's land. Messrs. Gale and Goddard define an easement from the servient owner's point of view. The Indian Legislature defines it from the dominant owner's point of view.

Act (XV of 1877) lays down that in that Act 'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own *profit* any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon the land of another. And as profits *a prendre* may unquestionably be either real or personal according to English law, it has been held that profits *a prendre in gross*, not being expressly excluded by this definition, are 'easements' within the meaning of Act XV of 1877.[5]

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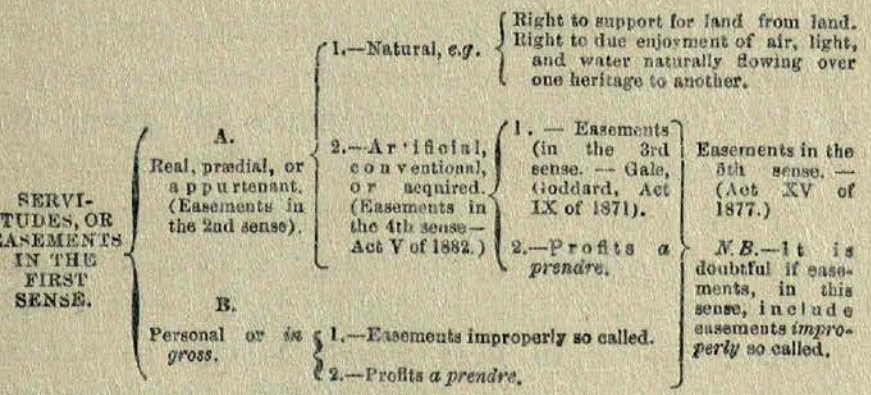
5th sense.

The following table shews the several meanings of the term, and their relations to each other:



In this Lecture I shall, in general, use the term 'easement' in the sense in which it is used in the Indian Easements Act, that is, as exclusive of servitudes in gross and 'natural rights,' and as inclusive of profits *a prendre* appurtenant. An easement, then, is a right (other than a natural right) which the owner or occupier of certain land possesses, as such owner or occupier, for the beneficial enjoyment of

[5] Chundee *v.* Shib, I. L. R., 5 Calc., 945; 6 C. L. R., 269. See p. 391, note 10, *infra*.

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that land, to do and continue to do something (including the taking of profits), or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. In affirmative easements, the dominant owner has the right to *do* and continue to do something. In what are called negative easements, he has the right to *prevent* and continue to prevent something being done. The servient owner is bound to *permit* the doing of that thing, or to *refrain* from doing that other thing. The dominant owner is entitled to enjoy the right without disturbance by *any other person*.

Easements should be distinguished from certain other rights.

In order to understand the nature of easements, it is necessary to distinguish them from rights of property, natural rights over neighbouring lands,[6] local customary rights *in re alieno solo*, licenses in respect of immoveable property, servitudes *in gross*, and other incorporeal rights.

Distinguished from rights of property.

In one sense every easement may be regarded as a *right of property* in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest, in land which belongs to another whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement.[7]

An easement, as well as a right of property, is a right *in rem*.[8] A right arising out of a contract, being a

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[6] For instances of natural rights, not being rights over *land*, see p. 8 (note), *supra*.

[7] *Per* Lord Watson in Dalton *v.* Angus, 6 App. Cas., 740, 830.

[8] The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by *any other person*. Section 32, Act V, 1882. In the case of a negative easement, it is *less likely* that a *stranger* (*i. e.*, a person other than the servient owner) should disturb.

right *in personam*, cannot be either a right of property or an easement. But a right *of property*, strictly so called, generally gives the party entitled an *indefinite* power of applying the land to *all* uses or purposes, save such as are inconsistent with his relative or absolute duties; while an *easement* is a right to *put* the land to uses of a *definite* class, or to *prevent* its being put to uses of a *definite* class.[9]

The owner's right of walking over his own land, of building upon it, of digging under it, of excluding others from his land, or of preventing them from interfering with the legal use of his land are *ordinary rights of property*. These ordinary rights of property which are determined by the boundaries of the land are not 'easements' in any sense of the word.

An easement is a right *in re alieno solo*, in the land or tenement of *another*, or in land or tenement which is not the claimant's own.[10] When the owner

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[9] Austin's Lectures. pp. 823, 836. Such relative duties as arise from *contracts* with the owners of neighbouring lands, and correspond to rights *in personam*, are not easements. Absolute duties annexed to property (such as that of preventing a house in a town from getting into a ruinous state) are also not easements. Restrictions imposed on the owner's rights of user by such general maxims as *sic utere tuo ut alienum non lædas* (use your property so as not to injure others) are similarly not 'easements.' These general restrictions apply to *all* heritages.

[10] The rights and liabilities of the owners of property adjoining to a party-wall, when such wall is their *common property*, partake of the character of easements, but are *not easements*. When such wall belongs to *one* of the adjoining owners, it may be subject to an easement in the other, to have it maintained as a dividing wall between the two tenements. See Gale, p. 513; Watson *v.* Gray, 14 Ch. Div., 192. In this Chancery case, Fry, J., gives the four different senses of the term Party-wall:—(1) where the wall is common property; (2) where one strip of it belongs to one of the neighbours and the other to the other; (3) where the wall belongs to one of the neighbours, subject to an easement in the other to have it maintained; (4) when the wall is divided into two strips (longi- Party-walls.

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of estate *A*, acquires a right of way over the adjoining estate *B*, he acquires an easement, but does not acquire a right of property in the servient estate *B*, though his right of walking over *B* is similar in many respects to the right of the owner of *B qua* owner to walk over his own estate. The owner of *A* can use *B*, *only* for the purposes for which he acquires the easement, while the owner of *B* can use it for *all* purposes save such as are inconsistent with his general or particular duties.

But *all* rights *in rem* over *another's* property are not easements. The rights of the lessee or the usufructuary mortgagee over the demised or mortgaged land are not easements. They are *rights of property* in the land, modified by regard to the rights of the lessor or the mortgagor. Besides, such rights not being ancillary to the enjoyment of other lands of the lessee or mortgagee, are not *rights appurtenant*, as easements (proper) always are.

The nature of julkur rights.

The *julkur* right of fishery in small and shallow rivers, the beds of which are recognized as the property of the claimant himself, is unquestionably a *right of property*.[1] Julkur rights in navigable rivers also are often settled as separate estates, and sold for arrears of revenue, and such rights have often been granted by Government extending over large estates,

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tudinally) and each strip is subject to a cross-easement in favor of the owner of the other strip. Akilandammal *v.* S. Venkatachala, 6 Mad., 112, gives an instance of the first sense of the term. See Radha Mohun *v.* Raj Chunder, 2 C. L. R., 377, 381, for an instance of the second sense of the term, but Justice Markby does not call the wall in that case a party-wall.

[1] See Beng. Reg. XI of 1825, sec. 4, cl. 4. Such a right of fishery is called "a territorial fishery." I. L. R., 2 Bomb., 19, 46.

the property of persons other than the grantees of the *julkur*.[2] Under Act IX of 1871, such rights, though incorporeal, were treated as interests in immoveable property, or proprietary rights.[3] As these rights are not appurtenant to other heritages or estates, they are *not easements* under the Indian Easements Act. And when these julkur rights entitle their holder to *all* the profits derivable from a river, lake, or other water in a tract of country, subject to *no restriction* in favor of the owner of the bed or subsoil, they are hardly servitudes in the ordinary sense of the term.[4] The fact that *julkurs* are often described as *mehals* or estates, goes, to a certain extent, to shew that they are generally treated as rights of *property*.

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[2] See Gour Huri *v.* Amirunnissa, 11 C. L. R., 9; Radha Mohun *v.* Neel Madhub, 24 W. R., 200; Moharanee Surno Moyee *v.* Digumbery Debea, 2 Shome's Rep., 93.

It has been held by the Privy Council, that in British India the Government has a freshold in the bed of navigable rivers, and in the land between high and low watermark. *Doe dem* Seebkristo *v.* E. I. Company, 6 Moo. I. A., 267. It has been held by the Calcutta High Court, that the Government has also the right of excluding the public from fishing in such rivers. The Government has, in many instances, granted to private individuals the exclusive right of fishery in such rivers. See Chunder *v.* Ram, 15 W. R., 212; see also 11 C. L. R., 9.

[3] Parbutty *v.* Mudho, I. L. R., 3 Calc., 276. In 2 Shome's Report, 93, julkur rights are treated as rights of property even as against the owners of the estates over which the rights extend. But the grantee does not derive his rights from the owners of such estates, and such rights are not treated as fragments of *their* rights of ownership.

As to the rights of the sovereign or the Government and of the public in navigable rivers and the sea, see Baban *v.* Nagu, I. L. R., 2 Bomb., 19.

A *several fishery*,—*i.e.*, a fishery in waters covering land which does not belong to the claimant, like all *exclusive* profits *a prendre*, but unlike most other easements, is, in English law, capable of being *trespassed* upon. See I. L. R., 2 Bomb., 45.

[4] There are authorities for the proposition that an indefinite claim to destroy the subject-matter cannot be supported as a profit *a prendre in alieno solo*. See 7 App. Cas., p. 646.

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Besides, as these rights are transferable and capable of being let out to tenants, *independently* of *other* property, they are not easements within the meaning of the Transfer of Property Act.[5] Where the owner of the bed of a river or lake grants to another *definite* rights over his water, or such rights are acquired by prescription against the owner, such rights are servitudes and not rights of property.

The grant of a several (*i.e.* exclusive) fishery for only one *particular* species of fish, can give the grantee no property in the water or in the subsoil. In England, the grant of an exclusive fishery, without any restriction as to the kinds of fish to be taken, specially where the grantor reserves a rent, *primâ facie* includes the soil.[6] Where the grant of a *julkur expressly* conveys (besides exclusive rights of fishing) *other* purely aqueous rights (such as the gathering of rushes and other vegetation which arise from and are connected with water), it may be very well conceived that, if in such cases the right to the *soil* were implied in the grant, it would be wholly unnecessary to *specify* these particular rights; if the grantee

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[5] See sec. 6, Act IV of 1882. It is apprehended that even under Act XV of 1877 such *indefinite* aqueous rights are rights of *property*, and not profits or easements. It has, however, been held, that the interest of a lessee of a julkur or sayer mehal is not an interest in land within the meaning of the District Road Cess Act (Beng. Act X of 1871). See David *v.* Grish, I. L. R., 9 Calc., 183.

According to English law, the owner of a profit *in alieno solo* (whether in gross or appendant to land) may get the benefit of his profit by selling or letting an interest in it, for a longer or shorter term, and during the term the transferree has an irrevocable *license* to take so much of the profit. See 7 App. Cas., 658. Cf. 11 C. L. R., 9.

[6] Brown, 179, 190. Marshall *v.* The Ulleswater Steam Navigation Company, 3 Best & Smith's Reps., p. 732.

were the owner of the land, he would, as a matter of course, be entitled to everything on it. However, although a *julkur* does not *necessarily* imply any right in the subsoil, the fact that a *julkur mehal* is sometimes called a *mouza* shews that the settlement of a *julkur may* include the soil.[7]

Easements distinguished from natural rights.

Besides the *ordinary* rights of property which are determined by the boundaries of the land, there are certain *accessorial* rights, *incident* to the ownership of land, which entitle the owner to enjoy the natural advantages arising from the situation or position of the land in relation to *other* lands in its vicinity. The right of every owner of land that such land in its natural condition shall have the support (vertical and lateral) naturally rendered by the subjacent minerals and adjacent soil of another person, the right of the owner of higher land that the fall of its surplus rain-water upon the adjacent lower ground shall not be obstructed by the owner of the latter, the right of every riparian owner to the uninterrupted flow (subject to lawful use by others) of a natural stream[8] in

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[7] Radhamohun *v.* Neel Madhub, 24 W. R., 200; David *v.* Grish, I. L. R., 9 Calc., 183; Rakhal *v.* Weston, I. L. R., 10 Calc., 150.

[8] See Illustration (*h*), sec. 7, Act V of 1882. As to the natural right to use the water of a natural stream or lake, by riparian proprietors, for their household purposes, for watering their cattle, and to some extent for irrigating their land, or for the purposes of any manufactory situate thereon, see Illus. (*j*) of the same section; see also Rameshwer *v.* Koonj, I. L. R., 4 Calc., 633, 637, P. C.

It may be here observed, that the right of a riparian proprietor to the use of a stream does not depend on the ownership of the soil of the stream; hence a riparian owner on a navigable and tidal river, in addition to the right connected with navigation, to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation. Tudor, p. 195; Lyon *v.* Fishmonger's Company, 1 App. Cas., 162.

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its natural state, are, when recognized by custom or the law of the land, instances of such *accessorial* rights. These rights, which are very like easements proper, are generally called 'natural rights,' and are sometimes described as 'natural easements.'[9]

The right of every owner of land to so much light and air as pass *vertically* thereto is an ordinary right of property, based upon the maxim *cujus est solum, ejus est usque ad cœlum et inferos.*[10] The right to light and air in its natural state transmitted *laterally* over and from a neighbouring estate, differs from the right to natural streams of water. The first and paramount right which the ownership of land seems to give, is that of doing what the owner pleases thereon, either by building or otherwise; and therefore he has by such primary right the power of obstructing the lateral passage of

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As to the difference between the ordinary use of the water of a flowing stream (for original purposes), and the extraordinary use of the water (for manufacturing or irrigation purposes), see Miner *v.* Gilmour, 12 Moore, P. C., 131, 156; and Ormerod *v.* Todmordon Mill Co., 11 Q. B. D., 155, 168, 172; Sardowan *v.* Hurbans, 11 W. R., 254.

Any user of water by a *non-riparian* proprietor, even under a license or a grant of an easement from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian owners. Ormerod *v.* Todmordon Mill Co., 11 Q. B. D., 155.

As to the natural right of discharging rainfall by natural means through a natural watercourse passing through another's land, see Khetter *v.* Prossunno, 7 W. R., 498. As to the flow of surface drainage water from higher lands, see W. R., Special Number, F. B., 25. See also Kopil *v.* Manick, 20 W. R., 287, as to water naturally falling on one's land running off over adjoining land of a lower level. I. L. R., 1 Mad., 335.

[9] See the judgment of Lord Selborne in Dalton *v.* Angus, 6 App. Cas., 740; Goddard, p. 3, note (c). Easements proper are also *accessorial* rights trenching upon the liberty of others, but they are *not* incident to the ownership of land.

[10] "Whose is the soil, his it is even to heaven and to the middle of the earth."— *Wharton.*

light and air from over his own land to adjacent lands.[1] But the owner of such lands may *acquire* (as an easement proper) the right to prevent such obstruction, by grant or prescription. The right to light and air transmitted *laterally* is, therefore, not a *natural right*, unless recognized as such by special customs. Support to that which is *artificially* imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be *acquired*, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it. But the right to support of *buildings*, when *acquired*, is the same in character as the natural right to support of *land*.[2]

An easement, in the words of Mr. Gibbons, is rather a fringe to property than property istelf. So far as the *dominant* owner is concerned, it is something superadded to the ordinary and natural rights of property. It is a privilege *exceeding* what would of common right belong to the owners of lands and tenements as such. It is some advantage derived by one tenement from or upon a neighbouring tenement, *greater* than what would naturally and ordinarily belong to the former. 'Natural Rights' (that is, the accessorial rights which are sometimes called 'natural easements'), like the ordinary rights of property, are secured to the landowner by the common law of the country.[3] They are inherent in the land *ex jure*

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[1] Broom and Hadley, Vol. II, p. 40; Goddard, p. 32.

[2] See 6 App. Cas., p. 792.

[3] See Goddard, p. 2. In the report of the Law Commission on the codefying bills, 1879-80, the ordinary rights of property as well as the accessorial natural rights are called 'natural rights.' In the Statement of

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naturæ, of *natural* right. They owe their origin to the disposition and arrangements of Nature, are more purely negative[4] in their character, and though susceptible of being suspended by adverse easements, are incapable of being extinguished permanently, inasmuch as they *revive* on the extinction of such easements.[5]

As regards the *servient* heritage, Easements are *restrictions* of the 'ordinary rights' of property, or of the accessorial rights called 'natural rights.'[6]

Easements are not given to *every* owner of land, but are created by *special* human acts or incidents. They may be either positive rights to do something on another's land, or negative rights to prevent something being done on his land. Natural rights need no age to ripen them, nor any particular incident to create them. A 'natural right' is an incident of property, not acquired by long and continuous

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Objects and Reasons appended to the Easements Bill, both these classes of rights are described as "rights incidental to the ownership of immoveable property."

[4] But the natural right to support of land, and the right to discharge surplus rain-water, *partake* of the character of *positive* easements.

It may be further observed that there can be no "natural rights" *in gross* over another's land, and that there are no *natural* profits *a prendre*, in respect of *another's* land. The right of the public to fish in the sea is, however, sometimes treated as a *natural* profit *in gross*. But such a right is neither a servitude nor a right of *property*. See I. L. R., 2 Bomb., pp. 51, 52, and 53. There are also no *natural* rights of way. (Goddard, p. 68.)

[5] See Gale, pp. 2 & 3; Goddard, p. 356. *A's* natural right to build on his own land may be suspended by *B's* easement to the access of light. but it will not be extinguished thereby. A natural right (as well as an easement) may, however, be *abandoned* by the dominant owner. (Khetter Nath *v.* Prossunno, 7 W. R., 498.)

[6] See sec. 7, Act V of 1882, which gives ten instances of these two classes of rights.

user, and in no way dependent on the consent, express or implied, of the owner of the servient heritage. It is in the words of Justice Innes, "a right of vicinage attaching to the situation of the tenement." Easements proper are *conventional*, and must be *acquired* by grant, prescription or other means.

Nuisances and disturbances of easements.

Annoyances caused by infringements of natural rights are called (private) *nuisances*. Those caused by infringements of easements are called *disturbances*. Repeated acts amounting to *nuisances* may in course of time confer prescriptive easements inconsistent with natural rights.[7]

Easements distinguished from licenses.

A lease of *B's* land to *C*, gives *C* an interest, or a (limited) right of property in *B's* land. An easement acquired by *C* over *B's* land does not give *C* any right *to* *B's* land or *to* any *corporeal* interest therein; but *C* acquires an irrevocable incorporeal right over *B's* land to *do* something or to *prevent* something being done on such land, for the beneficial enjoyment of *C's* own lands. Under particular Acts (*e.g.* Act XIV of 1859 and the Statute of Frauds) an easement may be treated as an *interest* in land, but a mere license is never so treated. A license is a right *in gross* granted to the licensee to *do*, upon the licenser's immoveable property,[8] something

[7] Gale, pp. 482, 633; Innes' Digest, 54. In the English law, the term "nuisance" is applied to *both* classes of annoyances. Strictly speaking, the term should be confined to the *first* class of annoyances.

If the transmission of impure air from *A's* land is submitted to for twenty years by his neighbour *B*, *A* acquires an easement inconsistent with *B's* natural right.

[8] See Ch. VI, Act V of 1882. There may be a license to do a thing upon the licensee's *own* land, *e. g.*, to build on his land so as to obstruct the licenser's easement over such land. A loan of specific *moveable* property often amounts to a mere license. A license to practise a profession has

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which would be otherwise unlawful. This right of the licensee is revocable at the pleasure of the licenser (except under certain circumstances),[9] is not enforceable against the licenser's transferee, and cannot, in general, be transferred by the licensee or exercised by his servants or agents.[10] A right of easement cannot be revoked at the will and pleasure of the grantor.[1] It is available against all the world, and may be transferred by the party entitled thereto along with the land to which it is appurtenant. A servitude may be appurtenant or in gross, an easement is a right appurtenant, while a license is a right in gross. An easement may be positive or negative, while a license is only positive. An easement is, generally, permanent, while a license is generally temporary. Besides, a license to do acts may be determined *individually* as well as by class, while an easement is a right to put the land generally to uses of a definite *class*, and not merely to uses determined specifically or individually.[2] *A*

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nothing to do with any *property*. These, however, are not 'licenses' within the meaning of Act V of 1882.

[9] A license *may* be called a *right*, because it has a continuing incorporeal existence *so long* as it is not revoked by the grantor, and also because its enjoyment cannot be hindered by strangers (see Goddard, p. 4). "A license merely excuses the act when done, is retrospective, and not prospective, in its operation; it begets no obligation on the part of the licenser to keep it in force, and may, therefore, be revoked by him at any moment." Phear on Rights of Water, p. 58. But a license is not revocable *if* it is *coupled with an interest* (*i.e.*, coupled with a transfer of a right of property), or if the licensee has *executed* a work of a permanent character and incurred expenses. See sec. 60, Act V of 1882.

[10] A license to attend a place of public entertainment is, in general, transferable; sec. 56.

[1] In one case only, *viz.*, where the grantor reserves a power to revoke, an easement may be revoked by him; sec. 39, Act V of 1882.

[2] Austin, Lecture, 49.

may have *B's* permission or license to enter or walk over *B's* land once or twice, but such right over *B's* land cannot amount to an easement or a servitude. The privilege of doing *one* particular act on the grantor's land *may* be a license, but cannot be a servitude or an easement. The licensee is entitled to do *or* to continue to do something. But the dominant owner is entitled to do *and* to continue to do something, or to prevent *and* to continue to prevent something being done, upon the servient heritage.[3]

Easements distinguished from customs.

An easement belongs to a *determinate* person or persons in respect of his or their land. A congeries of persons, such as the inhabitants of a locality, unless incorporated as a determinate juristical person, cannot claim an easement. A *customary* right belongs to no *individual* in particular. It may be enjoyed by any who inhabit a particular *locality* for the time being, or who belong to the particular *class* entitled to the benefit of the custom.[4] Easements are, so to speak, *private* rights belonging to particular *persons*, while customary rights are *public* rights, annexed to the *place* in general. A custom for the inhabitants of a particular village to dance or to have horse-races on the land of an individual, or to go on a close and take water from a spring, and other customs, may be valid, if not unreasonable.[5] But the customary right of even an *indi-*

[3] To do and to *continue* to do a thing does not mean the *incessant* or constant doing of the thing. Use perpetually recurring at certain or uncertain intervals is sufficient. The dominant owner should have a right to use the subject an *indefinite number* of times. Austin, Lecture, 49.

[4] Goddard, p. 17.

[5] Gale, p. 20. A right claimed by all the villagers to a profit *a prendre* over another's land cannot exist by custom or prescription. Such a

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vidual of the class is not an easement, unless by virtue of the custom he becomes entitled to an independent right *in respect of his estate* situated in the locality to which the custom belongs, and the right is beneficial to the occupation or enjoyment of such estate.[6] The illustrations to sec. 18 of Act V of 1884 shew that an independent right, to graze one's cattle on the common pasture, or to prevent interference with privacy, may be acquired, in virtue of a local custom, as an easement in respect of some property within the locality to which the custom applies. An easement of this sort is called 'a customary easement.'[7]

Easements distinguished from rights *in gross.*

An easement cannot be severed from the land to which it is annexed and made a *right in gross*.[8] It cannot be transferred *apart* from the dominant heritage.[9] In order to constitute a valid easement, there must exist two tenements or heritages—the servient

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claim is *unreasonable*. See Lord Rivers *v.* Adams, 3 Exch., 361; and Luchmiput *v.* Sadatullah, 12 C. L. R., 382.

[6] Goddard, pp. 19, 20, and 13.

[7] In England, a variable and fluctuating body, like the inhabitants of a certain locality, cannot claim a profit *a prendre in alieno solo*, even by custom. Illustration (*a*) of sec. 18, Act V of 1882, however, would seem to recognize such a claim. In Goodman *v.* Mayor of Saltash, at p. 669, 7 App. Cas., Lord Fitzgerald questioned the wisdom of the English law on this subject as laid down in Gateward's case. But the Calcutta High Court in Luchmeeput *v.* Sadaulla, I. L. R., 9 Calc., 698, considered such a custom unreasonable and therefore invalid.

[8] Goddard, p. 10. The *benefit* of an easement passes *with* the dominant tenement, as the *burthen* of it passes *with* the servient. 9 L. R., Ch. App., 474.

[9] Sec. 6, Act IV of 1882. But the owner of one heritage may *grant* an easement to the owner of a neighbouring heritage. An easement may be granted separately, and apart from any conveyance of the would-be dominant heritage when such heritage *already* belongs to the grantee. Few cases, however, are to be found in the books of an instrument granting an easement *per se*. Gale, p. 84.

and the dominant.[10] There must be the land *a qua* and the land *in qua*. If a person prescribes for an easement, he must claim it 'in a *que* estate' (that is, in himself and those whose *estate* he holds[1]), and claim *such things only* as are incident or appurtenant to lands, for it would be absurd to claim anything as an appurtenance to an estate with which the thing claimed has no connection.[2] The easement (whether acquired by grant or prescription) must be for the beneficial enjoyment of the dominant *heritage*, and not for some *general* benefit of its owner, *unconnected* with the enjoyment of such heritage.[3] The expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity.[4] A right to let off, upon the neighbouring land, water which had been rendered noxious by a particular use thereof on the dominant premises, may be acquired as any other easement; but a claim by the owner of a house to discharge foul water *simpliciter* cannot be claimed as an easement.[5] A right to cut wood on another's land is not an easement, unless the wood when cut is to be used on or for the benefit of a dominant heritage.[6]

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[10] "Probably, however, in the English as in the Civil law, the grant of an easement in respect of a house *about to be* built or purchased, by the grantee, would enure as such." (Gale, p. 11.)

[1] Not in himself and his *ancestors*. An easement passes *with* the dominant estate to the owner of such estate. A servitude *in gross* passes to the heirs and legal representatives of the person who acquires it.

[2] Wharton's Law Lexicon.

[3] Broom and Hadley, Vol. II, p. 33; Gale, p. 14; sec. 21, Act V of 1882.

[4] Sec. 4, Expl., Act V of 1882.

[5] See Wright *v.* Williams; Gale, p. 271; and Bailey *v.* Stevens; Broom and Hadley, Vol. II, 34.

[6] Goddard, p. 14; Illustration (*d*), sec. 4, Act V of 1882.