Salmond on Jurisprudence

TWELFTH EDITION

P J Fitzgerald

Universal Law Publishing Co. Pvt. Ltd.

JURISPRUDENCE

SALMOND

ON

JURISPRUDENCE

TWELFTH EDITION

BY

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INDIAN ECONOMY REPRINT 2002

Universal
Law Publishing Co. Pvt. Ltd.

Jurisprudence *Salmond*

First Edition	(1902)	By Sir John Salmond
Second Edition	(1907)	
Third Edition	(1910)	
Fourth Edition	(1913)	
Fifth Edition	(1916)	
Sixth Edition	(1920)	
Seventh Edition	(1924)	
Eighth Edition	(1930)	By C.A.W. Manning
Ninth Edition	(1937)	By J.L. Parker
Tenth Edition	(1947)	By Glanville Williams
Eleventh Edition	(1957)	
Second Impression	(1960)	
Third Impression	(1963)	
Twelfth Edition	(1966)	By P.J. Fitzgerald
Second Impression	(1970)	
Indian Economy Reprint	**(2002)**	

ISBN 81-7534-263-X

UNIVERSAL LAW PUBLISHING CO. PVT. LTD.
C-FF-1A, Ansal's Dilkhush Industrial Estate,
G.T. Karnal Road, Delhi-110 033
Tel : 7215334, 7438103, 7458529
Fax : 91-11-7459023
e-mail : unilaw@vsnl.com
Website : www.unilawbooks.com

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SWEET & MAXWELL LTD., U.K.

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Mrs. A.L. Gillingham,
Wellington, New Zealand

Printed in India at Gopsons Papers Ltd., Noida

DEDICATION OF SEVENTH EDITION

[By the Author]

TO THE MEMORY OF

MY SON

WILLIAM GUTHRIE SALMOND

A CAPTAIN IN THE NEW ZEALAND ARMY,

WHO IN FRANCE ON THE 9TH DAY OF JULY, 1918,

GAVE UP HIS LIFE

IN THE TWENTY-SIXTH YEAR OF HIS AGE.

PREFACE

ANYONE editing a standard textbook is constantly forced to choose between preserving the original and altering and adapting it to developments in legal thought and practice. The latter has been the policy adopted by previous editors of *Salmond on Jurisprudence*, who regarded the work as a living textbook rather than a dead classic. In this they were surely right, for, notwithstanding the value and importance of Sir John Salmond's own personal views and theories, the chief requirement of a student's textbook is that it should deal with and take into account all those aspects of the subject which he has to study. With this requirement in view I have followed my predecessors' policy and have not hesitated, where necessary, to introduce major alterations; and indeed such has been the development in jurisprudence over the last ten years that many such alterations have proved inevitable. On the other hand, where possible, I have tried to underline and draw attention to those of Salmond's own views which are particularly important and worthy of attention, though differing from the views adopted in the text.

The major change consists of a complete revision of the chapters on the nature of law. Compared with other textbooks on jurisprudence *Salmond* was relatively reticent about theories of law other than the one held by Sir John Salmond himself. This is hardly justifiable today, for the importance of this part of jurisprudence is such that the student is entitled to demand a more expanded treatment. I have accordingly replaced the first two chapters of the last edition by nine new sections which serve to introduce the student to the problem of defining law, and which discuss in outline some of the chief theories of law and, in particular, the recent approach to this problem adopted by Professor H. L. A. Hart. In addition there have been considerable alterations to the chapters on

Rights, Ownership, Possession and Persons, in order to take account of and profit from the type of linguistic analysis of concepts employed by those who are influenced by what is sometimes termed "Oxford Philosophy."

The increase in length resulting from these changes has been counterbalanced to some extent by the jettisoning of various items which now seem no longer worthy of inclusion. The list of authorities seems to fall into this category, particularly in view of the recent publication of Dias' valuable *Bibliography of Jurisprudence*. The appendices too have been dropped in the interest of space, as have also the summaries at the end of each chapter. There has also been considerable rearrangement of the chapters on Legislation, Precedent, and Liability, though the text itself has been less altered than a glance at the Contents might suggest.

The House of Lords' decision to relax the rule that it is absolutely bound by its own previous decisions was announced too late to be noticed in the text. The best that could be done was to add a short note recording the announcement.

Throughout I have been helped and encouraged by Messrs. Sweet & Maxwell; my thanks are also due to Miss Pat Spencer and Miss Susan Hiley, who produced the typescript of the new parts of the text.

P. J. FITZGERALD.

Leeds University.
July 1966

NOTE

On the eve of going to press we learned of a radical change in the field of precedent. On July 26, 1966, the House of Lords announced that it would no longer consider itself absolutely bound by its own decisions.

The announcement in *The Times*, July 27, is as follows:

"The Lord Chancellor announced the change in a statement in the Lords yesterday, on behalf of himself and the Lords of Appeal in Ordinary. He said:

> 'Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> 'Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> 'In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> 'This announcement is not intended to affect the use of precedent elsewhere than in this House.'

"The statement was made in the presence of Viscount Dilhorne, the Bishop of Chester, Lord Reid, Lord Denning, Lord Parker of Waddington, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce, Lord Upjohn and Lord Wilberforce."

This step is much to be welcomed, as indeed it has been both by the Bar and the Law Society. It does, however, render out of date much of our discussion on precedent in the House of Lords,

though the problem of the logical status of the rule in the *London Street Tramways* case (and of any contrary rule, such as the one announced on July 26) may still remain to plague us, as can be seen from the comment of Mr. H. A. P. Fisher, Q.C., vice-chairman of the Bar Council, who said:

"It is a little difficult to see how the House of Lords can now depart from the law of the land as so stated. It might be thought that only an Act of Parliament can give them the power to reverse their own previous decisions."

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1. The nature and value of jurisprudence

Jurisprudence (*a*) is the name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems. It is a subject which differs in kind from other subjects on the legal syllabus. For the typical legal subject, *e.g.*, contract or tort, consists of a set of rules and principles to be derived from authoritative sources and applied to factual situations in order to solve practical problems. Jurisprudence, by contrast, does not constitute a set of rules, is not derived from authority and is without practical application. One result of this difference is that far less agreement is to be found in different jurisprudence textbooks than in textbooks on other legal subjects, where much the same ground is covered and much the same picture presented, for the simple reason that, whatever the writer's views, the legal rules remain the same, whereas jurisprudence, which is without rules, allows a far greater play to the writer's own personal approach.

Another consequence of this difference is that the method of inquiry apt for jurisprudence will not necessarily be that used in the study and practice of ordinary or typical legal subjects. In jurisprudence we are not concerned to derive rules from authority and apply them to problems; we are concerned rather to reflect on the nature of legal rules, on the underlying meaning of legal concepts and on the essential features of legal systems. Thus, whereas in law we look for the rule relevant to the given situation, in jurisprudence we ask what it is for a rule to be a legal rule, and what distinguishes law from morality, etiquette and other related

(*a*) The word "jurisprudence" has meant many different things at different times. For a discussion of its meanings see A. H. Campbell, "A Note on the Word 'Jurisprudence'" (1942) 58 L.Q.R. 334.

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

Now the basic features of a legal system are chiefly to be found in its authoritative sources, and the investigation of the nature and workings of legal authority naturally forms a subject of jurisprudential inquiry. Here we consider such matters as the pros and cons of codification, the value of a strict system of judicial precedent and the methods of judicial reasoning. In addition to this abstract inquiry we must look, if possible, in more concrete detail at the actual workings of authority within a particular legal system; and for us it is natural to look at that system with which we are most familiar, *viz.*, English law. Here we shall discuss such topics as the canons of statutory interpretation, the rules about the hierarchy of judicial precedents and the elucidation of the *ratio decidendi* of a case; and here to some extent the difference in method between jurisprudence and law becomes negligible, for the aim of our inquiry is to discover the common law rules which can be applied to concrete problems.

Another branch of jurisprudence consists of the analysis of legal concepts. The law of contract and tort is concerned with different rights which one person may have against another. Jurisprudence, on the other hand, studies the meaning of the term "right" in the abstract and seeks to distinguish the various kinds of rights which are in theory possible under a legal system. Similarly it investigates such other legal concepts as "act," "intention," "negligence," "ownership," and "possession." All of these are equally rigorously studied in the ordinary branches of law, but since each of them functions in several different branches of law, jurisprudence tries to build up a general and more comprehensive picture of each concept as a whole. Jurisprudence also examines such concepts against the background of ordinary language, in order to see the relation between lay and legal usage and the extent to which legal problems may be generated by

language itself. In this respect the writer on jurisprudence appears in the guise of a logician, elucidating legal notions, unravelling confusions and constructing syntheses of legal concepts.

But whether discussing the nature of law or the working of authority or the analysis of legal concepts, jurisprudence should not confine itself to logic. Legal theory is concerned with law as it exists and functions in society; and the way in which law is created and enforced, the influence of social opinion and law on each other, the effectiveness of law and the part played by sanctions are all points where jurisprudence meets other disciplines such as sociology, psychology and so forth. For one task of jurisprudence is to link law with other disciplines and so help to locate it within its wider social context. Thus, in analysing legal concepts, we must try to present them against a background of social developments and changing economic and political attitudes. One result of this may be the discovery that principles formerly accepted as self-evident and fundamental to any legal system arose in fact from social and economic attitudes no longer held at the present time. Indeed this kind of inquiry into law is part of the wider problem of investigating the consistency between a legal system and the way of life of the society in which it operates.

Now we have seen that, in general, jurisprudence is a subject without applicability. But if the value of the ordinary legal subject lies in its practical use, what possible value then can there be in an abstract, theoretical subject like jurisprudence? There is of course its own intrinsic interest, in which it resembles any other subject of serious scholarship. Just as, for example, the mathematician investigates number theory, not with the aim of seeing his findings put to practical use, but by reason of the fascination which it holds for him, so the writer on jurisprudence may well be impelled to his subject by nothing more than its intrinsic interest. And this should in no way surprise us, for speculation and theory have a natural appeal, whatever the subject; it is as natural to speculate on the nature of law as on the nature of light. The fascination of a subject however is no

guarantee of its worth. A life devoted to the solution of chess problems seems less worth while than one devoted say to historical or mathematical research, because this has a general sort of relevance to thought and life which chess problems do not possess; number theory has significance for general mathematical thought, which in turn has implications for science, philosophy, logic and indeed the whole spectrum of human thought. Similarly researches into jurisprudence may well have repercussions on the whole of legal, political and social thought.

But jurisprudence is not without practical value, albeit of a long-term character. In science and mathematics progress has been largely due to increasing generalisation, which has unified branches of study previously distinct, simplified the task of both scientist and mathematician, and enabled them to solve by one technique a whole variety of different problems. But in law too generality can mean improvement. The English law, relating to negligence for example, has progressed from a host of individual rules about particular types of situation to a general principle. And indeed one of the tasks of jurisprudence is to construct and elucidate organising concepts serving to render the complexities of law more manageable and more rational; and in this way theory can help to improve practice (*b*).

Finally jurisprudence also has an educational value, since the logical analysis of legal concepts sharpens the lawyer's own logical technique. In addition, the study of jurisprudence can help combat the lawyer's occupational vice of formalism, which leads to excessive concentration on legal rules for their own sake, to interest in legal form rather than in social realities, and to resulting disregard of the social function of law. This is best remedied by setting the law in its proper context, by considering the needs of society and by taking note of advances in related and relevant disciplines. A proper grasp of the law of contract may well need some understanding of economics and economic theory, a proper grasp of criminal law some knowledge of criminology and psychiatry, and a proper grasp of law in general some acquaintance with sociology. English lawyers, rooted as they are in the

(*b*) See Sawer, *Law in Society*, Chap.11.

common law with its worship of precedent, have a natural tendency to turn to history, to look backwards instead of forwards and to regard every question as a historical one. Jurisprudence can teach him to look, if not forwards, at least sideways and around him, and to realise that the answers to new legal problems must be found by consideration of present social needs rather than in the distilled wisdom of the past.

BOOK 1

THE NATURE OF LAW AND THE ADMINISTRATION OF JUSTICE

CHAPTER 1

THE NATURE OF LAW

2. The purpose of legal theory

Since legal theory is in general an attempt to answer the question "What is law?", we may first inquire why it is that so much time and energy should be devoted to this problem. It has been truly observed that no vast literature has been dedicated to answering the analogous question "What is chemistry?" (*a*). What then, we may ask, are the reasons that have motivated this investigation into the nature of law? For these may well throw light on the kind of answer that is sought and the method that is most appropriate to the inquiry.

In the first place it is clear that attempts to define law are not simply the result of that sort of desire for formal elegance which requires that a treatise should begin with a short definition of its subject-matter. True, some writers such as Austin (*b*) and Kantorowicz (*c*) appear to have regarded the definition of law in this way as merely preliminary to their further work on jurisprudence. In the event however the former devoted six lectures and the latter eighty-nine pages to the task. The need for formal elegance alone will hardly explain this sort of treatment.

It could be argued that the need to provide a definition of law springs from the necessity of clarifying the most basic of all legal concepts, the concept of law itself. For if jurisprudence is concerned with the analysis of legal concepts, surely the first problem is to analyse the basic concept. Further, it might be argued that this is no mere theoretical matter but one of practical legal significance. Perennial questions such as whether international law is really law and whether an unjust law can really be

(*a*) H. L. A. Hart, *The Concept of Law* 1. The analogy is not altogether appropriate, for chemistry is but one branch of science, and a vast literature is dedicated to the nature of science itself.

(*b*) Austin regarded it as necessary to define law in order to establish the province of jurisprudence. His introductory lectures on this topic were eventually published as *The Province of Jurisprudence Determined*, in 1832.

(*c*) Kantorowicz, *The Definition of Law* (ed. A. H. Campbell, 1958) was written as the first part of an introduction to a projected co-operative comprehensive *Oxford History of Legal Science*.

law can only be solved, it is sometimes claimed, by reference to the definition of law (*d*).

This argument, however, is misconceived. The fact is that "law" itself is not a legal concept any more than "geometry" is a geometrical concept (*e*). In geometry the mathematician calculates or operates with certain geometrical concepts such as "circle," "triangle," "parallel" and so on, but the concept of geometry itself is not included within this framework, nor does he perform any operations with it. Likewise, in law we find such legal concepts as "consideration," "possession" and so on, used by the lawyer to draw conclusions and solve legal problems, but the concept of law itself is not one that figures in legal argument or gives rise to conclusions of practical significance: no legal judgment ever hinges on the definition of law. "What constitutes consideration?" is a typical legal question of practical importance; "what is law?" is a theoretical question, not a question of law but a question about law. Consequently the standard procedure used to construct a definition of a legal concept, mapping out its boundaries by references to statutes and judicial decisions, will not apply to the problem of defining law itself. Conclusions of law do not depend on the definition of law, and legislators and courts, concerned as they are with practice rather than theory, have not therefore sought to lay down definitions or clarifications of this concept.

Nevertheless, it could be argued, this merely means that the vast majority of legal problems entail no reference to the concept of law; it does not mean that the concept is entirely without practical significance. How, without a definition of law, can we decide such practical matters as whether international law is law and whether an unjust law is law? And are not these questions of more than theoretical importance? Yet the existence of this kind of problem does not entail that the definition of law has itself a practical *legal* use. This would only be the case if lawyers and courts were to decide actual legal cases by reference to a definition of law. Now we do on occasion find courts faced with the task of

(*d*) This claim is made by Goodhart in "*An Apology for Jurisprudence*" in *Interpretations of Modern Legal Philosophies* (ed. Sayre, O.U.P., New York, 1947), Chap. 12.

(*e*) "Law is no more a legal concept than courage is a courageous concept" —Buckland, *Some Reflections on Jurisprudence*, p. vii. But Buckland's comparison is unfortunate because the term "courageous concept" has little meaning.

deciding whether or not to apply for example a rule of international law. In such cases, however, courts do not begin by defining law in order to decide whether or not international law is law. What they do in fact is to inquire whether there exists within the framework of international law such a rule as is claimed (*f*); and if the court is a national court, this may be followed by a further inquiry whether such a rule must be applied by the national court (*g*), and this will depend on those rules of the national law that govern the application of international law. Similarly, we occasionally find courts urged to refuse application to some law on the ground of injustice. Here again, however, courts do not begin by defining law in order to determine whether an unjust law can qualify as law. If a court does refuse to apply the rule in question, this may be because its injustice contravenes a fundamental rule of the state constitution, as may happen for instance when the United States Supreme Court declares a statute to be void (*h*). Or it may be because its injustice runs counter to the fundamental policy of the state's own legal system, as where an English court refuses to apply foreign laws repugnant to the distinctive policy of English law (*i*). Or again a court may be able to avoid the injustice of a rule by modifying it in accordance with established canons of statutory interpretation (*j*). But in none of these cases is the concept of law itself used as a touchstone of the legality of legal rules.

This type of question, then (whether international law or an unjust law can really be law), has practical significance; but its significance lies outside the law and law courts, and the answer is connected with, but not dependent on, the definition of law.

But if law is not a legal concept, it is nevertheless the basic concept of jurisprudence (*k*), and its analysis is relevant to that

(*f*) See for example the *Asylum Case*, I.C.J. Rep. 1950, p. 276, where the International Court of Justice investigated whether an alleged custom showed a general practice accepted as law.

(*g*) English courts regard international law as part of English law, subject to certain qualifications, one of which is that international law must yield before an Act of Parliament. See Oppenheim, *International Law* (8th ed.), 39–41.

(*h*) See the discussion of *Marbury* v. *Madison*, 1 Cranch 137; 2 L.E.D. 60, (1803) in Evans, *Cases on Constitutional Law* (7th ed. 1957) 48 *et seq.*

(*i*) See Cheshire, *Private International Law* (7th ed.), 134–142.

(*j*) According to the " Golden Rule " of statutory interpretation (*infra*, § 25), the court may depart from a literal interpretation of a statute, if adherence to the literal meaning would lead to an absurd or wholly unreasonable result.

(*k*) See B. E. King, " The Basic Concept of Professor Hart's Jurisprudence " [1963] C.L.J. 270.

of all other legal concepts. Such legal notions as "right", "possession" and so on can largely be explored without reference to the concept of law, but in the end completeness involves reference to this. For legal rights have to be distinguished from other (non-legal) rights, possession in law from possession in fact and so on; and this leads back to the definition of law itself.

But the desire to define law springs also from a desire for generalisation. Having learnt to define various specific crimes, we find it natural to ask for a general definition of the notion of a crime. Likewise, knowing how to tell whether a proposition is a valid proposition of English law, French law or any other system of law, we feel it natural to take the further step of looking for a general test of legality and searching for some abstract criterion by which to determine the validity of a rule of law (*l*). In so doing we are also in fact trying to set up an abstract model of a legal system at work in society, just as an economist for example seeks to construct a model of an economic society (*m*). And the model so produced may, if not oversimplified and misleading, afford insight into the workings of concrete legal systems.

Furthermore, the word "law" is one high in emotive content (*n*). Refuse to classify unjust laws as law, and the citizen will feel more free to disregard them; cease to describe international law as law, and much of its prestige and effectiveness is gone; designate a rule of constitutional law a mere convention, and its obligatoriness diminishes. Accordingly, whether or not to apply the term "law" to such phenomena may not be a strictly legal question, but it is one of considerable non-legal or political importance.

Now one reason why the definition of law has consumed so much time and energy is that this notion is itself surrounded with philosophical perplexities (*o*). In the first place the traditional method of definition is inadequate for the concept of law. The traditional method is to define something by specifying the class to which it belongs and by describing the features which distinguish it from other members of this class. For example, we

(*l*) See R. Wollheim, "The Nature of Law" in (1954) 2 *Political Studies* 128; see Lloyd, *Introduction to Jurisprudence* (2nd ed.), 46–48.

(*m*) See G. Sawer, *Law in Society*, 1–2.

(*n*) See Glanville Williams, "International Law and the Controversy concerning the word 'Law'" (1945) 22 B.Y.I.L. 146.

(*o*) See Hart, *op. cit.* 6–17.

may define a man as a rational animal, locating him within the animal kingdom but differentiating him by his rationality from the other members of that kingdom. Of course we could define law as a species of rule and set out what distinguishes legal from non-legal rules. But such a definition would be largely inadequate simply because so much of the difficulty in defining law stems from the problem of explaining exactly what rules are. We know what law is and what rules are, but yet we find it hard to explain their nature. Like a traveller who knows his way from point A to point B but lacks a complete grasp of the geography of the country, we need a logical map to orientate us in this conceptual territory. We need to learn to distinguish between conduct enjoined by law and conduct compelled by force; we need to discover the inter-relation between law and morality, to ascertain whether conformity with morality is an essential part of the nature of law.

What emerges then is that no neat and simple definition of law will do. If law were a legal concept, it might be useful to lay down clear boundaries between what shall and what shall not count as law, just as in the law relating to burglary it is useful to draw up a precise definition of the term "night time"(p). But the fact that the concept of law has no practical application precludes the need for this kind of definition. Nor on the other hand would such a definition solve any of the perennial problems, such as whether international law is law. To this question it is no answer to say that it all depends on how you define law, that international law is law in A's sense and not law in B's; for the question remains whether it is law in the ordinary sense of the word. Nor again would a short, simple definition provide an adequate analysis of a rule, an examination of the difference between legally obligatory conduct and conduct coerced by force, or an investigation into the connection between law and morality.

What we need is an analysis to unravel the confusions surrounding the concept of law, to highlight the salient features of a legal system and to furnish us with an insight into the nature, function and operation of law. Here the various theories of law advanced by legal theorists are of particular value, for they not only constitute a starting-point for our investigation but also

(p) "Night" is defined by s. 46 of the Larceny Act, 1916, as the hours between 9 p.m. and 6 a.m.

serve to emphasise the different facets of law and so build up a complete and rounded picture of the concept.

It should be noted, however, that these different theories are not necessarily all attempts to answer the same question. Some theories try to define law by reference to its formal characteristics and to state what distinguishes law from other related phenomena. Others concentrate rather on the content of law and inquire what law ought to be rather than what it is. Yet others stress the operation of law in society and attempt to describe the function of law as it works in actual practice. Conflicts between such theories then are not altogether real, in so far as each theory is dealing with a slightly different aspect of law.

Nevertheless real conflict does arise. Obviously a theory defining law as the command of the sovereign is diametrically opposed to one which defines law as a rule in accordance with right reason. Less obviously, however, this kind of conflict cannot be solved in the same way as ordinary conflicts. For the disagreement here is not one of fact but one of attitudes. o matter how many examples we provide of rules commonly designated legal albeit not laid down by a sovereign, the adherents of the " command " theory will not budge from their allegiance but will reply that such counter-examples are not really law. Conversely, however many unjust laws have been enacted, the supporters of the " right reason " theory remain unmoved and they in their turn will discount all such examples as violations of law rather than true law. Yet since both sides are agreed as to the facts about society and about legal systems, to treat the dispute as one to be resolved by further evidence is to mistake its nature. Rather we should reflect that whatever the theory the facts remain the same; and we should ask, therefore, what has led different writers to put forward such different pictures of law, and which features of law are illuminated, and which obscured, by each theory

In an elementary textbook we cannot investigate each different theory of law. Indeed this would reduce the text to nothing but a catalogue of what all other writers on jurisprudence have said. Instead, we shall consider three particular approaches to law on account of the influence which they have had and the insight which they provide into the nature of the law. These are the theory of natural law, which defines law according to its

content and looks to the problem of what law ought to be; the imperative theory, which defines law according to formal criteria; and the realist theory, which defines law in terms of its actual functioning and operation. The discussion of these three theories will be followed by an examination of the problem from the standpoint of modern linguistic philosophy and in the light of Hart's analysis.

3. Law as the dictate of reason: natural law

The idea that in reality law consist of rules in accordance with reason and nature has formed the basis of a variety of natural law theories ranging from classical times to the present day (*q*). The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. This connection enables us to ascertain the principles of natural law by reason and common sense, and in this the natural law differs from rules of ordinary human law (positive law) which can be found only by reference to legal sources such as constitutions, codes, statutes and so on. But since law can only be true law if it is obligatory, and since law contrary to the principles of natural law cannot be obligatory, a human law at variance with natural law is not really law at all, but merely an abuse or violation of law.

The attractions of the theory are self-evident. Ordinary laws all too often fall short of the ideal, and from the celebrated protest of Antigone (*r*) against the tyrant's unjust decree to the rejection at Nuremberg (*s*) of the defence of superior orders, men have felt the need of an appeal from positive law to some higher standard. Just such a standard is provided by natural law, which

(*q*) There is a vast literature on Natural Law. For a general view see d'Entrèves, *Natural Law*; Friedmann, *Legal Theory* (4th ed.), Chaps. 5–12; Jolowicz, *Lectures on Jurisprudence*, Chaps. 2–5; Lloyd, *The Idea of Law*, Chaps. 3–4; Hart, *The Concept of Law*, Chap. 9; Dias, *Jurisprudence* (2nd ed.), Chap. 20.

(*r*) Sophocles, *Antigone*, 453–457.

(*s*) See Lord Wright, "War Crimes in International Law" (1946) 62 L.Q.R. 40.

with its battle-cry "*lex injusta non est lex*" has served to criticise and restrict positive law.

Natural law also serves as a defence against ethical relativism. Indeed the idea of natural law (*t*) originated in answer to a philosophical theory which challenged the obligatoriness of all human rules and even of law itself. This theory arose out of the celebrated distinction drawn by Greek philosophers between occurrences regulated by laws of nature, *e.g.*, the growth of plants, the movements of the heavenly bodies and so on, and conventional phenomena dependent on human choice, *e.g.*, human customs, manners and fashions. On this view, rules of law, like those of language or etiquette, appeared ultimately to depend not on natural necessity but rather on pure historical accident and convention; and, being arbitrary and contingent rather than necessary and obligatory, they seemed to have no special claim to obedience. It was in answer to this that Aristotle pointed out that while some laws seemed to be purely conventional, others seemed to be common to all states (*u*). The laws relating to ransom for example varied from city to city, an arbitrary sum being set by the law of each state, whereas the law that heralds were inviolable was common to all city states, as though it were natural for all men to have such a law. The very distinction which had threatened to discredit law was shown in fact to apply within the context of law itself, which was accordingly distinguishable into conventional and natural law.

This, however, was but the germ of a natural law theory. The real construction of a theory was the work of the Stoic philosophers of the following centuries. Their philosophy was that man should live according to nature and that since the distinctive feature of man's nature was his endowment with reason, this meant that he should live according to the dictates of reason (*v*).

(*t*) See Jolowicz, *op. cit.* Chap. 2

(*u*) Aristotle, *Nicomachean Ethics*, 1134b-1135a; Lloyd, *Introduction to Jurisprudence* (2nd ed.), 70.

(*v*) *Cf.* Cicero, *De Republica*, III, 22–23, "There is indeed a true law (*lex*), right reason, agreeing with nature, diffused among all men, unchanging, everlasting. . . . It is not allowable to alter this law, nor to derogate from it nor can it be repealed. We cannot be released from this law, either by the praetor or by the people nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law to-day and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law"; Lloyd, *op. cit.* 70–71.

Now one attraction of natural law theory is the possibility which it promises of finding common moral ground for different religions and different outlooks. Though Christianity, like Judaism, derived many of its moral tenets from divine revelation, nevertheless St. Paul had taught that conscience unaided could arrive at moral truths (*w*). On this foundation the medieval theologians were able to synthesise Christian doctrine with much of the teaching of non-Christian philosophers. According to Aquinas, for example, all things are governed by God's eternal law, man differing from all else in that he alone can choose whether or not to obey that part of the eternal law which applies to him (*x*). This latter part of the eternal law is the natural law, discoverable by reason and quite distinct from the revealed portion of divine law. This means that Christian and non-Christian alike can arrive at the same moral truths, since discovery of the natural law is independent of belief in the existence of a divine being. Indeed later philosophers considered the validity of natural law to be independent of the existence of the deity (*y*). But whereas the medievalist had viewed natural law from the standpoint of man's function and duties, later philosophers such as Hobbes and Locke were concerned rather with man's rights, and sought to derive from the characteristics of human nature certain natural or fundamental rights (*z*).

The idea of natural law, however, raises formidable difficulties. These centre round the problem whether moral propositions can be derived from propositions of fact, whether an "ought" can be deduced from an "is." The value of being able to make such a derivation is that factual propositions can be established as true and are therefore less open to disagreement than moral propositions. Men may disagree about whether euthanasia is justifiable, but not for example about whether arsenic is poisonous. Accordingly, if moral propositions could be deduced from factual propositions, we could establish moral truths commanding general agreement.

The difficulty is that the inference of a moral proposition from

(*w*) See *Romans*, II. 14–15.
(*x*) Aquinas, *Summa Theologica*, 1a–2 ae. xci. 2, and 1a–2 ae. xcv. 2; Lloyd, *op. cit.* 76—79.
(*y*) Grotius, *De Jure Belli ac Pacis*, proleg. 11.
(*z*) See Hobbes, *Leviathan*, Chaps. 14–15; Locke, *Treatise of Civil Government*, Bk. II; Lloyd, *op. cit.* 79–82; Hume, *Treatise of Human Nature*, Bk. III, part 2; Hart, *op. cit.* 189–195.

a factual statement is not apparently one of strict logical necessity (*a*). In a strict logical inference it is impossible to affirm the premise and deny or even question the conclusion. For example it is impossible to affirm that an object is red and at the same time deny that it is coloured without arriving at a self-contradiction, because the notion of being red includes, as it were, the notion of being coloured. By contrast, whatever factual proposition is used as the premise for an ethical conclusion, the premise can be affirmed and the conclusion denied without producing a self-contradiction. Take for example this argument: "if anyone shows you kindness, you ought to repay him with kindness". Here the conclusion seems to follow naturally enough from the premise, but we can affirm the latter and deny the former without illogicality: "Smith has always shown me kindness but I am not morally obliged to repay him with kindness" may strike us as odd but hardly self-contradictory. Further examination, however, of the problem of bridging the gap between factual and moral propositions is outside the scope of the present discussion, which is confined to the way in which natural law theory seeks to bridge this gap.

The way in which natural law seeks to do this is by arguing that if it is a natural law for man to act in a certain way—and this is something which observation can reveal—then he ought morally to act in this way. If for example it is a natural law for mankind to reproduce itself, then men should beget children. It would be no more right for men to act contrary to this law than for trees not to bear fruit, for each would be acting contrary to their nature.

Bentham (*b*), who regarded natural law as nothing but a phrase, and natural rights as "nonsense on stilts" considered that natural law reasoning resulted from confusing scientific laws with moral and legal laws. Scientific laws describe what generally does occur; moral or legal laws prescribe how men *should* behave. The law of gravity, for instance, is a general description of how things do behave, and any discrepancy between the law and

(*a*) The *locus classicus* on the gap between "ought" and "is" propositions is Hume, *op. cit.* 469; see Toulmin, *The Place of Reason in Ethics*, Chaps. 7–8, for a criticism of the view that moral arguments are defective, because they are not deductive: Toulmin points out that scientific arguments too are not deductive but are nonetheless valid. Lloyd, *op. cit.* 28.

(*b*) See Bentham, *A Fragment on Government*, Chap. 4; Lloyd, *op. cit.* 127–128.

observed phenomena means, not that the law of gravity has been broken, but that our theory of gravity must be revised to fit the facts. Accordingly, it is fallacious to argue from natural laws of a scientific type to natural laws of a moral type. To say that it is natural law for man to have children, means merely that this is his general tendency, not that he is under any moral or legal duty to conform to this tendency.

But this attack is not altogether well founded. Even if scientific laws are descriptive, it is still open to the natural lawyer to contend that they describe not merely how things do behave, but the manner in which it is ordained that they must behave. In other words he may argue that the creator has imposed a law on things, a law to which they (unlike men) are under perfect obedience. Discrepancy between observed phenomena and the law of gravity would then mean simply that we had not yet succeeded in accurately discovering the law actually ordained. Here then is no necessary confusion of scientific and moral law.

Moreover, such criticisms overlook the teleological flavour of natural law thinking (*c*). To the Greeks, it seems, regular occurrences, such as the growth of acorns into oaks, were more than just examples of regular behaviour patterns; they exemplified the fulfilment of a natural function. It was regarded as the function of an acorn to develop into an oak, this development being the natural goal or end towards which it had to strive. Likewise it was the function of smoke to rise, fire to burn, stones to fall and so on. Man, too, according to this view had his own proper function, his own end or goal, which, whether it be regarded as divinely given or not, could be discovered by reason and reflection. Indeed it is worth noting how much of these teleological overtones still remain in our ordinary language today. We consider it the *function* of the white blood corpuscles to kill harmful bacteria, of the kidneys to cleanse the blood of waste matter, of the lungs to oxygenate the blood and so on.

Natural law arguments then are of the following pattern. Everything has its proper function, and so to be good of its kind it must fulfil this function. For instance, the proper function of a watch is to indicate the time correctly, and so to be any good as a watch it must do this. Likewise, man too has his own proper

(*c*) See Jolowicz, *op. cit.* Chap. 2; Hart, *op. cit.* 182–189.

function which can be ascertained by reflection on the nature of man, his needs and his wants, and so to be a good man he must fulfil this particular function. How man must act in order to do this is laid down in moral principles discoverable by reason and common sense.

But the analogy between man and an object like a watch is misleading. To ascribe a function to a watch is to say that it was made or is used for some particular purpose. This analogy can only hold, if we can say that man has been given a purpose by his maker. But any argument based on this premise is in one respect disappointing. Part of the attraction of natural law was its guarantee that pure reason could arrive at moral truths which are indisputable. But a natural law theory based on the idea of a God-given function must begin by either proving or assuming the existence of God; and the problem of proving God's existence by reason alone is as difficult as that of deducing an "ought" from an "is", while to found the theory on an assumption rules out the hope of finding truths beyond dispute, because assumptions need not be universally accepted.

On the other hand we do use the term "function" without necessarily implying the existence of a maker or user; we may use the term to refer merely to the job which a thing performs. We speak of its being the function of the heart to pump blood, meaning only that the heart does in fact pump blood. Likewise to say that it is man's function to reproduce could mean merely that the human species is in fact self-reproducing. But this purely factual statement does not entail any moral proposition; there is no necessary truth of morals that what is should continue to be. Sometimes, it is true, the term "function" may be used to denote the job which a thing *ought* to perform, but statements using the word "function" in this sense are really concealed "ought" propositions and not indisputable factual propositions.

The attempt to derive natural law from a metaphysical theory based on the notion of function cannot it seems, succeed. An alternative argument is that the propositions of natural law are self-evident. Certainly such propositions as "it is wrong to make others suffer", "it is wrong to kill", do seem to be self-evident, the sort of things we know, as it were, by instinct. But this is a retreat from the more attractive claim that such propositions can be proved. For here the argument is that everyone knows such

moral truths as "killing is wrong", just as everyone knows such logical truths as "if A = B and B = C then A = C" Anyone who could not see that the latter statement is true would be judged abnormally stupid, if not wholly irrational. Likewise, so runs the suggestion, anyone contending that there is nothing wrong with killing would be reckoned for that very reason lacking in moral sense. In both cases, exceptional dissention is no refutation of the self-evident truth of the statements. There is, however, an important difference. With logical truths it is only the exceptional individual who fails to see their validity; otherwise they seem to enjoy a continuity of general acceptance. In morals, no such continuity of thought and no such general agreement is to be found. Indeed whole societies may differ on such questions: for example modern Western European society would not accept the ancient Greek view that slavery is justifiable. Attitudes to moral propositions, unlike attitudes to the truths of logic, vary with time and place, and this makes it difficult if not impossible to contend that such principles are in fact self-evident.

One attempt to salvage the theory involves the idea of natural law with a varying content (*d*). On this view the basic principles remain the same, but their detailed application would depend on the special circumstances of each society. The fact that ancient Greek society was largely unmechanised as compared with society in present-day Europe would affect the application of any general principle to the effect that a man is an end in himself and ought not to be used as an instrument by others. One difficulty here, however, is that the chief social difference for which allowance may have to be made may be a difference in moral attitude. The greatest difference between one society and another might well be simply the fact that the one accepts, and the other rejects, slavery, the colour bar, and so on. In such cases to allow the content of natural law to vary according to social differences would be to abandon any hope of objectivity in ethics or law.

Yet another approach is to start from a consideration of man's needs, desires and nature, and from this to construct a set of appropriate principles, *i.e.*, principles necessary to satisfy those needs (*e*). Human nature has certain obvious characteristics. For

(*d*) The chief exponent of this view was Stammler. See Stammler, *Theory of Justice*; Lloyd, *op. cit.* 84–85.

(*e*) *Supra*, p. 17 n. (*s*).

example, man is peculiarly vulnerable; he requires food, shelter and clothing in order to survive; he needs to live in societies. Given man's general commitment to survival and to the continuance of society, we can work out a rudimentary set of principles to satisfy these needs and support survival. Rules prohibiting violence, rules to protect the institution of family life, rules concerning property and so on will obviously be necessary. But such a basic theory of natural law does not carry us very far. It provides us only with a series of blank cheques, as it were: some rules about violence, some rules about family law, some rules about property are required, but we are not told which. All that the theory really does is to indicate topics of law rather than to provide actual legal rules.

Despite these objections to natural law, there remains a wide measure of agreement between natural lawyers and many of their opponents. Many positivists, *i.e.*, those who consider the existence of law to depend on its meeting certain formal requirements rather than on its conforming to ideal moral standards, would concede the existence of objectively valid moral propositions, but would part company from natural lawyers when the latter start contending that these propositions constitute a superior law failure to conform to which deprives ordinary positive law of all legality.

Now to describe moral propositions as natural law is in a way to get the best of both worlds. The term " law " furnishes that additional prestige which stems from the emotive power of the word, while the term " natural " suggests that these laws are in some way superior to ordinary positive law which is contingent and owes its origin to historical accident. But the temptation, to assimilate morals to law, though understandable, should be resisted, because this assimilation obscures certain vital distinctions between legal and moral rules and so prevents real appreciation of the nature of either.

Legal rules differ from moral rules in certain important respects. Legal rules admit in principle of alteration by legislation. Most legal systems provide legislative procedures for changing the law, and even where such procedures are absent, as in the case of international law, this absence is purely contingent: there is nothing illogical or self-contradictory in the notion of international law possessing a legislature. Moral rules on the

other hand do not even in principle admit of change by legislation; to change moral rules by legislation is not only factually impossible, it is unimaginable. What sense could it make to say that certain acts which have always been morally wrong shall from now on by decree be morally permissible? Moral attitudes may and do change, but not in this fashion.

Secondly, there is a difference relating to the settlement of disputes. Legal disputes are essentially amenable to adjudication: a dispute about the existence, meaning or application of a legal rule can be decided with finality by a tribunal. In moral arguments final settlement is unattainable not on account of some factual defect, but by virtue of the very nature of moral disputes; for the notion of adjudication is logically inconsistent with that of a moral conflict. If two people disputing about the morality of euthanasia were to agree to accept the verdict of a third party, any finality so obtained would be illusory. For even after judgment was given either party could still question the moral correctness of the "judge's" verdict. Moral disputes, unlike legal disputes, remain permanently open.

But apart from this, further difficulty arises from the claim that positive law contrary to natural law is void. This sort of contention has been advanced in connection with the trials of the war criminals at Nuremburg (*f*). Sometimes indeed an individual is so placed that the demand of the law and the requirement of morals run counter to each other. In such a case the natural lawyer's view is that the positive law is not really law and should not be obeyed; consequently obedience to the positive law should not necessarily avail as a defence if the individual is later prosecuted. To this the positivist replies that laws are man-made and can be unjust as well as just; "the existence of law is one thing. its merit and demerit another" (*g*).

In this dispute, both sides would agree as to the existence of a conflict between the positive law and the dictates of morality. Likewise, both would agree that in such a conflict law must give way to morality. The natural lawyer, however, would settle the conflict by designating the positive law as not really law, while the positivist would argue that this law can be criticised and

(*f*) See the discussion between Hart and Fuller on the morality of using the notion of natural law to secure retrospective convictions in (1958) 71 H.L.R. 593–629, 630–672. See also Pappe in (1960) 23 M.L.R. 260.

(*g*) Austin, *The Province of Jurisprudence Determined* (ed. Hart), 184.

rejected without any such theory, and that natural law theory has no monopoly of legal criticism.

Now this is not simply a factual dispute, to be settled by further evidence, but rather a conflict over how best to describe this situation (*h*). Is it better with the positivist to describe it by stating that here law says one thing and morality another? Or would there be some advantage in adopting natural law terminology and refusing to classify unjust laws as law? Any advantage must be either theoretical or practical. Theoretical considerations suggest no advantage, for if unjust laws were no longer classified as law, a complete study of a legal system would nonetheless still necessitate their investigation. Even if the Roman law relating to slavery is no longer classified as law, no study of Roman law would be complete without taking the rules on this topic into account.

From a practical standpoint, however, natural law terminology might seem to offer advantages. First, as an antidote to legal rigidity, it could provide flexibility, allowing rules of law to be changed from what they are to what they ought to be, on the ground that the law always is what it ought to be. But surely this is no more than a serviceable device which detracts from the certainty and predictability of law and which in modern times should surely be replaced by more explicit methods of alteration, *e.g.*, legislation. Secondly, the natural lawyer's terminology, it is claimed, would weaken the authority of unjust and immoral laws. Yet surely it may be better in such cases to highlight the conflict between law and morals and to stress that mere formal legality alone is no title to obedience, rather than to conceal the very existence of the conflict. Indeed, adoption of natural law terminology could even weaken our capacity to criticise the law. It is easy to move from the premise that if a rule is unjust it is not law to the conclusion that if a rule is law it is just, and this without realising that in the conclusion we may be determining in the first place that the rule is one of law by purely formal criteria. Starting from the position that *lex injusta non est lex* we slide easily to the position that what is on the statute book is morally right.

Moreover, natural law terminology tends to obscure the

(*h*) For a discussion of this type of non-factual dispute see Wisdom, *Philosophy and Psychoanalysis*, 51–101.

possibility of criticising law on other than purely moral grounds. For law must be evaluated by reference to its efficacy, general convenience, simplicity and many other factors, as well as by reference to the demands of justice and morality. Finally, to use natural law terminology to secure a conviction of those whose actions at the time of the performance contravened no rules of positive law, by finding them guilty of violating the natural law, runs counter to the highly important moral principle that no one should be held criminally liable for acts legally innocent at the time of their commission (*i*). Even in the trials of men like Eichmann this principle should not be lightly abandoned, and if it is abandoned then we should be quite clear what we are surrendering and why we are doing so rather than ignore the fact of surrender.

4. Law as the command of the sovereign: imperative law

Diametrically opposed to the theory of natural law is the positivist, or imperative, theory of law (*j*). This theory distinguishes the question whether a rule is a legal rule from the question whether it is a just rule (*k*), and seeks to define law, not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on. Though this approach is often criticised as sterile and inadequate because it fails to take moral considerations into account, it was never intended by such exponents as Austin to exclude the problem of evaluating law: on the contrary, analysis was regarded as a necessary preliminary to the task of critical assessment, which in Austin's view should be made according to the principle of utility, a principle that serves as an index to such divine laws as are unrevealed (*l*).

According to Austin, whose version of the theory will be considered here, positive law has three characteristic features. It is

(*i*) On the principle *nulla poena sine lege* see *infra*, p. 127.

(*j*) The idea that law is the command of the sovereign was advanced by such writers as Bodin, Hobbes and Bentham, but found its chief expression in Austin, whose theory of law is contained in *The Province of Jurisprudence Determined*, first published in 1832. References here are to the 1954 edition by H. L. A. Hart. See also Dias, *op. cit.*, Chap. 14; Lloyd, *The Idea of Law*, Chaps 5, 8; Friedmann, *op. cit.*, Chaps. 19–20; Hart, *op. cit.*, Chaps. 2–4. The term "positivism" covers a variety of positions; see Hart, *op. cit.* 253 (note 10 p. 181).

(*k*) See p. 23, n. (*g*).

(*l*) Austin, *op. cit.*, Lecture II.

a type of command, it is laid down by a political sovereign and it is enforceable by a sanction. A typical example would be the Road Traffic Act, 1960, which could be described as a command laid down by the sovereign under the English legal system, *i.e.*, the Queen in Parliament, and enforceable by penalties for violation.

Now first we must clarify the term "command". How do commands differ from requests, wishes and so on? To Austin all these are expressions of desire, while commands are expressions of desire given by superiors to inferiors. This agrees with ordinary usage which allows us, for instance, to speak of officers commanding their subordinates but not of subordinates commanding their officers. This relationship of superior to inferior consists for Austin in the power which the former enjoys over the latter, *i.e.*, his ability to punish him for disobedience. Conversely, the subjection of the inferior to the superior consists in his liability to suffer a penalty for disobedience. In a sense, then, the idea of a sanction is built into the Austinian notion of command; logically it might be more correct to say that law has two rather than three distinguishing features.

We must now distinguish commands which are laws from commands which are not. Imagine a state governed by an absolute ruler R. Here the law is what R commands. But is the converse true? Are all R's commands law? Suppose he orders his servants to make preparations for a banquet; would this qualify as a law? Would we really wish to designate as law his every instruction, *e.g.*, to close the window, to turn up the heating and so on, even though R being an absolute ruler could have his servants executed for disobedience (*m*)? Now Austin distinguishes laws from other commands by their generality, laws being general commands; and indeed laws seem much less like the transitory commands barked out on parade grounds and obeyed there and then by the troops, and much more like such things as the standing orders of a military station which remain in force generally and continuously for all persons on the station. But there are, however, exceptions, for there can exist laws, such as

(*m*) Unless some distinction could be drawn, R would be in an analogous position to that of King Midas, whose touch turned everything without exception into gold. In fact there are various ways of ensuring that the laws of such a ruler can be distinguished from his non-legal utterances; to be law, they may have to be uttered in some solemn form, in some special place, according to some special procedure, etc.

acts of attainder, which lack this type of generality. Generality alone, then, is neither necessary nor sufficient to serve as the distinguishing feature of law.

Now if particular commands can qualify as laws, how can we distinguish laws from commands which are not law? Everyday life is sprinkled with examples of people giving commands to others: masters give orders to servants, teachers to pupils, parents to children and so forth. Sometimes commands are unlawful, as would be that of a bank robber who points his gun at the bank clerk and orders him to hand over the contents of the till. Indeed some have criticised the positivist theory as a theory of "gunman law", on the ground that it makes no real distinction between a law and the command of a bank robber (*n*).

Such criticisms overlook the importance of Austin's second requirement: for to qualify as law a command must have been given by a political superior, or sovereign. To Austin a sovereign is any person, or body of persons, whom the bulk of a political society habitually obeys, and who does not himself habitually obey some other person or persons. The latter proviso serves to exclude viceroys, colonial governors, satraps and so forth, who are obeyed by those whom they rule, but who are not their own masters but are subordinate to a higher ruler. Accordingly, one difference between the order of a gunman and the decree of a dictator (both of which depend on brute force and may be contrary to morality) is that the latter enjoys a general measure of obedience while the former secures a much more limited compliance.

One great virtue of this definition of sovereignty is to stress the fact that law is only law if it is effective, and this it can only be by being generally obeyed. Obviously perfect obedience is unnecessary, for many sometimes, and some continually, contravene the law without depriving it of all effectiveness. On the other hand without general obedience the law-maker's commands are as empty as a language no longer spoken or as a monetary currency no longer in use: they have the appearance but no longer the reality of law. Now the causes of this general obedience, whether fear, habit or love of order, are questions for the social scientist; how the sovereign came to enjoy this obedience, whether through conquest, usurpation or election, is a question for the historian.

(*n*) See Goodhart, *Law and the Moral Law*, 20.

For the legal theorist it is enough that such obedience exists: the fact of obedience is his starting point.

In our present world, given human nature, a sovereign without the means of enforcing obedience to his commands would have little hope of continuing to rule. Law stands in need of sanctions —Austin's third distinguishing mark of law. Nor for the positivist is this a mere practical need; law to him is something for the citizen to obey, not as he pleases but whether he likes it or not, and this it cannot be without some method of coercion. Sanctions then are a logical part of the concept of law; they consist of the penalties inflicted on the orders of the sovereign for the violation of the law—in other words of institutionalised punishments.

Now against this theory several attacks can be mounted. First there are the natural lawyer's objections which have been discussed above (*o*). Secondly there is the objection that the theory conflicts with ordinary usage by denying the name "law" to rules which are generally classified as legal, *e.g.*, rules of customary law, international law and much of constitutional law. None of these rules originate from a sovereign command: customary law springs from habitual behaviour rather than from precept, international law is a system of customary rules originating from state practice, and constitutional law consists in part of conventions which have evolved without legislation or judicial decision. Indeed many of the rules of common law originate from custom, though for the positivist these become law only by transformation into law by legislative or judicial acceptance.

Clearly then the positivist theory proceeds by first defining "law" in a special way and then using the definition to refuse application of the term to various phenomena generally included within the category of law. But would it not be more correct first to identify the phenomena termed law and thereafter to frame a definition accordingly, fitting the definition to the facts rather than the facts to the definition? The positivist is sometimes defended on the ground that he is defining law for his own purposes and that, in jurisprudence just as in other disciplines, precision justifies arbitrary definitions (*p*). This defence, however,

(*o*) *Supra*, § 3.

(*p*) According to Austin international law is not law *properly so called*; *op. cit.* 142, 201. Glanville Williams in "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 B.Y.I.L. 146 would argue that there is no such thing as the proper sense of the word; and in this he seems to be followed by Dias, *op. cit.* 360–361.

will not suffice. In the first place, any arbitrary definition of law still leaves us with such problems as that of deciding whether international law is law, not just in Austin's or anyone else's sense, but in the ordinary sense of the word (*q*). More important it is questionable how far any arbitrary definition which fails to take into account borderline and untypical examples of law can achieve the positivist's aim of providing an understanding of legal phenomena. Moreover, a theory defining law in terms of " command ", " sovereignty " and " sanction " alone, cannot provide an adequate analysis of the ordinary standard type of legal system.

To define law as a command can mislead us in several ways. First, though this may be a not inappropriate way of describing certain portions of law such as the criminal law, the greater part of a legal system consists of laws which neither command nor forbid things to be done, but which empower people by certain means to achieve certain results: *e.g.*, laws giving citizens the right to vote, laws conferring on lease-holders the right to buy the reversion, laws concerning the sale of property and the making of wills: indeed the bulk of the law of contract and of property consists of such power-conferring rules. At this point the theory could be saved by arguing that a rule conferring a right on one person is really an indirect command addressed to another: a law empowering the citizen to vote is really an order to the returning officer to register the vote. But this saves the theory at too high a price. To regard a law conferring power on one person as in fact an indirect order to another is to distort its nature. It would be analogous to arguing that the rule in chess which allows a player to take a pawn *en passant* is really a rule enjoining his opponent to recognise this type of move. Of course in both cases a restriction is imposed on the other person, but in both cases the main feature of the rule is not this so much as the increase in the ambit of the enabled party's activities. This distinguishes such rules from simple commands or prohibitions such as " do not steal ", and nothing is gained by a definition of law that blurs this distinction.

Secondly, the term " command " suggests the existence of a

(*q*) See Wisdom, *op. cit.* at 96 *et seq.* for an analogous problem concerning the use of the word " round ".

personal commander. In modern legal systems the procedures for legislation may well be so complex as to make it impossible to identify any commander in this personal sense. This is especially so where sovereignty is divided, as in federal states.

Thirdly, " command " conjures up the picture of an order given by one particular commander on one particular occasion to one particular recipient. Laws differ in that they can and do continue in existence long after the extinction of the actual law-giver (*r*). Here again an attempt to save the definition can be made by arguing that laws laid down by a former sovereign remain law only in so far as the present sovereign is content that they should, and that since the latter can always repeal them, his allowing them to remain in force is tantamount to adopting them as his own laws: what the sovereign permits, he impliedly or tacitly commands (*s*). But it is not always true that the present sovereign can repeal any law: in certain states the law-making powers of the sovereign are limited by the constitution, which prevents the repeal by ordinary legislation of " entrenched " clauses; in such cases no question arises of the present sovereign's allowing or adopting such clauses. At this stage the only argument left to the positivist is to contend that such limited sovereigns are not really sovereigns at all, a contention which will be considered later. Quite apart from this, the notion of an implied or tacit command is suspect; an implied command seems not to be a command at all (*t*). It would be better to accept the possibility of laws which are not commanded by the present sovereign, to jettison the notion of " command " and to adopt some different analogy, *e.g.*, the rule of a religious order, which can continue in force long after the death of its founder.

But whether we define law as a command or a rule, we must still distinguish commands (or rules) which are law from those which are not. For Austin, as we saw, a command can only be law if it emanates from the sovereign. This raises the question how far there can exist laws other than those made by the sovereign. Obviously in a complex modern state it would be impossible for the

(*r*) What Hart refers to as the " persistence " of law, *op. cit.* 60 *et seq.*

(*s*) See Austin's use of the notion of a tacit command to explain how customary and judge-made law is in reality the command of the sovereign: Austin, *op. cit.* 30–32.

(*t*) See Hart, *op. cit.* 43–46, 62–64.

sovereign legislature to enact every legal rule: much law-making will in fact be done by subordinates to whom legislative powers have been delegated. A good deal of English law consists of such delegated legislation, *e.g.*, regulations made by Ministers under Acts of Parliament. Here Austin finds no problem, since he sees no difficulty in the notion of a sovereign conferring law-making powers on others (*u*).

The bulk of English law, however, has been created neither by ordinary nor by delegated legislation, but by the decisions of the courts. Austin would argue that this too is really the creation of the sovereign, since the judges too are delegates of Parliament which has conferred upon them law-making powers (*v*). It is of course true that in England the judiciary are appointed by a government answerable to Parliament and that there are parliamentary procedures for their removal. But to describe the judges as delegates is wholly misleading, for this obscures the fact that their law-making powers co-exist with those of Parliament and are neither based on nor derived from any parliamentary enactment. The fact that Parliament can always overrule any judicial decision of the courts does not entail that judicial law-making is of a delegated nature. This would be to confuse subordinate with derivative powers (*w*).

There is yet another area of law which again owes nothing to sovereign legislation and whose existence is of crucial difficulty for the positivist theory. Let us take the case of a country ruled by a hereditary monarch with absolute power. Now when this present monarch dies, we do not need to wait and see who next will enjoy obedience from the population in order to ascertain the identity of the next sovereign. Since the rules of succession prescribe who shall inherit the throne, we already know his identity before he issues any commands and before any question of obedience arises. What we have here then is a rule laying down who shall be the sovereign, so that the extinction of the present sovereign is no bar to the continuance of legislation (*x*). In modern complex states, the rules defining sovereignty will obviously be more intricate than this: the relevant English rule involves, in fact, a number of

(*u*) Austin, *op. cit.* 225–232.
(*v*) *Op. cit.* 31–92.
(*w*) See Cross, *Precedent in English Law*, 162–163.
(*x*) See Hart on the "continuity" of law, *op. cit.* 50 *et seq.*

separate rules about the monarchy, about both Houses of Parliament and about parliamentary procedures of legislation. In many modern states such rules are contained in written constitutions, but whether written, as in the United States, or unwritten, as in England, they clearly cannot be the commands of the sovereign himself. A special parliamentary statute to the effect that all enactments of Parliament are law will not render such enactments law unless the statute is already law itself, in other words, unless Parliament is already sovereign; but if Parliament is already sovereign, then there already exists a rule to the effect and this rule is independent of the special statute. The rules that define sovereignty then are basic rules of any legal system (*y*), but are not themselves the creation of the sovereign. To refuse to call them law would run completely counter both to ordinary language and to legal terminology: no English lawyer or court would regard the rule that parliamentary statutes are the supreme law of England as anything other than a rule of English law.

Now this throws doubt on Austin's definition of sovereignty itself. We have seen that Austin defines the sovereign in terms of obedience. But the identification of the sovereign as a person who is obeyed by the bulk of the population but who himself obeys no other person claims at one and the same time too little and too much. It is not enough to say that sovereignty consists merely in being obeyed, yet it is too much to state that the sovereign cannot himself be in the habit of obedience to some outside body. In fact this identification confuses the two questions "where is sovereignty?" and "where is supreme power?" (*z*). The latter is a question of fact, the answer to which is to be found by observing who it is in reality whose orders are executed; the former is a question not merely of fact but also of law, to be answered by reference to the constitutional rules which lay down what body it is whose decrees are to count as law. In the last years of the Roman republic, while Caesar was in Gaul, it could be said that the real ruler of Rome was to all intents and purposes Pompey. Nevertheless he was not the sovereign, for though he

(*y*) Salmond terms such basic rules ultimate legal principles; in Kelsen's terminology they constitute *grundnorms*. See *infra*, §§ 6 and 17.

(*z*) Bryce in *Studies in History and Jurisprudence* distinguished between "legal sovereignty" and "practical sovereignty", the former consisting of the ultimate authority to make law and the latter consisting of the ability to enforce obedience: Bryce, *op. cit.* 51–64; Lloyd, *op. cit.* 147–148.

could get enacted any law he wished, his own commands would not have qualified as laws. Sovereignty consists, not in having power, but in having authority.

This confusion landed Austin in particular difficulty when trying to identify the sovereign in England (*a*). At first sight the sovereign is a composite body comprising the Crown, the House of Lords and the House of Commons. But since the latter house is elected and must therefore ultimately obey the electorate, the House of Commons cannot on Austin's theory qualify as part of the sovereign. Accordingly, he concludes that the real sovereign is that body which consists of the Crown, the House of Lords and the Commons themselves. In fact, however, this larger body never issues any orders or decrees, nor, if it did, would they qualify as law under our present constitution. The real sovereign is, in fact, the Crown, the House of Lords and the House of Commons, whose enactments, whether made at the bidding of the electorate, the city, the trade unions or what you will, continue to count as law.

Since this is what sovereignty really means, it becomes unnecessary to add a rider to the effect that the sovereign must not himself be in the habit of obeying some other body. This is merely a confused attempt to distinguish supreme from subordinate law-makers. A subordinate legislator, whether enjoying delegated authority, as is the case with colonial legislatures, or original jurisdiction, as is the case with the courts, can be overruled by the supreme legislator. The real distinction is that when enactments of the two conflict, the enactments of the supreme law-maker prevail over those of the subordinate. The hall-mark of the sovereign is that his enactments qualify as law and that no other enactments overrule them. This shows that there is no logical or legal necessity for the sovereign's authority to be unlimited. No paradox arises if a written constitution places limitations on the legislature; if a constitution limits the legislative powers of the sovereign by providing that certain fundamental laws cannot be altered by legislation (*b*), we need not

(*a*) Austin, *op. cit.* 228 *et seq.*

(*b*) Some constitutions such as that of the German Federal Republic (1949) provide that certain fundamental rules are completely unalterable: Art. 79 (*g*) of the Basic Law of the Republic provides that Arts. 1–20 cannot be amended. Others such as the Constitution of the United States provide that such rules can only be amended by special procedures.

conclude that the real sovereign must be some other body, such as the people, which could, if necessary, alter the constitution. For ordinary laws not contravening these fundamental provisions can still be enacted by the existing legislature, which is accordingly the sovereign, albeit a limited one.

In trying to define positive law Austin was looking for a criterion to determine whether a given rule is a rule of a legal system (*c*). Now since every advanced legal system provides methods of enacting new law and since the most obvious method is to confer law making authority on a legislature, it follows that a great number of laws will result from legislation. One criterion for identifying a rule as one of a legal system, therefore, will be its having been enacted by such a legislative body. This, however, need not be the only criterion. In England, for example, there are additional criteria: a rule will qualify as a rule of English law if it has been laid down by the courts. Accordingly, to ask only whether the rule emanates from the sovereign is too crude and unsophisticated an approach to the problem.

There remains the question of sanctions. It was amongst other things the lack of sanctions that led Austin to describe international law as positive morality rather than law (*d*). International lawyers, however, contend that while sanctions render a legal system stronger, they are not logically necessary and that the idea of a legal system without sanctions is not self-contradictory. Of course one essential feature of law is that its subjects are bound by law whether they like it or not and cannot opt out of their legal obligations. Yet we know that on occasions the subject may refuse to obey the law and decide not to carry out his obligations. Were the majority of citizens of a society to follow this path, the legal system would break down, become ineffective and cease to be law; for it is only by being accepted and obeyed that law remains effective and continues to be law. The question then is whether the absence of sanctions would result in a legal system ceasing to be effective. The various reasons *why* people

(*c*) See *supra*, p. 12, n. (*l*).

(*d*) It might be argued that the sanction in international law is the use of force by the innocent state against the law-breaking state, but this is to reduce the notion of "sanction" from that of an institutionalised penalty to that of self-help. In any case, the present state of international law makes it far from clear whether such use of force would be legal under the United Nations Charter.

obey the law are outside our present scope, and form the subject rather of sociological research. It would seem reasonable, however, to estimate that the less civilised a society the greater the need for sanctions to ensure obedience to law; and the more advanced the society, the greater the likelihood that law will be obeyed from a conviction that a law-abiding society is preferable to lawlessness and anarchy. In most societies, however, there is at least a selfish minority prepared to enjoy all the benefits of an ordered society without accepting the burden of adherence to the rules; and here sanctions are needed, not to coerce the law-abiding majority, but rather to prevent the minority from gaining an unfair advantage. Given human nature as it exists, it seems fair to assume that law without sanctions would fail to be completely effective. In international law there exists nothing by way of institutionalised sanctions and yet the rules of international law, though often flouted, are far from totally ineffective. Suppose, however, that we found a community where the rules were always obeyed despite the absence of anything in the nature of sanctions: would such a system of rules differ so greatly from any system we know that we should hesitate to call it law? Completely effective law without sanctions may not exist, but the notion that there could exist such a system of law is not logically inconceivable. We conclude then that the idea of sanctions, though central to that of law, is not logically essential.

5. Law as the practice of the court: legal realism

Positivism regards law as the expression of the will of the state through the medium of the legislature. Theories of legal realism (*e*) too, like positivism, look on law as the expression of the will of the state, but see this as made through the medium of the courts. Like Austin, the realist looks on law as the command of the sovereign, but his sovereign is not Parliament but the judges; for the realist the sovereign is the court.

(*e*) The term "American Realists" serves to describe a number of American legal theorists, who, though in no way constituting a formal school of jurisprudence, share the view that the law consists of the pronouncement of the courts. On this theory of law see Holmes, "The Path of the Law" (1897) 10 H.L.R. 457–478, reprinted in *Collected Legal Papers*; Llewellyn, *The Bramble Bush* (2nd ed.); Frank, *Law and the Modern Mind* and *Courts on Trial*; Gray, *The Nature and Sources of Law* (2nd ed.). See also Friedmann, *Legal Theory*, (4th ed.), Chap. 23; Dias, *op. cit.* Chap. 19; Hart, *op. cit.*, Chap. 7.

One version of realism was held by Salmond (*f*). All law, he argued, is not made by the legislature. In England much of it is made by the law courts. But all law, however made, is recognised and administered by the courts and no rules are recognised and administered by the courts which are not rules of law. It is therefore to the courts and not to the legislature that we must go in order to ascertain the true nature of the law. Accordingly, he defined law as the body of principles recognised and applied by the state in the administration of justice, as the rules recognised and acted on by courts of justice.

This raises the question of the meaning of the word "courts" in the definition. Does it include administrative tribunals? By the National Insurance Act, 1946, and regulations made thereunder, the decision of questions arising under the Act is entrusted, in the last resort, to a commissioner whose decision is final. Suppose that the commissioner lays down a rule that he intends to follow in exercising his discretion. Is this "law"?

Again, there are other persons and bodies besides the law courts and administrators who enforce rules of conduct. If a member of the House of Commons affronts the House by interfering with the mace he is subject to disciplinary action; does this mean that there is a rule of law that no member must interfere with the mace? In the *Sheriff of Middlesex's Case* (*g*), where the sheriff was imprisoned by order of the House of Commons for attempting to enforce the judgment of a court of law, the act done by the sheriff was in accordance with the law enforced by the law courts; could it be said to be against a system of law enforced by the House of Commons?

To these objections Salmond would reply that they are marginal cases, that all words have a relatively fixed central core of meaning and a more hazy marginal sense, and that the word "law" is no exception.

Another criticism of Salmond's definition is that, though appropriate to case-law, it is not appropriate to statute-law. For a statute is law as soon as it is passed; it does not have to wait for recognition by the courts before becoming entitled to the name "law." Statutes are recognised by the courts because they are

(*f*) Salmond, *Jurisprudence* (7th ed., 1924 by Sir John Salmond), § 15.
(*g*) (1840) 11 A. & E. 273.

law; they are not law simply by virtue of judicial recognition. To this he would reply that so long as the courts and legislature are working in harmony, it does not matter whether we say that a statute is law because the courts recognise and apply it, or that the courts recognise and apply statutes because they are law. The statements are simply two aspects of a single truth. To make a practical issue, one would have to imagine that the legislature passes a statute which the courts subsequently declare to be void, and that a political conflict thereupon arises between the legislature and the courts. Is the statute then part of " the law "? No answer can be given to such a question in the abstract. An impartial observer could not give an answer until one side or the other had triumphed so that harmony between courts and legislature was once more restored. Here again we are faced with a marginal case where the application of the word " law " is unclear.

A much more polemical version of legal realism is that which originated with Holmes (*h*) and which has wielded enormous influence in the United States. This is the theory that all law is in reality judge-made. Holmes begins by considering the situation, not of the judge or lawyer, but of what he calls the " bad man," the man who is anxious to secure his own selfish interests. What such a person will want to know is not what the statute book or textbooks say but what courts are likely to do in fact. " I am much of his mind ", said Holmes; " the prophecies of what the courts will do, in fact, and nothing more pretentious are what I mean by the law " (*i*). But what the courts will do in fact cannot necessarily be deduced from the rules of law in textbooks or even from the words of statutes themselves, since it is for the courts to say what those words mean. As another American writer observed, " the courts put life into the dead words of the statute " (*j*).

This is a useful counter to an attitude once prevalent in

(*h*) See n. (*e*). Several factors contributed to the prevalence of this approach to law in the United States. First, in many states judges are elected to office by popular vote, and accordingly decisions are likely to be influenced by political considerations. Secondly, the federal courts have the power of judicial review, whereby they can declare void any state or federal legislation contrary to the constitution. Thirdly, there is the factor of a multiplicity of jurisdictions. See *infra*, n. (*l*).

(*i*) Holmes, " The Path of the Law " (1896–97) 10 H.L.R. at 461; Lloyd, *Introduction to Jurisprudence* (2nd ed.), 272.

(*j*) Gray, *op. cit.* 125.

England to the effect that the judges never really create law but only declare what the law already is (*k*). In England a court, when overruling precedents of inferior courts, would commonly assert that the lower court had fallen into error, and that the law was and always had been what the present court now asserted it to be. American lawyers, however, confronted with a multiplicity of common law systems each of which had started from the same point but arrived at different results (*l*), realised that the development of common law could not consist of mere mechanical deductions of conclusions from premises, but must involve a process of creating new rules to deal with new situations, where a choice between competing alternatives had to be made. Questions of law, they saw, could not be answered by purely logical inference; they must be decided by reference to social, moral, political and other factors. As Holmes remarked, "the life of the law has not been logic, it has been experience "(*m*).

Today, it may be thought that the creative days of the judges are largely past. Now that common law is mostly completed and the greater part of modern law is statutory, the task of the judges is in fact the more automatic one of applying settled rules to the cases before them. In fact, however, for the courts the necessity of choice still remains. All legal rules are far less certain than was once imagined. For example, in England the unlawful and intentional killing of another is the common law crime of murder. But what if A intentionally inflicts on B a mortal wound and then, mistakenly thinking him dead, throws his body into a lake, with the result that B dies by drowning ? Is this murder ? Certainly A intended to murder B, who would have died from the wound had he not been thrown in the lake. On the other hand while the wounding was intentional, the actual killing was not. In 1954 the existing law had no answer to this problem, which arose in the case of *Thabo Meli* v. *R.* (*n*) where the court was forced to develop further the law of murder. Another example is provided by the

(*k*) See *infra*, pp. 144 and 189 and Cross, *Precedent in English Law*, 21–30.

(*l*) For example, many American states have accepted the doctrine of *Rylands* v. *Fletcher*, but many have rejected it. See *Prosser on Torts* (2nd ed.), § 59; Harper and James, *Torts*, 789–801.

(*m*) Holmes, *The Common Law* 1.

(*n*) [1954] 1 All E.R. 373; [1954] 1 W.L.R. 228. This was an appeal from Basutoland to the Privy Council. Though there was no English authority, this kind of point had arisen in the United States: see Glanville Williams, *The Criminal Law* (2nd ed.), 173–174.

Road Traffic Act, 1930, s. 11 (1), which made it an offence to drive a motor vehicle in a manner dangerous to the public. Is a person who steers a broken-down vehicle on tow a driver? Since Parliament had not defined the term "driving" the word must presumably bear its ordinary meaning. But the ordinary usage of the word is not built to cope with this kind of marginal situation, for it draws no very clear line between what is, and what is not, driving. Faced with this question, then, the court had to draw an arbitrary line and further define the term "driving" (*o*).

Now this type of difficulty is one to which legislation is particularly susceptible. It arises from the fact that legislation is concerned with general classes of persons, objects and actions and must therefore employ words of general application. Such words, however, are usually far from precise. Though they draw boundary lines round the class of objects which they denote, their borders are often anything but clearly marked out; here they will be faint and hard to perceive, here vague and wavering, and elsewhere they may disappear altogether. Consequently the categories to which such words apply are never finally determined. Because of this feature, which has been described as the "open-texture" of ordinary language, the use of such general terms always leaves open the possibility of a borderline case (*p*). In so far as rules of law are expressed in ordinary language, they too are prone to this inherent imprecision, and even where the law defines the word with new precision, this new definition must be given in terms of other words belonging to ordinary language, so that uncertainty is never completely ruled out. But this defect has its compensations. Suppose the legislator could draft rules that were absolutely clear in application: even so, he could not foresee every possible situation that might arise, and so, he could not anticipate how he, or society, would wish to react to it when it did arise. Too certain a rule would preclude the courts from dealing with an unforeseen situation in the way they themselves,

(*o*) In *Wallace* v. *Major* [1946] K.B. 473 this was held not to amount to driving.

(*p*) See Waismann, "Verifiability" in *Essays on Logic and Language*, I (ed. Flew), 117–130. This factor of open texture lends extra force to Hoadly's dictum to the effect that "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spoke them". Still, we must beware of mistaking the performer for the composer.

or society, might think best. As it is, legal uncertainty is counterbalanced by judicial flexibility (*q*).

Since law in practice must differ from the law stated in statutes or textbooks, American jurisprudence developed considerable scepticism about legal rules (*r*). Where courts must choose between alternatives, much will depend on the temperament, upbringing and so on of the members of the Bench. A conservative-minded judge, with religious leanings and aristocratic background, will obviously differ in outlook, and therefore in decisions, from one of radical agnostic middle-class make-up; and this will affect not only decisions on points of law, but also on questions of fact. On paper the law may provide that contributory negligence is a complete defence to an action for negligence. But courts, and juries may be so sympathetic to injured plaintiffs and so antipathetic to the defendants' insurance companies, as rarely to find any plaintiff guilty of contributory negligence. In this case contributory negligence would be a defence in theory only.

Accordingly, the realist concludes that a statement of law is nothing more than a prediction of what the courts will decide. This well describes what a lawyer does when advising a client whether or not to bring proceedings; on his knowledge of the law and his experience of court reaction the lawyer estimates the chances of success, assesses the amount of damages likely to be awarded and so advises his client. The description also fits to an extent the case of a textbook writer who expounds the rules of law which have been made, examines the practice of the courts in applying them, and to some extent indicates their possible future development.

There are other legal situations, however, which cannot be described in terms of prediction. Counsel's submission on a point of law is not a prediction; it is not a forecast of what this or any other judge will decide, but an argument about what the judge

(*q*) See Hart, *op. cit.* 125 *et seq.* Uncertainty of language has allowed the Supreme Court of the United States to adapt the United States Constitution to the needs of a changing society. See for example Sutherland, "The American Judiciary and Racial Desegregation" (1957) 20 M.L.R. 201.

(*r*) Most American realists have been rule-sceptics, who doubt whether there are in truth any rules of law and who seek to predict judicial decisions from the findings of non-legal sciences. Judge Frank claimed to be a fact-sceptic, *i.e.*, he doubted whether any uniformity in law could be found, on the ground that the fact-finding which is a necessary preliminary to judicial decision is itself too fraught with uncertainty.

should decide. A judicial decision is not a prediction; it is not a forecast of what other, or higher, courts will hold, but a judgment as to what the law now *is*. Nor again is a piece of legislation a prediction of judicial behaviour: the legislature is not predicting what will be done but laying down what *shall* be done. For predictions, like other factual statements, can be wrong; indeed for this reason the term is not inappropriate to describe the activity of a legal adviser or writer, because later events can prove these wrong. When a judge's decision, however, is reversed by a higher court, his error (if there is one) is certainly not that of failing to predict that higher court's decision: for this indeed was no part of his objective.

The realist is misled by the fact that some statements of law, such as those of individual lawyers and writers, are unofficial and may have to be withdrawn later in the face of contrary official statements of law, *e.g.*, those of judges. This leads him wrongly to conclude that the law is simply what the judges happen to decide. Now there could be a state in which the constitution left the courts completely free to decide any point as they wished and to resolve each case on its merits, *ex aequo et bono*. Truly in such a state no one could ever say what the law was; one could only predict what the judges might do. But this is not the position in any ordinary legal system, and certainly not the position in the common law.

Moreover, the realist forgets that the decisions creating new law represent in fact only a fraction of the total of actual lawsuits. The majority of court cases involve no point of law and a greater number still never reach the courts at all; in such cases the law is clear and established and can be fairly automatically applied. Such is the case with the rules relating to commerce and property, which are in general clear enough to render even legal advice unnecessary in most situations. Excessive concentration on the law reports, which of course exist to record decisions developing the law, gives a lopsided picture of the operation of the law.

Furthermore, the realist overstresses the uncertainty of language. The fact that a country's boundaries are unclear means that uncertainty will arise concerning borderline territory, but not that all that land within the country, and all outside, is in dispute. So it is with words. The fact that a word like "driving" may be

unclear in its marginal applications must not be allowed to blind us to the truth that there exists a category of cases which clearly constitute driving. Because we cannot always draw a line, we must not imagine there are not some cases well to each side of any line that could be drawn. However blurred the edges of words may be, they have a hard central core of meaning without which language and communication would be at an end. As has been said, doubt about dusk is not doubt about noon.

But the distinction which the realist draws between law in the books and law in practice is a valid one. Indeed it is a distinction drawn by other legal theorists quite removed from the school of American realism (*s*). The importance of the distinction is self-evident, and the particular contribution of the realist is to highlight the creative nature of the judicial role, to demonstrate the inability of "slot-machine" deductions to provide solutions to legal problems, and to show that legal decisions must often involve value judgments on questions of policy. By focusing attention on the extra-legal considerations on which such decisions are based, the realist paved the way for a replacement of the inspired hunches of judicial intuition by the expert evidence of sociologists, economists and other scientists. Reliance on such findings rather than on past decisions surely will best enable the judiciary to adapt the law to changing social needs (*t*).

But concentration on court practice alone is legalistic rather than realistic. The majority of human situations governed by law produce no litigation, partly because the law in question is sufficiently clear, and consequently most of the layman's activities in private, commercial or industrial life are undertaken without legal advice. People act in accordance with the law as they understand it. But such understanding can be wrong: many people do not know, for instance, that the law requiring certain contracts to be in writing has changed; many are unaware that there is no judicial authority entitling policemen to "detain"

(*s*) On this distinction see Sumner, *Folkways*; Ehrlich, *Fundamental Principles of the Sociology of Law* (trans. Moll); see also Friedmann, *op. cit.*, Chap. 18. Sawer, *Law in Society*, Chap. 10.

(*t*) In constitutional cases in the United States the courts accept evidence derived from sociology, psychology and other sciences in order to decide questions of law and policy. This practice originated in the "Brandeis Brief" in *Muller* v. *Oregon*, 208 U.S. 412 (1907).

subjects just for questioning (*u*). While the law which applies to many such situations consists of official statements by Parliament and the courts, the law which is actually applied may turn out to be the unofficial view of the ordinary citizen, the policeman, the local government official, the civil servant, the accountant, the tax inspector and so on; in many cases even professional lawyers are forced by pressure of work to rely largely on recollection and general impression rather than on actual research and authority. To see what the law is, then, *i.e.*, to discover the rules which actually govern our lives, we must look not only at judicial practice but also at the humbler, more extensive non-judicial and even non-legal practice. We must not forget that the law which regulates people's lives may well be the plain man's misunderstanding of the official law.

6. Law as a system of rules

The three theories so far discussed are all at one in viewing law as consisting of rules. Such rules are regarded by natural law as dictates of reason, by positivism as decrees of the sovereign and by realism as the practice of the courts. None of the theories, however, provides any adequate analysis either of the term "rule" or of the notion of a system of rules. Austin's attempt to define rules in terms of commands is, as we saw, unsatisfactory. The realist on the other hand would deny the existence of rules, and would identify them with the uniformity of judicial practice. But we have seen that law cannot be completely analysed in terms of such practice. We shall now attempt to analyse law in terms of rules. (*uu*)

First, rules are concerned not with what happens but with what ought to be done; they are imperative or prescriptive, rather than indicative or descriptive. This characteristic they share with commands, and the fact that they share it tempts us to assimilate the two. But rules differ from commands in their generality. Whereas a command normally calls for one unique performance, a rule has general application and demands repeated activity. In this it resembles recipes, travel directions, maker's instructions and so forth It differs from these, however, in that all these are

(*u*) Sawer, *op. cit.* 184–186 gives some interesting examples of popular misconceptions.

(*uu*) This section is largely based on Professor Hart's theory of law, as set out in Hart, *The Concept of Law*.

of an instrumental nature: the recipe must be followed to cook the pie, the directions to reach the destination, etc., though in fact these objectives might equally well be attained by some different means, in which case there would be no need to adopt the recipe or directions in question. Rules by contrast have a certain independence or self-legitimating character. In some cases rules are constitutive and define the activity in question (*v*): the rules of a game such as contract bridge define the game, and when bridge-players comply with these rules they are not just using one particular method of achieving an objective (*i.e.*, playing bridge); on the contrary, compliance with the rules is partly what bridge-playing consists in. In other cases rules are not constitutive or definitive in this way, but regulate activities which would take place in any case whether the rules existed or not. Such are the rules of grammar and spelling, of etiquette, of morals and of law. In these instances the rules which exist could well be replaced by other rules. Nevertheless they are not merely instruments or means to and end, like recipes and directions. Rules of grammar are complied with, not as a means to, but rather as part of, the correct use of a language. Rules of etiquette and morals are observed, not as a means to, but as part of, being polite and virtuous. Rules of law are obeyed not as a means to producing an ordered, tolerable society: law-observance is itself part of what constitutes such a society.

Now the fact that we cannot point at rules, as we can at material objects, can lead to perplexities of a kind well known in philosophy. Some, like certain American realists, are tempted to identify rules with regularities in judicial behaviour. Others, such as the Scandinavian realists (*w*), contend that there are no such things as rules, but that conformity with a rule consists really in habitual behaviour accompanied by a feeling of being bound to act in this habitual way. On this view, the various psychological and other factors giving rise to such feelings are very important socially, highly worthy of study, and even perhaps essential for the

(*v*) See Marcus G. Singer, "Moral Rules and Principles" in *Essays in Moral Philosophy* (ed. Melden, 1958).

(*w*) Such theorists include Hägerström, *Inquiries into the Nature of Law and Morals* (trans. Broad; ed. Olivecrona); Olivecrona, *Law and Fact*: Lundstedt, *Legal Thinking Revised*. The Danish theorist Alf Ross, though sharing some of these views, would regard laws as directions to the judges rather than as mere statements of fact: see Ross, *On Law and Justice*.

function of what is believed to be the law. They are nonetheless impossible to justify on rational grounds because in reality nothing by way of rules exists to bind or compel obedience.

As Hart has demonstrated, however, compliance with a rule differs from mere acting out of habit (x). Contrast for example the case of a man who habitually cleans his car on Sunday morning with that of the driver who always conforms to the traffic law requiring him to stop at a halt sign. The former case is completely described by the statement that he always behaves like this, while it would be a far from adequate description of the latter case to say just that the driver always stops at halt signs. This would only suffice as a description provided the narrator and his audience already understood that his stopping was in compliance with a traffic regulation; in other words if they knew the relevant traffic regulation, or at least realised what it meant to observe such regulations. Otherwise such a description would only represent the observation of an external observer, who perceives the outward conduct of the driver but misses the point, known to the driver himself and others who fully understand the situation, that this conduct is the outcome of the driver's attitude of mind, of his acceptance of the traffic regulation as a rule with which he ought to comply. To the external observer the halt sign is a sign that the motorist will stop. To the motorist himself it is a signal to stop. Complying with a rule involves both aspects, external behaviour together with an internal attitude that such behaviour is obligatory.

Although Hart seems at first sight close to the Scandinavian realists here, there are important differences between them. Instead of behaviour accompanied by an unanalysable feeling of being bound, Hart talks in terms of conduct supplemented by an attitude of mind to the effect that the conduct in question is obligatory because it is required by rule. This attitude he analyses by specifying the criteria for its existence. Where a person is said to regard himself as required by a rule to act in a certain way, he will consider that his own conduct ought to conform to this pattern and will require the same of others; accordingly he will criticise deviations from the pattern because of their very non-conformity.

(x) Hart's analysis of the concept of rules is to be found in *The Concept of Law*, 9–11, 54–59, 86–88.

and will justify on the basis of conformity to the rule acts that might otherwise incur criticism on other grounds. In order then to ascertain whether a person accepts the existence of a rule, we must look, not into the inner workings of his mind, but rather at what he says and how he reacts; to discover whether a society accepts the existence of a rule, we must look at general social reaction. In international law, for example, to prove the existence of a customary rule of law one must show first that states follow a certain pattern of practice, and secondly that they do so by way of right or obligation. Evidence for the existence of this second factor (in international legal terminology the "opinio juris sive necessitatis") consists in the official statements of governments, of their reactions when the practice is challenged or disregarded, and of their own reliance on the practice as a justifying factor (*y*).

A further difference between Hart and the Scandinavian realists is that the latter look upon the feeling of being bound as mistaken or illusory; the citizen imagines that he is bound by a rule of law, while in fact this is not the case because there are no rules to bind. The internal attitude which Hart analyses involves no mistake or illusion: where people or states consider themselves obliged by rule to act in a certain manner, they are not *ipso facto* mistaken. Mistakes can of course exist: people may imagine themselves bound by rules which are no longer operative; indeed Parliament itself has through ignorance repealed statutes which had already been repealed and were therefore no longer in force (*z*). These, however, are highly unusual cases. Short of some such factual error, it makes no sense to contend that the members of a society are mistaken in believing themselves bound by the laws of that society; for being bound by law or other rules consists in fact largely of believing that one's behaviour ought to conform to the pattern specified in the rules.

Hart's analysis helps to distinguish between being obliged or compelled, and having an obligation (*a*). Acts done under compliance with the law are not, as Austin thought, done under coercion; they are done out of a sense of obligation. This is shown by the fact that even a person who cannot be compelled to obey

(*y*) Oppenheim's *International Law* (8th ed. by Lauterpacht), Vol. I, § 17. See also the *Asylum* case, I.C.J.Rep. 1950, pp. 276–277.
(*z*) Examples are given in C. K. Allen, *Law in the Making* (7th ed.), 442.
(*a*) Hart *op. cit.*, 80–81, 88, 236.

the law is still reckoned as having an obligation to obey; the law still remains as a standard demanding obedience. Laws and rules are concerned with obligation rather than coercion.

With this analysis of the term " rule " in mind, we must now go on to distinguish the characteristic features of legal rules. In some ways legal rules resemble the rules of games, clubs and societies. Rules such as these are typically of a formal nature and open to amendment by bodies authorised for this purpose. Moreover where difficulty arises as to the meaning or application of such rules, some sort of adjudication process is typically to be found. In the United States for example there has developed an extensive body of " case law " on the rules of golf. These characteristics which legal rules share with those of games and clubs differentiate them from the rules and principles of morality. For we saw earlier that rules of morality are not amenable to legislative alteration and that moral disputes are not resolvable by adjudication. And this, we saw, is not just due to the non-existence of legislators and judges of morality, but to the very nature of morality: legislation and adjudication in this sphere is logically inconceivable.

There is one characteristic, however, which legal and moral rules have in common and which distinguishes them both from the other types of rules just mentioned. Both legal and moral rules are *in invitum*; obedience to them is, as it were non-optional. In the first place the rules of a game apply only within a fairly limited context, *i.e.*, only to the players and only throughout the duration of the game. Likewise the rules of a club apply only to the members, whereas membership usually forms a relatively narrow segment of the members' lives. By contrast law and morals are concerned with much broader aspects of life. Morality may apply to every human act, while law, though narrower in scope, extends to a great number of such acts.

Secondly games and clubs are not compulsory; withdrawal and resignation are permanent possibilities. There is no such analogous choice in the case of moral rules, which apply to a man's conduct regardless of his own views on the matter. Morality is not something which one can participate in at will and resign from at one's pleasure. And the same is largely true of law. The law applies to the citizen whether he wants or no; it is not a club

which he is free to join or leave as he pleases. One can indeed withdraw from a legal system and adopt another one, but this involves the drastic step of emigration; and even so, one cannot avoid, so long as one resides in a country of some degree of civilisation, being subject to some system of law.

Law then consists of rules which are of broad application and non-optional character, but which are at the same time amenable to formalisation, legislation and adjudication. What is it, therefore, that serves to unite such rules and transform them into a legal system (*b*)? Austin, as we saw, considered that this uniting element was the characteristic of having been laid down by the same sovereign. A legal system may well, however, contain rules which cannot be attributed directly or indirectly to any act by the sovereign: the rules identifying the sovereign are a case in point.

A more sophisticated suggestion is that of Kelsen (*c*), who considers the systematic character of a legal system to consist in the fact that all its rules (or norms) are derived from the same basic rule or rules (grundnorms). Where there is written constitution, the grundnorm will be that the constitution ought to be obeyed.

(*b*) It should be noted that the term law is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the law of England, the law of libel, criminal law and so forth. In its concrete application, on the other hand, we say that Parliament has enacted or repealed a law. In the abstract sense we speak of law, or of the law; in the concrete sense we speak of a law, or of laws. But the concrete term is not co-extensive and coincident with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws, but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. A law means a statute, enactment, ordinance, decree or other exercise of legislative authority. It is one of the sources of law in the abstract sense.

This ambiguity is a peculiarity of English speech. All the chief Continental languages possess distinct words for the two meanings thus inherent in the English term law. Law in the concrete is *lex*, *loi*, *Gesetz*, *legge*. Law in the abstract is *jus*, *droit*, *Recht*, *diritto*. The law of Rome was not *lex civilis*, but *jus civile*. *Lex*, a statute, was one of the sources of *jus*. So in French with *droit* and *loi* and in German with *Recht* and *Gesetz* though it is not the case that the distinction between these two sets of terms is always rigidly maintained, for we occasionally find the concrete word used in the abstract sense. Medieval Latin, for example, frequently uses *lex* as equivalent to *jus*; we read of *lex naturalis* no less than of *jus naturale*; and the same usage is not uncommon in the case of the French *loi*. The fact remains that the Continental languages possess, and in general make use of, a method of avoiding the ambiguity inherent in the single English term.

(*c*) Kelsen's Pure Theory of Law is to be found in his *General Theory of Law and State* (trans. Wedberg). See also Kelsen, *What is Justice?* and Kelsen "The Pure Theory of Law" (1934) 50 L.Q.R. 474; Kelsen, "Professor Stone and the Pure Theory of Law" (1965) 17 Stan.L.R. 1128.

Where there is no written constitution, we must look to social behaviour for the grundnorm. The English legal system would appear to be based on several different such basic rules, one of which concerns parliamentary legislation, others of which deal with the binding force of judicial precedents. Such basic rules are to a legal system what axioms are to geometry: they are the initial hypotheses from which all other propositions in the system are derived.

Similar to this is Hart's view that a legal system arises from the combination of primary and secondary rules (*d*). Primary rules are those which simply impose duties; secondary rules are power-conferring rules, of which the most important are those which confer power to make and unmake other rules in the system, and which Hart terms rules of recognition. These are rules of a higher order; being rules about the other rules of the legal system. They can be looked at from two different angles. We may regard them as prescribing the method and procedures for creating, annulling and altering rules of law. Or we may look on them as tests to discover whether a given rule is one of the legal systems in question. The English rule about parliamentary sovereignty at one and the same time lays down the procedure for legislation and serves as one means of identifying rules as rules of English law.

It is these rules of recognition which in Hart's view transform a static set of unrelated rules into a unified dynamic legal system capable of adaption to social change. He parts company from Kelsen, however, in refusing to regard them as hypotheses. The basic rule of a legal system is not something which we have to assume or postulate. On the contrary it is itself a rule accepted and observed in the society in question. Unlike the other rules of the system it cannot of course be derived from any more basic rule. It is, nonetheless a rule—a customary rule, acceptance and observance of which finds expression in social practice and the general attitude of society. Although the rule about parliamentary sovereignty in England cannot be derived from any other rule of English law, it is more than a hypothesis: it is a customary rule of English law, followed in practice and regarded as a standard requiring compliance.

(*d*) Hart, *op. cit.*, Chaps. 5, 6.

While Hart's analysis of the concept of law provides many valuable insights and represents a marked advance, it raises in its turn new questions to which there are no obvious and immediate answers (*e*). The technique which he employs throughout "The Concept of Law" is that of the linguistic philosopher, who seeks to explain and analyse concepts by reference to the way in which we use the words denoting them. But to regard this as a mere lexicographical exercise would be a mistake. Indeed Hart's own claim is to have written an essay in descriptive sociology; for in his view (a view shared by linguistic philosophers generally) sharpened awareness of words sharpens our awareness of the phenomena which they describe (*f*). Accordingly, Hart, like Austin and many other legal theorists, is concerned less to define the meaning of "law" than to describe a working model of a standard legal system (*g*). This being so, critics of his analysis have expressed disappointment at finding that this sociological description rests less on empirically discovered facts about social behaviour and social institutions than on Hart's own reflections on how words are used. For a better understanding of the working of law in society we must enlist the help of the sociologist, the psychologist and others. Meanwhile, Hart's contribution may be said to have cleared the ground and prepared the way for advances in this direction.

One of his most valuable insights is that provided by his analysis of the term "rule", in which he marks out the distinction between the external and internal aspects of rule-observance. Less satisfactory is his claim to have found the crucial factor which distinguishes a legal system from a set of rules to consist in the combination of primary and secondary rules. Certainly the basic secondary rules concerning the criteria for identification provide unifying force to a legal system, but are there not other factors of equal importance? Suppose for example that the legislative sovereign is forcibly replaced by a new body, but that the law remains in every other respect unaltered, and that the

(*e*) For criticisms of Hart's theory Graham Hughes, "Professor Hart's Concept of Law" (1962) 25 M.L.R. 319; B. E. King, "Professor Hart's Concept of Law" [1963] C.L.J. 270; Robert S. Summers, "Professor H. L. A. Hart's Concept of Law" [1963] *Duke Law Journal* 629; see also Robert S. Summers in (1963) 13 *Philosophical Quarterly* 157–161.

(*f*) Hart, *op. cit.*, p. vii.

(*g*) Hart, *op. cit.*, p. vii; see Sawer, *Law in Society*, 1–2.

various rules in the different branches of private and public law retain their validity. Hart's analysis would suggest that in such a case the legal system must be said to have changed. But it might equally well be argued that what has changed is not the legal system but only the basic constitution of the state. Must the adoption of a new French constitution in 1958 necessarily be regarded as entailing the adoption of a new legal system?

What this suggests is that there may be other factors that can weld into a legal system what would otherwise be discrete rules of law. One such factor is surely those fundamental principles which lie behind the rules of the system. These are not themselves rules of law, since they are too wide and general to be rigorously applied. Lord Atkin's contention that " you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour "(*h*) is not a strict rule of law that can be simply applied; there are too many well-established exceptions to allow for its wholesale application, and in any case it is too vague and imprecise to function as a legal rule. What Lord Atkin enunciated was a principle which serves to draw together into a coherent whole the various individual rules relating to the duty of care in the tort of negligence, and which forms a starting point from which to derive new rules (*i*). Such principles, being roughly the general reasons underlying the rules, help to rationalise and make more consistent the precise rules which crystallise out in actual cases.

Well-developed legal systems, such as English law, contain both basic rules in Hart's sense and basic principles such as those described above. International law is a less developed system, which lacks the basic rules relating to the criteria for identification; it therefore qualifies in Hart's eyes as a mere set of rules. Yet international law does rest on certain fundamental principles (*j*) of the same kind as are to be found in common law systems, and it is arguable that these go far to render this corpus of rules more than a mere disparate set. We may contrast the rules of a club's

(*h*) In *Donoghue* v. *Stevenson* [1932] A.C. 562 at 579.

(*i*) See Heuston, " *Donoghue* v. *Stevenson* in Retrospect " (1957) 20 M.L.R. 1.

(*j*) See Schwarzenberger, " The Fundamental Principles of International Law " (1955) 87 *Hague Recueil*, Vol. I, 195–383.

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constitution, which usually incorporate regulations regarding its amendment, regulations analogous to the basic rules in a legal system; but the rules of the constitution are not further unified by anything in the nature of fundamental principles, and would for this reason perhaps be regarded in general as forming a set, rather than a system, of rules. With these examples we are in uncertain territory, but it is suggested that international law has more in common with ordinary legal systems than with rules of the kind just mentioned.

Another problem which arises about Hart's analysis concerns the extent to which the basic secondary rules of a legal system must enjoy that critical acceptance which constitutes the internal aspect of rule-observance. According to Hart's theory, in order for a rule to exist there must be more than a mere regular pattern of behaviour; there must also be a generally accepted view that this is a pattern to which conduct should conform and from which deviations are criticised. Driving on the left-hand side of the road would not amount to observance of a rule of the road if all that happened was that some, or even most, drivers, each for his own part and without regard to what others did, drove on the left. Now the difficulty with the basic rules of a legal system is that these may in truth be neither well known nor understood by the vast majority of society: the rules about the sovereignty of Parliament and judicial precedent may not be at all fully apprehended by the ordinary citizen. All that is necessary here, according to Hart, is that they should be accepted as rules by the officials concerned to apply and administer the law; the minimum requirement is that these officials should maintain a critical attitude towards them. It would not be enough, if for example each judge merely followed the practice for his own part, paying no attention to what was done by others. What is required is that the judges in general must regard the practice as required by a standard which is to be complied with, that they must disapprove of departures from the practice, and that they must follow it on the basis that it ought to be observed rather than out of fear of sanctions or desire for reward. To this it can be objected that the judge observing the rule of recognition, no less than the ordinary

citizen obeying the primary rules of law, may be motivated by fear or ambition—in which case his observance would seem devoid of the internal attitude required by the theory. But this objection appears to confuse the motives for compliance with the nature of the compliance itself: one may comply with a rule for fear of sanctions, while nevertheless regarding the rule as a rule. Furthermore, if the motive for observance is fear of punishment or desire for reward, this suggests that at some later stage such sanctions or rewards might be applied; but this is presumably done on the basis that the rule of recognition is something which ought to be obeyed.

Lastly, one problem not settled by the theory is the status of the "ought" in a basic secondary rule. Clearly this is not a mere instrumental "ought" as is the case with such statements as "you ought to go on a diet, if you mean to reduce your weight". Nor on the other hand is it a straight-forward legal "ought" such as is found in ordinary legal propositions. The rule that the citizen ought to pay taxes enshrines a legal "ought" since the rule has been laid down by a law derivable from the basic legal rules of recognition. But the basic rule of English law about parliamentary sovereignty is not itself derivable in this manner. We have seen that this is a customary rule. Yet such rules are not rules of morality and do not represent a moral "ought": that Parliament should be obeyed is a rule of law but not a rule which it would be morally wrong to alter. The truth would seem to be that behind all such basic rules of law lies a moral principle to the effect that social life is necessary and desirable, together with a factual truth to the effect that some type of legal system, and so some basic legal rule, is an essential means to this end. The proposition that Parliament's statutes ought to be the supreme law of the land, therefore, may be unpacked into a number of different propositions containing "oughts" of different nature. We ought (morally) to aim at a stable social system; for this we need, and so ought (instrumentally), to have some legal system incorporating some such basic secondary rule; and also perhaps we ought (morally) not lightly to disregard or abandon the rule which actually obtains.

7. International law

Whether or not international law is really law is a celebrated, if sterile, controversy (*k*). Following Austin (*l*) and defining law as a sovereign's command enforced by sanctions, positivists have argued that international law cannot qualify as law since it lacks anything by way of a sovereign legislature or of sanctions. As against this view the international lawyer tends to take two different stands. Some contend (*m*) that there is both legislation and law enforcement in international law, legislation being provided by multilateral treaties and sanctions by the right of self-help and war. Treaties and self-help, however, cannot qualify as legislation and law-enforcement in a positivist sense. Multilateral treaties bind only consenting states parties: no international body enjoys authority like that of a municipal legislator to make rules binding on non-consenting subjects. War and self-help (even if not now ruled out by the United Nations Charter) are quite different from the positivist notion of institutionalised and centrally organised sanctions, being nothing more than private remedies, whereby states take the law into their own hands; but these, no more than the vendetta and the blood-feud, constitute sanctions in the Austinian sense. Accordingly, the positivist would regard international law as nothing more than rules of international morality or good behaviour.

The alternative stand taken by international lawyers is to reject the Austinian definition of law, to deny the necessity of a sovereign and of sanctions, and to propose a definition of law wide enough to include international law. Oppenheim (*n*), for instance, defines law as a body of rules for human conduct within a community, which by common consent of this community shall be enforced by external power. Now clearly, since there is an international community and since there do exist rules of conduct and a common consent that these shall be enforced by external power, international law fulfils these requirements and qualifies

(*k*) See Starke, *Introduction to International Law* (5th ed.), 16–20; Oppenheim, *International Law* (8th ed.), 7–15; Hart, *op. cit.*, Chap. 10.

(*l*) Austin, *Province of Jurisprudence Determined*, 141–142, 201.

(*m*) Starke, *op. cit.* 17, advances this argument with regard to legislation. Kelsen at one time argued that war was the sanction in international law: see Kelsen, *General Theory of Law and the State*, 328.

(*n*) *Ibid.*, 10 *et seq.*

as law. This only means, however, that international law is law in Oppenheim's sense; it still fails to amount to law in Austin's sense. How do we establish which of the two is right?

To this, according to some writers, there is no answer (*o*), nor should we look for one, for this is to demand the impossible. International law is law in Oppenheim's sense but not law in Austin's. Both are quite validly defining law for their own purposes, the only mistake of each being not to recognise that the other is referring to a different thing by the term "law" And if we ask whether international law is law in the proper sense of the word, they reply that there is no such thing as the proper sense of a word; words have no God-given meanings but only those we choose to bestow upon them. The truth of the matter is that whatever description we choose to give to these international rules will not in any way affect their actual existence and character; whatever we say, the facts remain the same. Consequently, whether we should call international law law or not is a trivial and empty verbal question.

Verbal questions, however, are neither all alike nor all equally trivial (*p*). Some verbal, *i.e.*, non-factual, questions simply demand a dictionary definition. To such a question as "What is a sinecure?" there is a straightforward answer which provides no factual information other than information about the way the word is used. Contrast the question "Is it driving to steer a towed vehicle?" We have seen that this cannot be answered by mere reference to the dictionary; for the ordinary usage of the word "driving" is too unclear to establish whether it applies here or not. Now to designate this a verbal question conceals the fact that it differs from the former type of question. Admittedly here too the demand is not for factual information, but this type of question arises not from ignorance of linguistic usage but rather from the presence of a borderline situation, which manifests resemblances to, and differences from, the standard case, so that we are prompted at one and the same time to allow and to refuse the application to it of the standard term. Steering a vehicle on

(*o*) See Glanville Williams, *op. cit.* in (1945) 22 B.Y.I.L. 12.

(*p*) On the difference between trivial and non-trivial verbal questions see Wisdom, "Philosophy, Metaphysics and Psycho-Analysis" in Wisdom, *Philosophy and Psycho-Analysis*. See also Lloyd, *Introduction to Jurisprudence* (2nd ed.), 416–420.

tow is in some ways like, and in others quite unlike, the normal case of driving, and whether or not we shall end by regarding it as amounting to driving will depend on whether we are more impressed by the similarities or by the differences. Moreover, the view we take may have important practical consequences. In *Wallace* v. *Major* (*q*), for example, acquittal or conviction was at stake.

Into this category of non-trivial questions we must locate the problem over international law. No mere lexicographical definition will help us here, because the word "law" lacks the requisite precision. Nor will simple arbitrary definition assist. For there will still remain the question whether international law is law, not in the new sense, but in the old or ordinary sense. The untrivial character of this question lies in the way in which the view we take may serve to enhance or diminish the prestige, respect and effectiveness now enjoyed by the rules of international law.

Clearly international law is a borderline case. It lacks certain important features, characteristic of a standard legal system, such as legislative organs, courts with compulsory jurisdiction and institutionalised methods of law enforcement. Such defects militate against the current practice of statesmen, lawyers and the rest of us of characterising international law as a species of law, because this practice glosses over these highly important differences between international and ordinary law. Yet to classify international law as a species of morality or good behaviour is to overlook the significant characteristics which are common to both international and ordinary law and which distinguish both from morality. For the rules of international law, like those of a standard legal system and unlike those of morality, can be formalised, and can in principle be legislated and adjudicated on; and arguments in international law are, in their use of authority, of a kind with other legal arguments and quite distinct from moral disputes in which authority has no place. The co-existence in international law of similarities with, and differences from, ordinary law raises perpetual uneasiness as to whether to classify it as law or not.

(*q*) [1946] K.B. 473. *Supra*, § 5.

Hart's analysis of law (*r*) suggests that international law consists of legal rules forming not a system but a set of rules. The absence in international law of any basic rules of recognition prevents its being unified into a system; it remains a mere set of separate rules. Any attempt to find a basic rule in the principle that agreements must be kept "*pacta sunt servanda*", the principle on which rests the law concerning treaties, must fail simply because many of the rules of international law rest not on treaty but on custom, and cannot therefore be based on "*pacta sunt servanda*". An alternative suggestion that the basic rule is that which lays down the two requirements of a customary rule of international law, *i.e.*, state practice together with the "*opinio juris sive necessitatis*", must also be rejected, for this is not so much a rule of international law by which to identify other rules as a description of what a rule actually is, an analysis marking out the external and internal aspects required to qualify a custom as a rule.

Yet to allow the lack of any basic rule of recognition to lead us to regard international law as nothing more than a simple set of discrete rules seems to err in the opposite direction. For, though the rules of international law enjoy no unifying rule of recognition, they are far from being a mere list of wholly unconnected regulations. In fact they are interrelated and knit together by a cluster of basic principles and organising concepts rendering what would otherwise be separate rules into a coherent network. Such principles and concepts, it is suggested, play as important a part in the systematisation of law as do any basic rules of recognition (*s*).

8. The authority of law

The acceptance of international law as law poses the problem of explaining its binding force, and this in turn raises questions as to the authority of all law (*t*). Some writers have sought to demonstrate the binding character of international law from its derivation from natural law (*u*). But we have seen that natural

(*r*) Hart, *op. cit.*, 228 *et seq.*
(*s*) *Supra*, § 6.
(*t*) On this see Brierly, *The Basis of Obligation in International Law*, Chap. 1, and Hart, *op. cit.*, 211.
(*u*) The view that international law consisted of the precepts dictated to states by natural law was advanced by Vattel, *Droit de gens*, Preliminaries,

law is nothing more than morality and that the existence of moral rules is no guarantee of the existence of corresponding legal rules. Such an argument shows at most that the rules of international law are morally binding, not that they are legally binding. Moreover, many legal rules are morally indifferent: morality may demand the existence of some rule without specifying what that rule should be. Such is the case in municipal law with regard to the formalities required for wills, contracts and conveyances; and in international law with some of the rules regarding title to territory and the limits of jurisdiction. The binding force of such rules can hardly be attributed to any moral characteristic.

Another suggestion is that the binding force of international law rests on the consent of states, members of the international community being legally bound by the rules because they have agreed so to be bound (*v*). Now while consent plays an important part within the framework of international law, this argument, which seeks to reconcile the existence of international law with the sovereignty of states (*w*), suffers from one fatal flaw: how are we to establish the legally binding force of this very principle itself, that states are bound by the rules to which they consent? The validity of such a principle depends on its operation within a general framework of law which accepts the concept of binding agreement.

But the problem of proving that international law is binding is no greater than that of demonstrating the authority of any system of law (*x*). A rule of English law, for example, owes its legal validity to some higher rule, which in turn derives from some yet higher rule, until finally we arrive at an ultimate principle or rule of recognition, such as the rule that parliamentary statutes are law (*y*). On such fundamental rules rest all the other rules of

§ 7. That international law is derivable from the natural *rights* of states was the view of Grotius, *De Jure Belli ac Pacis, Prolegomena*, §§ 11, 39. See D'Entrèves, *Natural Law*, 53 *et seq.*

(*v*) Grotius is sometimes represented as sharing this view, but see Brierly, *op. cit.*, 10.

(*w*) Likewise, the Social Contract theory seeks to reconcile the co-existence of individual freedom and of municipal law.

(*x*) See Fitzmaurice, "The Foundations of the Authority of International Law" (1956) 19 M.L.R. 1. Fitzmaurice sees the binding force of international law in the extra-legal principle of the concept of justice. Brierly found it in man's belief that order and not chaos is the governing principle of the world; Brierly, *op. cit.*, 67.

(*y*) See *infra*, §§ 12, 18.

the system. And here the problem arises, how do we establish that these are legally binding?

This kind of problem arises partly from a confusion. To show that an individual rule of a legal system is binding is a different thing from showing that the system itself is binding. To show the former is to demonstrate that the rule in question can be validly derived from, or identified in accordance with, one of the basic rules of recognition. The basic rules, however, cannot be derived from some still more ultimate rules. For suppose that our basic rules were derivable from some such ultimate rule: in this case the basic rule would in fact be this ultimate rule and, unless we are to end in an infinite regress, this rule cannot itself be derived from anything more ultimate. To try to prove the legal validity of such an ultimate rule, *e.g.*, to look for authority in English law for the basic rules about Parliament and the workings of precedent, is like trying to prove Euclid's axioms from Euclid's geometry.

What this suggests is that the basic rules of a system of law (and in the case of international law, which has no basic rules, all the different rules) are at best mere rules of practice. In other words, English law and international law are in general followed. Yet we have seen that following a practice is not the same thing as observing a rule. The basic rules of English law (and the rules of international law) are regarded with that internal critical attitude that distinguishes rule-observance from mere habitual conduct. But now the question "how are these rules binding?" seems to break down into different questions. It may end up as a request for an historical account of how people came to accept the sovereignty of Parliament as a rule of law. Or it may turn out to be an inquiry as to whether such a rule involves a legal, moral or other kind of "ought". To this the answer must be that the acceptance of some kind of legal system is necessary in order to achieve ends which are morally desirable, but that morality is silent as to which particular system, together with its basic rules, is to be accepted. Consequently such rules of recognition as the rule of parliamentary sovereignty involve a mixture of moral, legal and instrumental "ought" propositions (*z*).

(*z*) Supra, § 6.

9. The function and purpose of law: justice, stability and peaceful change

So far our discussion has centred round the formal aspects of legal rules and legal systems. But law is an instrument of society, and no discussion would be complete without some inquiry as to its object. What then does, or should, law achieve?

One answer is justice (*a*). Theorists as far removed from one another as Aquinas and Salmond have claimed justice as the goal of law: indeed for them it is a logical part of the very notion of law. For to Aquinas (*b*), following Augustine, an unjust law is no law, while to Salmond (*c*) law is those principles applied by the state in the administration of justice. Others, such as the positivists, who would deny any essential or logical connection between the two concepts, would nevertheless regard justice as highly relevant to a critical evaluation of law (*d*). It is, therefore, a concept which legal theory must investigate.

The difficulty of defining it is increased by the fact that justice can be used in a wider or a more restricted sense (*e*). In the wide sense, such as is used by Aquinas in his contention that an unjust law is no law, justice appears to be roughly synonymous with morality. In the narrower sense, as in the expressions "courts of justice", "natural justice" and "denial of justice", the term refers to but one area of morality.

That "justice" has this narrower sense can be seen by examining the converse concept, that of injustice. An unjust man, act or law is automatically immoral, but the converse is not true. Wickedness can take other forms than injustice. The cruelties of a Stalin have shocked the world, but not primarily on account of their injustice. Rape is an abhorrent act, but the last description

(*a*) On Justice see Pollock, *Jurisprudence and Legal Essays* (ed. Goodhart), 16–30; S. K. Allen, *Aspects of Justice*; Dowrick, *Justice according to English Common Lawyers*; Hart, *The Concept of Law*, Chap. 8; Lloyd, *The Idea of Law*, Chap. 6.

(*b*) *Supra*, § 3.

(*c*) See Salmond, *Jurisprudence* (7th ed.), 39: "The law may be defined as the body of principles recognised and applied by the state in the administration of justice. In other words, the law consists of the rules recognised and acted on by courts of justice."

(*d*) Austin, *op. cit.*, lecture V, 126. "The *science of jurisprudence* (simply and briefly, *jurisprudence*) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness"; and see *supra*, p. 23, n. (*g*).

(*e*) Dowrick, *op. cit.*, discusses seven meanings of the word "justice".

to be applied to it is that of being unjust. Injustice is rather the charge levelled against men, acts or laws that treat one or more persons more harshly or more favourably than others in the same situation. A father who picks on one child and makes a favourite of another is an unjust parent. An examiner who, for personal reasons and not on their merit, marks certain candidates more leniently or harshly than the rest, is an unfair examiner. The practice of exemplary sentences, whereby for reasons of deterrence one convicted criminal is punished with unusual severity, similarly offends against justice. For justice consists precisely in *not* singling persons out for special treatment in the absence of significant differences, but in treating like cases alike and meting out fair and equal treatment to all.

Now justice operates at two different levels (*f*). As " distributive justice ", it works to ensure a fair division of social benefits and burdens among the members of a community. One of the most important of democratic rights is the right to vote, the fair distribution of which is clearly demanded by the Benthamite claim that each should count for one and no one for more than one—a principle which would be manifestly offended against by a restriction of the franchise to red-haired citizens. One of the citizen's most onerous burdens is taxation, which too should, in justice, be fairly distributed, so that a statute taxing red-haired citizens at double the rate of others would equally contravene this requirement. Distributive justice then serves to secure a balance or equilibrium among the members of society.

This balance, however, can be upset. Suppose one citizen, X, is prevented by another, Y, from exercising his right to vote. Now the balance is upset because Y has deprived X of a right that should be equally enjoyed by all. At this point " corrective justice " will move in to correct the disequilibrium by forcing Y to make X some compensation. Or again if A wrongfully seizes B's property, corrective justice acts to restore the *status quo* by compelling A to make restitution. Justice, then, in its distributive aspect serves to secure, and in its corrective aspect to redress, the balance of benefits and burdens in a society.

The former aspect is the concern primarily of those whose task it is to enact constitutions and codes and make new laws by

(*f*) This distinction is made by Aristotle, *Nichomachean Ethics*, 1130b–1132b.

legislation, these being the levels at which division of social goods takes place. The function of the courts is chiefly that of applying justice in its corrective sense. In a just system of law, then, we shall expect to find on the one hand rules aiming to procure an equality of distribution, and on the other specific rules relating to the application of corrective justice by the courts. These latter rules, however, can be themselves regarded as securing fair dispensation of corrective justice. In the example above, where A seizes B's property, fair dispensation of justice requires that any investigation of the dispute should set both parties on an equal footing. Consequently, in a fair legal system we should look for procedural or other rules to afford each party an equal opportunity of presenting his case and calling evidence and to prevent judicial prejudice in favour of either. Detailed application of such rules may involve the provision of legal aid and the disqualification of interested persons from sitting in judgment, the former requirement for the sake of equal representation and the latter for the sake of impartiality.

But fair and equal dispensation of justice demands more than equality between the parties to individual lawsuits; it requires that all be equal before the law. What this means is not that all should enjoy equality of legal rights, for the distribution of these has little or nothing to do with judicial function. It means rather that the legal rights which each person has should be given equal protection by the courts. In England, for example, where certain categories of persons, such as minors and lunatics, lack certain rights, all are not legally equal; but, in so far as the rights possessed by each citizen are equally respected by the courts, to this extent all are equal before the law. This entails then, not just that in each case both plaintiff and defendant get an equal "crack of the whip", but that today's plaintiff and tomorrow's receive the same sort of hearing; in other words, that the judges should mete out justice without fear or favour, without distinction between high and low, rich and poor, and so forth.

But this in turn entails that like cases be treated alike not only as regards the hearing but also in respect of the finding. For if today's plaintiff is awarded damages because of the defendant's wrong, then tomorrow's plaintiff should, in an identical situation, receive an identical award, otherwise the court would be failing in

its duty of giving each plaintiff's right equal protection. Likewise, if yesterday's prisoner in the dock was fined a certain amount, today's should, for a similar offence, be ordered to pay a similar sum. Major discrepancies in sentencing mean in fact inequality before the law. This requirement, then, that like cases be treated alike in this sense, points away from a system of " palm tree " justice, whereby each case is decided on its merits according to what the judge thinks fit, to a system of general rules prescribing what is to be decided in whole classes of similar cases; and these rules we shall expect to find in the substantive provisions of the law.

Now once we have a legal system operating via such general rules, we can see that there is yet another sort of balance to be achieved by distributive justice. Hitherto we have considered justice at this level as providing an equitable division between the actual members of society. Once general rules of substantive law appear on the scene, however, whether they result from legislation or from judicial creation, a balance is beginning to be struck, not between persons, but between interests. For at this stage the law has left behind the question of weighing Smith's rights against Jones's rights, and reached the point of considering rights in the abstract; it is no longer concerned with whether this plaintiff's right to his good name should prevail over this defendant's right to speak his mind, but with the balancing and reconciling in general of the right to reputation and the right of freedom of speech. Similarly in property law, in those cases where an innocent victim's goods are dishonestly acquired and sold to an innocent purchaser, the law is compelled to adjudicate not just between the two interested parties but between the conflicting social interests of security of property and ready marketability of goods.

This has led jurists such as the American writer Roscoe Pound (*g*) to regard law as a species of social engineering, whose function it is to maximise the fulfilment of the interests of the community and its members and to promote the smooth running

(*g*) See Pound, *Philosophy of Law*, " The Scope and Purpose of Sociological Jurisprudence " (1910–11) 24 H.L.R. 591, (1911–12) 25 H.L.R. 140, 489. *Social Control Through Law*; " A Survey of Social Interests " (1943–44) 57 M.L.R. See Lloyd, *Introduction to Jurisprudence* (2nd ed.), Chap. 6; Friedmann, *Legal Theory* (4th ed.), 237–244.

of the machinery of society. Now an interest may be roughly defined as anything that is of general advantage to a person. Bodily security, property, reputation and freedom of speech are all interests in this sense, since all of these are to a man's advantage or in his interest. Not all such interests, however, necessarily receive recognition and protection by law. The right to privacy, for instance, is not fully recognised by English law (*h*). But what interests there are in a society and which of these are, and which should be, the subject of legal recognition are questions partly for sociology, partly for law and partly for ethics; and the reconciliation of conflicts between competing interests is in a broad sense part of the problem of justice.

But the basic notion of like treatment of like cases is but the formal aspect of justice. The material aspect concerns the determination of what makes like cases alike. Of the many ways in which people differ from one another some are clearly too trivial to be taken into account. To restrict the franchise or the burden of taxation to red-haired citizens would be to use ridiculous criteria based on differences which are without importance. Others by contrast are clearly significant. To exclude young children from voting and payment of taxes is to work according to reasonable criteria, since limited intelligence and earning capacity are relevant in this context. Between these two extremes lies a range of criteria involving discrepancies about which there may be considerable disagreement. Into this intermediate category fall differences in sex, race and religion. Those who discriminate on these grounds justify their practice on the basis that such factors are so important as to render unequal those who differ with regard to them; while those who condemn such discrimination do so on the ground that such factors are irrelevant to the measurement of human equality. Which factors are, and which are not relevant is in the ultimate a question not of fact but of outlook and attitude; and in so far as the law must answer such questions, it must do so by accepting and enshrining value judgments rather than by applying simple rules of law.

(*h*) See *Salmond on Torts* (14th ed.), 22–23. In the United States the law, which is more developed on this topic than in England, originates from an article by Warren and Brandeis "The Right of Privacy" in (1890) 4 H.L.R. 193. A Right of Privacy Bill introduced into the House of Lords in 1961 was dropped after a Second Reading.

Justice, however, is not the only possible or desirable goal of law. Indeed the notion of law represents a basic conflict between two different needs, the need for uniformity and the need for flexibility. Uniformity is needed partly to provide certainty and predictability. Where rules of law are fixed and generalised, the citizen can plan his activities with a measure of certainty and predict the legal consequences of his behaviour. In some areas of law such as contract and property this need may outweigh all others, and fixed rules which work in some instances unfairly may be preferable to rules that are fairer but less certain. Another advantage of uniformity is to substitute fixed rules for the arbitrary "fiat" of the judge; for a government of laws is preferable to one of men not simply by virtue of being less uncertain but by reason of releasing the citizen from the mercy of other human beings. Yet another benefit is the stability and security which the social order derives from uniform, unchanging and certain rules of law.

On the other hand there is a need for flexibility. The existing rules may not provide for the exceptional case, and as legal realism has shown, no rule can provide for every possible case. Some measure of discretion, therefore, is valuable where circumstances alter cases. Sentencing is one activity where completely rigid rules, preventing the courts from giving weight to all the factors in the case, would be wholly inappropriate and where some amount of individualisation is desirable. Furthermore, flexibility is necessary to enable the law to adapt itself to social change (*i*). As a society alters, so do its needs, and a serviceable legal system must be able in its development to take account of new social, political and economic requirements. Given an unalterable system of law, the necessary changes can only be brought about by violence and upheaval; law that is capable of adaptation, whether by legislation or judicial development, allows for peaceful change. This reconciliation of stability with flexibility is a permanent problem for any legal system.

10. Law and fact

It is commonly said that all questions which arise for consideration and determination in a court of justice are of two kinds, being either questions of law or questions of fact. In a sense

(*i*) See Friedmann, *Law and Social Change in Contemporary Britain*, Chaps. 1-2.

this proposition is true, but it is one which requires careful examination, because both the term question of law and the term question of fact are ambiguous and possess more than one meaning.

The term question of law is used in three distinct though related senses. It means, in the first place, a question which the court is bound to answer in accordance with a rule of law—a question which the law itself has authoritatively answered, to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. All other questions are questions of fact—using the term fact in its widest possible sense to include everything that is not law. In this sense, every question which has not been predetermined and authoritatively answered by the law is a question of fact—whether it is, or is not, one of fact in any narrower sense which may be possessed by that term. Whether a contractor has been guilty of unreasonable delay in building a house is a question of fact; the law contains no rule for its determination. But whether the holder of a bill of exchange has been guilty of unreasonable delay in giving notice of dishonour is a question of law to be determined in accordance with certain fixed principles laid down in the Bills of Exchange Act. The question whether a child accused of crime has sufficient mental capacity to be criminally responsible for his acts is one of fact, if the accused is over the age of ten years, but one of law (to be answered in the negative) if he is under that age. The Sale of Goods Act provides (section 56) that " where, by this Act, any reference is made to a reasonable time, the question what is a reasonable time is a question of fact ". This means that there is no rule of law laid down for its determination.

In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. Questions of law in this sense arise, not out of the existence of law, but out of its uncertainty. If the whole law could be definitely ascertained (*j*), there would be no

(*j*) As the American Realists have shown, such certainty cannot be achieved. See *supra*, § 5.

questions of law in this sense; but all questions to be answered in accordance with that law would still be questions of law in the former sense. When a question first arises in a court of justice as to the meaning of an ambiguous statutory provision, the question is one of law in this second sense; it is a question as to what the law is. But it is not a question of law in the first sense, but a question of fact. The business of the court is to determine what, in its own judgment and in fact, is the true meaning of the words used by the legislature. But when this question has once been judicially determined, the authoritative answer to it becomes a judicial precedent which is law for all other cases in which the same statutory provision comes in question. The question as to the meaning of the enactment has been transformed from one of fact into one of law in the first sense; for it has in all future cases to be answered in accordance with the authoritative interpretation so judicially placed upon the enactment. The judicial interpretation of a statute, therefore, represents a progressive transformation of the various questions of fact as to the meaning of that statute into questions of law (in the first sense) to be answered in conformity with the body of interpretative case-law so developed.

There is still another and third sense in which the expression question of law is used. This arises from the composite character of the typical English tribunal, at any rate until recent years, and the resulting division of judicial functions between a judge and a jury. The general rule is that questions of law (in both of the foregoing senses) are for the judge, but that questions of fact (that is to say, all other questions) are for the jury. This rule, however, is subject to numerous and important exceptions. Though there are no cases in which the law (in the sense, at least, of the general law of the land) is left to a jury, there are many questions of fact that are withdrawn from the cognisance of a jury and answered by the judge The interpretation of a document, for example, may be, and very often is, a pure question of fact, and nevertheless falls within the province of a judge. So the question of reasonable and probable cause for a prosecution—which arises in actions for malicious prosecution—is one of fact and yet one for the

judge himself. So it is the duty of the judge to decide whether there is any sufficient evidence to justify a verdict for the plaintiff; and if he decides that there is not, the case is withdrawn from the jury altogether; yet this is mere matter of fact, undetermined by any authoritative rule of law. By an illogical though convenient usage of speech, any question which is thus within the province of the judge instead of the jury is called a question of law, even though it may be in the proper sense a pure question of fact. It is called a question of law because it is committed to and answered by the authority which normally answers questions of law only.

We proceed now to consider more particularly the nature of questions of fact, already incidentally dealt with in connection with questions of law. The term question of fact has more than one meaning. In its most general sense it includes all questions which are not questions of law. Everything is matter of fact which is not matter of law. And, as the expression question of law has three distinct applications, it follows that a corresponding diversity exists in the application of the contrasted term. A question of fact, therefore, as opposed to a question of law, means either (1) any question which is not predetermined by a rule of law; or (2) any question except a question as to what the law is; or (3) any question that is to be answered by the jury instead of by the judge.

There is, however, a narrower and more specific sense, in which the expression question of fact does not include all questions that are not questions of law, but only some of them. In this sense a question of fact is opposed to a question of judicial discretion. The sphere of judicial discretion includes all questions as to what is right, just, equitable, or reasonable —so far as not predetermined by authoritative rules of law but committed to the *liberum arbitrium* of the courts. A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court. In determining questions of fact the

court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged, is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right. The Companies Act empowers the court to make an order for the winding-up of a company if (*inter alia*) the company is unable to pay its debts or the court is of opinion that it is just and equitable that the company should be wound up. The first of these questions is one of pure fact, whereas the second is a question of judicial discretion. The Divorce Court is empowered to grant divorce for adultery, and to make such provision as it may deem just and proper with respect to the custody of the children of the marriage. The question of adultery is one of fact; but the question of custody is one of right and judicial discretion.

Doubtless, in the wider sense of the term fact, a question whether an act is right or just or reasonable is no less a question of fact than the question whether that act has been done. But it is not a question of demonstrable fact to be dealt with by a purely intellectual process; it involves an exercise of the moral judgment, and it is therefore differentiated from questions of pure fact and separately classified.

There is yet a third meaning of the expression "question or matter of fact" in which it is contrasted with a question or matter of *opinion*. A question of fact is one capable of being answered by way of demonstration—a question of opinion is one that cannot be so answered. The answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong. The past history of a company's business is a matter of fact; but its prospects of successful business in the future is a matter of opinion. A prospectus which erroneously sets out the former, contains misrepresentations of fact; a prospectus which merely contains prophecies of future prosperity does not, for this is a matter of opinion, not of fact (except in so far as the statement of an opinion implies that as a matter of fact the person stating it does hold the opinion). Alternatively, the answer to a question of opinion may be a matter of assessment or evaluation which

can neither be proved by evidence nor determined by law, since the law may not provide criteria for assessment. A statement to the effect that a painting is by Constable is a representation of fact; a statement that it has great artistic merit is a matter of opinion. Many of the questions which courts decide "on the facts" and which are not governed by fixed legal rules are questions of opinion in this second sense. Whether the defendant drove without due care, whether the accused reacted to the deceased's provocation as would a reasonable man, whether a flat has been so substantially altered as to suffer a change of identity—all these are strictly neither questions of law nor of fact; they are matters for evaluation.

A distinction is also drawn between primary and secondary facts. Primary facts are proved by oral, documentary and other evidence; secondary facts can be inferred from primary facts. The importance of the distinction is that an appellate tribunal can be said to be in as good a position as the trial court with regard to secondary, though not primary, facts (*k*).

Matters and questions which come before a court of justice, therefore, are of three classes:

(1) Matters and questions of law—that is to say, all that are determined by authoritative legal principles;

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

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

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment, in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order

(*k*) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370. *Re St. Edburga's, Abberton* [1962] p. 10. In *Solle* v. *Butcher* [1950] 1 K.B. 671, Denning L.J. considered the question whether premises had been substantially altered a question of secondary fact. It would surely be more correct to regard it as one of evaluation. Mr. W. A. Wilson in a valuable contribution "A Note on Fact and Law" in [1963] 26 M.L.R. 609, calls such questions descriptive questions.

to ascertain the truth (*l*). On the trial of a person accused of theft, for example, the question whether the act alleged to have been done by him amounts to the criminal offence of theft is a question of law, to be answered by the application of the rules which determine the scope and nature of the offence of theft and distinguish it from other offences, such as that of obtaining goods by false pretences; the question whether he has done the act so alleged against him is a question of fact, to be determined in accordance with the evidence; and the question as to what is the just and reasonable punishment to be imposed upon him for his offence is a question of right or judicial discretion, to be determined in accordance with the moral judgment of the court.

The existence and development of a legal system represents the transformation, to a greater or less extent, of questions of fact and of judicial discretion into questions of law, by the establishment of authoritative and predetermined answers to these questions. This process of transformation proceeds chiefly within the sphere of judicial discretion, and only to a smaller extent within the sphere of pure fact. In respect of questions as to what is just, right, and reasonable, the purpose and effect of a system of law is to exclude and supersede to a very large extent the individual moral judgment of the courts, and to compel them to determine these questions in accordance with fixed and authoritative principles which express the established and permanent moral judgment of the community at large. Natural or moral justice is to a very large extent transmuted into legal justice; *jus naturale* becomes *jus positivum*. The justice which courts of justice are appointed to administer becomes for the most part such justice as is recognised and approved by the law, and not such justice as commends itself to the courts themselves. The sphere of judicial discretion is merely such portion of the sphere of right as has not been thus encroached upon by the sphere of law.

(*l*) It is worth noting that any question relating to foreign law is regarded by English courts as a question of fact to be proved by evidence. This is not the case with international law, nor of course with English law, where evidence is not admitted. But see *Swaffer* v. *Mulcahy* [1934] 1 K.B. 608, where expert evidence was allowed on the question whether or not an alleged statute of Henry III was a statute.

Questions of opinion too are transformed into questions of law. This is largely the result of replacing trial by jury in civil actions by trial by judge alone. For whereas formerly the judge would sum up the general law to the jury, leaving them to decide the matter on the facts and without giving reasons, today the judge himself decides the whole issue, applying the law to the facts and formulating the reasons for his decision. One consequence of this is a move away from general principles towards an infinite complexity of particular rules, which becomes wholly unmanageable. A welcome halt to this process was called by *Qualcast* v. *Haynes* (*m*), where the House of Lords held the trial judge's reasons for his conclusions on questions of negligence to be propositions, not of law, but of fact, if they are questions which in a jury trial would be decided by the jury. Future progress in the common law may well lie in the retransformation of questions of law into questions of opinion and discretion. In many areas judicial discretion has been freed from the fetters of law. Rules of pleading have been relaxed. Judges in divorce cases have been given a discretion to grant a decree even though the petitioner has committed a matrimonial offence. Courts now have a wide discretion in the matter of costs, in the apportionment of loss between joint and concurrent tortfeasors and in the cases of contributory negligence. The Occupiers' Liability Act, 1957, replaced a mass of particular rules by a few broad, simple principles. Such developments, providing the courts with a fixed framework within which they are relatively free to arrive at decisions on the merits, allow rules of law to function as "guideposts rather than hitchposts".

To a lesser extent, even questions of pure fact are similarly transformed into questions of law. Even to such questions the law will, on occasion, supply predetermined and authoritative answers. The law does not scruple, if need be, to say that the fact must be deemed to be such and such, whether it be so in truth or not. The law is the theory of things, as received and acted upon within the courts of justice, and this theory may or may not conform to the reality of things outside. The eye of the law does not infallibly see things as they are. Partly by deliberate design and partly by the errors and accidents of

(*m*) [1959] A.C. 743.

historical development, law and fact, legal theory and the truth of things, may fail in complete coincidence. We have ever to distinguish that which exists in deed and in truth from that which exists in law. Fraud in law, for example, may not be fraud in fact, and *vice versa*. That is to say, when the law lays down a principle determining, in any class of cases, what shall be deemed fraud and what shall not, this principle may or may not be true, and so far as it is untrue the truth of things is excluded by the legal theory of things.

This discordance between law and fact may come about in more ways than one. Its most frequent cause is the establishment of legal presumptions, whereby one fact is recognised by law as sufficient proof of another fact, whether it is in truth sufficient for that purpose or not. Such legal presumptions—*presumptiones juris*—are of two kinds, being either conclusive or rebuttable. A presumption of the first kind, sometimes called a *praesumptio juris et de jure*, constrains the courts to infer the existence of one fact from the existence of another, even though this inference could be proved to be false. A presumption of the second kind requires the courts to draw such an inference even though there is no sufficient evidence to support it, provided only that there is no sufficient evidence to establish the contrary inference. Thus a negotiable instrument is presumed to be given for value, a person not heard of for seven years is sometimes presumed to be dead, and an accused person is presumed to be innocent (*n*). A fact which by virtue of a legal presumption is deemed by law to exist, whether it exists or not, is said in the technical language of the law to exist constructively or by construction of law. Constructive fraud or constructive notice, for example, means fraud or notice which is deemed to exist by virtue of an authoritative rule of law, whether it exists in truth or not.

Another method by which the law on occasion deliberately departs from the truth of things for sufficient or insufficient reasons, is the use of the device known as a legal fiction—*fictio juris*. This was a device familiar to primitive legal systems, though mostly fallen out of use in modern law (*o*). An

(*n*) For the distinction between rebuttable presumptions of law and presumptions of fact see § 181.

(*o*) See Maine, *Ancient Law*, Chap. 2, and Pollock's note in his edition, p. 48.

important legal fiction recognised by modern systems is that of the adoption of children—a fiction which played a great part in the law of primitive communities. An adoptive child is a child who is not in fact the child of its adopting parent, but is deemed to be such by a legal fiction, with much the same results in law as if this fictitious parentage was real (*p*).

The same question may be partly one of law and partly one of fact or judicial discretion. This is so in two senses. In the first place, the question may be in reality composite, consisting of two or more questions combined, and the several components may be of different natures in this respect. The question, for example, whether a partnership exists between A and B is partly one of fact (*viz.*, what agreement has been made between them) and partly one of law (*viz.*, whether such an agreement is sufficient to constitute the legal relation of partnership). Similar composite questions are innumerable. In the second place, there are many cases in which the freedom of judicial discretion on any point is not wholly taken away by a fixed rule of law, but is merely restrained and limited by such a rule, and is left to operate within the restricted sphere so allowed to it. In such a case the question to be determined by the court is one of law so far as the law goes, and one of fact or judicial discretion as to the rest. The proper penalty for an offence is usually a question of this nature. The law imposes a fixed maximum, but leaves the

(*p*) In early law the purpose of most legal fictions was to alter indirectly and covertly a legal system so rigid that it could not be effectively altered in this respect by the direct and open process of legislation. The practical effect of any rule of law depends on the nature of the rule and on the nature of the facts to which it is applied. If the rule cannot itself be altered, its effect may be altered by establishing a legal fiction as to the nature of the facts. This device was familiar both to the law of Rome and in older days to the law of England. It usually assumed the form of fictitious allegations made in the pleadings in an action and not suffered to be contradicted. In Roman law foreigners were admitted to certain of the exclusive legal rights of Roman citizens by a fictitious allegation of citizenship, and in English law the old rule that the jurisdiction of English courts was limited to causes of action which arose in England was evaded by fictitious and non-traversable allegations that the foreign place in which the cause of action arose was situated in England. He who desired to enforce in the English courts a bond executed in France was permitted in his pleadings to allege a bond executed "at a certain place called Bordeaux in France in Islington in the County of Middlesex". "Whether there be such a place in Islington or no, is not traversable in that case." Co. Litt. 261b. For a discussion of legal fictions see J. W. Jones, *Historical Introduction to the Theory of Law*, Chap. 6; Fuller, "Legal Fictions" (1931) 25 Ill.L.Rev. 363, 513, 877.

discretion of the court to operate within the limits so appointed. So, in many cases, judicial discretion, instead of being excluded, is merely limited and controlled by rules of law which determine the general considerations which are to be taken into account as relevant and material in the exercise of this discretion. The discretion of the court has not been taken away, but it must be exercised within the limits, in the manner, and upon the considerations thus authoritatively indicated by law.

11. The territorial nature of law

We have defined the law as consisting of rules which can be created by a legislature and applied and developed by a court. Now since both these institutions are organs of state, and since states are territorial in nature, the law is conceived and spoken of as territorial. It is necessary, therefore, to consider the true significance of this territorial aspect and nature of a legal system. What is meant by saying that the system of law recognised and administered by the High Court of Justice in London is the law of England and is in force in England, and that the law in accordance with which the Court of Session in Edinburgh exercises its judicial functions is the law of Scotland and is in force in Scotland?

The answer to this question is somewhat surprisingly complex, and we must begin by distinguishing between the territorial enforcement of law and the territoriality of law itself.

The enforcement of law is undoubtedly territorial in the same way as a state is territorial; that is to say, the state power is in time of peace exercised (generally speaking) only within the territories of the state and on its public ships and aircraft and on vessels and aircraft registered under its laws.

The territoriality of law in this meaning flows from the political division of the world. No state allows other states, as a general rule, to exercise powers of government within it (*q*). The enforcement of law is therefore confined to the territorial boundaries of the state enforcing it. A person who commits a crime or a tort in

(*q*) There are exceptions; thus states are by international law allowed to exercise control over their armed forces while on friendly visits abroad

state A, and who then removes himself and his property to state B, cannot, so long as he is in state B, be reached by the authorities of state A. He has certainly violated the law of state A, by an act committed within its territory, but the enforcement of that law, while he and his belongings are outside the territory, is impossible.

In the case of crimes this situation is largely remedied by the practice of extradition (r). States conclude treaties with each other, by which each agrees to surrender to the other persons found in its territory who are wanted for crimes committed in the territory of the other party to the treaty. Extradition is not practised in civil cases, but as a general rule every state gives a remedy in its own courts for civil wrongs wherever they may be committed. Generally it is either necessary as a matter of law, or desirable in order to get an effective judgment, to sue in the state in which the defendant happens to be for the time being, or at least in a state in which he has property. If a valid judgment is once obtained, it may generally be enforced through the courts of another state if the conditions laid down in the law of that other state are complied with.

So far we have been speaking of the territoriality of law-enforcement rather than of the territoriality of law. It is easy to understand how the enforcement of law can be regarded as territorial, for force is a physical affair and is manifested in space. When a defendant is imprisoned or his property sold, these are acts that can intelligibly be said to take place on a certain part of the earth's surface. What is not so obvious is how law itself can be said to be territorial. Law consists of rules, which, unlike objects and acts, have no local habitation. It is true that the people who observe and apply them are located in space, but obviously that is not the same thing. An expert on French law may be living in England, but that does not extend the "territory" of French law to part of England.

The nature of the problem can be seen more clearly if we take the case of English law and Scots law. English law is said to prevail south of the Tweed, Scots law north of it.

(r) In practice resort is more often had to a method of disguised extradition by means of the regulations governing the admission and expulsion of aliens. See O'Higgins, "Reform of British Extradition Law" [1968] Crim.L.R.805.

What do we mean by these statements? Clearly we are not referring to the rule that a state cannot enforce its laws beyond its own boundaries, for England and Scotland are parts of the same state. In what sense, then, do English and Scots law stop short at the common boundary between the two countries? Similarly, in what sense can it be said that in a federation like the United States of America each component state has its own system of law which is valid as the law of the state?

There is only one possible answer to this question, but it is an answer that can be stated only with great caution and with many qualifications. The proposition that a system of law belongs to a defined territory means that it applies to all persons, things, acts and events within that territory (*s*), and does not apply to persons, things, acts or events elsewhere. For instance, the part of English law that is said to be emphatically "territorial" is the criminal law, and this, with but a few exceptions, applies to all offences committed in England, and does not apply to offences elsewhere. Similarly, the land-law of English courts applies only to land situated in England, and is not a universal non-territorial doctrine applied by those courts in suits relating to land situated elsewhere. So the law of marriage, divorce, succession, and domestic relations applies only to those persons who by residence, domicile, or otherwise, are sufficiently connected with the territory of England.

In other words, to say that a legal system belongs to a defined territory means partly that its rules do not purport to apply extra-territorially, partly that those who apply and enforce them do not regard them as applying extra-territorially and partly that other states do not so regard them.

Having said so much, we must begin to qualify. The proposition that a system of law applies only to persons, things, acts and events within a defined territory is not a self-evident truth; it is merely a generalisation from the practice of states. Also, it is a very rough and imperfect generalisation. To take English criminal law, there are several offences with which English courts will deal and to which they will apply English law, though committed elsewhere than in England: for example,

(*s*) "Territory" includes for this purpose public vessels and aircraft and private vessels and aircraft registered in the state enforcing the particular system of law.

piracy, and treason, murder or bigamy committed by British subjects in any part of the world. Some states, such as Turkey, go much beyond this, and apply their criminal law even to foreigners in respect of crimes committed abroad if the victims are their subjects and the foreigner concerned ventures within their territory (*t*). Next, the rule that title to land is governed by the *lex situs* is not invariable. An English court of equity will apply certain equitable rules even to land situated abroad. Italian law rejects the *lex situs* in favour of the law of the owner's nationality, in cases of succession on death (*u*). Turning to pure personalty, this is governed in several respects, in Anglo-American jurisdictions, by the law of the owner's domicile. According to this rule English law may be applied by English courts to chattels that are not in England and that belong to a person who is not at the time in England, if the owner is regarded as having his permanent home in England. This is a slight move away from the strict territorial principle.

The English law of torts knows comparatively little of any territorial limitation. If an action for damages for negligence or other wrongful injury committed abroad is brought in an English court, it will in general be determined in accordance with English law and not otherwise (*v*). Then again, the law of procedure is in hardly any respect territorial. The English law of procedure is the law of English courts rather than the law of England. It is the same for all litigants who come before those courts, whatever may be the territorial connections of the litigants or of their cause of action. Finally, a great qualification upon the territoriality of law is the existence in every legal system of a department known as the conflict of laws. The

(*t*) See Berge, " Criminal Jurisdiction and the Territorial Principle " (1932) 30 Mich.L.Rev. 238; Harvard Research in international law, Jurisdiction with respect to Crime, Art. 3 and Comment [1935] 29 A.J.I.L. Sup. 435. Even the English rules of criminal jurisdiction were extended in the peculiar circumstances of *R.* v. *Joyce* [1946] A.C. 347. For a discussion of the place where an act is deemed to be committed see *infra*, § 86.

(*u*) See Lorenzen, " Territoriality, Public Policy and the Conflict of Laws " (1924) 33 Yale L.J. at p. 740.

(*v*) The only limitation is that the act must be wrongful (not necessarily tortious) by the law of the place where it is committed: *Machado* v *Fontes* [1897] 2 Q.B. 231. For criticisms of this case see Lorenzen in (1931) 47 L.Q.R. at 490; Robertson in (1940) 4 M.L.R. at 35 *et seq.*: Cheshire, *Private International Law* (7th ed., 1965) 247; Falconbridge, " Torts in the Conflict of Laws " (1945) 23 Can. Bar Rev. 309.

avowed object of the various systems of conflict of laws is to help to regulate situations that have a foreign element.

One or two examples may illustrate this last point. Suppose that two Englishmen make a contract in England to be performed in England. If an action is brought upon the contract in English courts, the courts will as a matter of course apply the English law of contract. But if a contract is made in France between a German and an American, and is meant to be performed in Italy, the English courts, if they have to consider a question of law arising out of the contract, will first of all have to consider what system of law applies to it. The answer is supplied by the department of English law known as the conflict of laws. Suppose that the English system of conflict of laws indicates that French law is to be applied. The English courts will then apply to the contract not the English law of contract, what may be called the domestic law, but the French law of contract. Yet the French law is applied only in virtue of a rule of the English system of conflict of laws. Thus although the English courts do not apply domestic English law to the contract, they do apply the English system of conflict of laws. Moreover, it seems that in the example given the French rule, as so selected and applied, is applied not as a rule of French law but as a rule of English law (*w*). (Yet it has not all the characteristics of rules of English domestic law: for instance, questions of foreign law are classed as questions of fact, not as questions of law.)

It seems, therefore, that the territoriality of law, if considered as something distinct from the territorial enforcement of law, is an idea that fits the facts only in a very imperfect way. It does not follow from the notion of law, but is simply a rule that may or may not be adopted as convenience or policy dictates.

We must also observe that the territoriality of a particular system of law may be regarded very differently (a) in the courts of the state whose law is in question, (b) in the courts of another state, and (c) in international tribunals applying public international law. In (a) the territoriality of law is a matter of self-limitation by the state in question, and varies from state to state. In (b) it is a matter for each state to decide, in framing its rules

(*w*) See the demonstration of this by W. W. Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924) 33 Yale L.J. 457.

for the conflict of laws, how far it will recognise the legal rules of other states, here again the solution varies from state to state. In (c) there ought in theory to be a uniform solution for all states, though the rules of international law cannot be regarded as settled (*x*) To illustrate the three aspects of territoriality: in England any Act of the sovereign Parliament, however extra-territorial in nature, would be enforced by the courts (*y*). But this does not mean that the judgment of an English court enforcing such an Act would be regarded as valid by a foreign court or international tribunal, or that the Act itself would be regarded as valid by a foreign court or international tribunal. In general, states are prone to claim for themselves a wider extra-territorial competence than they are ready to accord to others.

We are now in a position to answer the question that was posed a short space back, namely, in what sense English law is the law of England and Scots law the law of Scotland. The answer seems to be that, although in some ways English law is confined to events in England and Scots law to events in Scotland, the outstanding characteristic of English law as opposed to Scots law is that it is the system of law accepted by the people and courts in England, and the outstanding characteristic of Scots law as opposed to English law is that it is the system of law accepted by the people and courts in Scotland. An example will bring out the significance of this. Suppose that two parties make a contract in some part of the world—England, Scotland or some foreign country. If an action be brought upon the contract in English courts, they will apply either (1) English domestic law or (2) the English system of conflict of laws; the latter resulting in th application either of (a) English domestic law, or (b) the domestic law of another country. If, on the other hand, an action be brought in Scottish courts, they will apply either (1) Scots domestic law, or (2) the Scots system of conflict of laws (in fact this is virtually identical with the English, but it might well be different), and the latter will result in the application either of (a) Scots domestic law, or (b) the domestic law of another country. Thus

(*x*) See Lorenzen, "The Theory of Qualification and the Conflict of Laws" (1920) 20 Col.L.R. 246, at 278 *et seq.*

(*y*) *Cf. Mortensen* v. *Peters* (1906) 14 S.L.T. 227; Oppenheim, *International Law* (8th ed. 1955) I. § 192. n. 1; Lauterpacht, "Is International Law Part of the Law of England?" (1989) 25 Trans.Grot.Soc. 51.

each system of courts applies primarily its own system of law, though its own system of law, in the department known as conflict of laws, may lead it ultimately to apply some foreign system.

If the case goes on appeal to the House of Lords, then if the case comes from the English courts the House will act in the spirit of the English courts, and if it comes from the Scottish courts the House will act in the spirit of the Scottish courts. Suppose, for instance, that the case started in an English county court, and the county court judge held that the law applicable to the contract was (under the English system of conflict of laws) Scots domestic law, and that the Scots law was so-and-so. Suppose, further, that an appeal were taken from his decision to the Court of Appeal and thence to the House of Lords. The House would presumably be precluded from inquiring into the validity of the county court judge's determination of what the rule of Scots law was, for in English courts the determination of " foreign " (*i.e.*, non-English) law is regarded as a matter of fact, and no appeal lies from the decision of a county court judge on a matter of fact. Yet if precisely the same question of Scots law arose in the Scottish courts, and went on appeal to the House of Lords, it would be treated as a question of law (*z*).

The dependence of the " law of the land " upon the court in which the case is heard has also been strikingly illustrated in the United States of America. In the United States each component state possesses its own system of law and of courts, and there is also a federal law and federal system of courts. Before 1938 it was possible for the federal court to take a different view of the law of (say) Kentucky from the courts of Kentucky themselves (*a*). What in such circumstances was " the law of Kentucky "? The

(*z*) Within the Commonwealth of Nations, each legislature legislates primarily for its own system of courts. Thus if Canada were to pass an Act regulating the conduct of Canadian citizens in Australia, such an Act would be part of Canadian law and would be enforced by the Canadian courts, but would not be enforced by the Australian courts except possibly under the Australian system of conflict of laws. *Cf. Re Midleton's Settlement* [1949] A.C. 418; [1947] Ch. 583 (C.A.), where an English court treated an English statute passed before the creation of the Irish Free State (now the Irish Republic) as constructively in the circumstances an Irish statute which was not to be applied by English courts.

(*a*) *Swift* v. *Tyson* (1842) 16 Pet. 1; overruled in *Erie R. R.* v. *Tompkins*, 58 Sup.Ct. 817: 304 U.S. 64 (1938). See Shulman, " The Demise of *Swift* v. *Tyson* " (1938) 47 Yale L.J. 1336; Griswold, *Law and Lawyers in the United States*, Chap. 4.

answer could only be that " the law of Kentucky " depended upon the court before which the action is brought.

Since territoriality is not a logically necessary part of the idea of law, a system of law is readily conceivable, the application of which is limited and determined not by reference to territorial considerations, but by reference to the personal qualifications of the individuals over whom jurisdiction is exercised: qualifications such as nationality, race or religion. The law of English courts might conceivably be the personal law of Englishmen—of British subjects—rather than the territorial law of England; indeed, it is this now to some extent. The history of early law shows us systems of personal law existing to a much higher degree. The early law administered by the courts of Rome was, in the main, not the territorial law of Rome, but the personal law of the Romans. Foreigners had no part in it. It was the *jus civile*, the law of the *cives*. It was only by a process of historical development that the *jus gentium* was superadded to the *jus civile* as applicable to *cives* and *peregrini* equally (*b*). In Europe, after the dissolution of the Western Roman Empire, the laws were to a large extent conceived as personal rather than territorial, the members of each race or nationality living by their own national laws (*c*). A similar process of thought and practice was observable until recently in the ex-territorial administration of the national laws of European states in the consular courts of the East. The law administered by an English consular court abroad was to be regarded rather as the personal law of English men, than as being in any proper or intelligible sense the territorial law of England.

It may be added that in India personal systems of law survive even at the present day, though they are gradually being superseded by legislation which either unifies the law of two or more races (particularly, of course, Hindus and Muslims) or applies to the country on a territorial basis. Conflicts of personal law still cause difficulties, for which there are no satisfactory rules (*d*).

(*b*) See Buckland and McNair, *Roman Law and Common Law* (2nd ed.) 25.

(*c*) See Story, *Conflict of Laws* (8th ed. 1883), § 2a, p. 3; Savigny, *History of Roman Law in the Middle Ages* (tr. Cathcart, 1829), I. Chap. 3, 99–104; Vinogradoff, *Roman Law in Medieval Europe*, 15, 24 *et seq.*

(*d*) See A. Gledhill, *Whither Indian Law?* (School of Oriental and African Studies, Univ. of London, 1956).

It is one of the misfortunes of legal nomenclature that there is no suitable and

12. Constitutional law

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

Constitutional law is, as its name implies, the body of those legal rules which determine the constitution of the state. It is not possible to draw any hard and fast line between the constitution and the remaining portions of the state's organisation; neither, therefore, is it possible to draw any such line between constitutional law and other branches of the legal system. The distinction is one of degree, rather than one of kind, and is drawn for purposes of practical convenience, rather than in obedience to any logical requirement. The more important, fundamental, and far-reaching any principle or practice is, the more likely it is to be classed as constitutional Conversely, the more special, detailed, and limited in its application, the less likely it is to find a place in any exposition of the law and practice of the constitution. The structure of the supreme legislature and the methods of its action pertain to constitutional law; the structure and operations of subordinate legislatures, such as those possessed by the colonies, are justly entitled to the same position; but those of such subordinate legislatures as a borough council would by general consent be treated as not sufficiently important and fundamental to be deemed part of the constitution. So the organisation and powers of the Supreme Court of Judicature, treated in outline and not in detail, pertain to constitutional law; while it is otherwise with courts of inferior jurisdiction, and with the detailed structure and practice of the Supreme Court itself.

In some states, though not in England, the distinction between constitutional law and the remaining portions of the legal system is accentuated and made definite by the embodiment of the former in a special and distinct enactment, the terms of which cannot be

recognised term by which to denote the territorial area within which any system of territorial law is in force. Dicey in his *Conflict of Laws* uses the term country for this purpose.

altered by the ordinary forms of legislation. Such constitutions are said to be *rigid*, as opposed to those which are *flexible*. That of the United States of America, for example, is set forth in a document agreed upon by the founders of the Commonwealth as containing all those principles of state structure and action sufficiently important to be deemed fundamental and therefore constitutional. The provisions of this document cannot be altered without the consent of three-fourths of the legislatures of the different states. The English constitution on the other hand is flexible; it is defined and set apart in no distinct document, and is not distinguishable from the residue of the law in respect of the methods of its alteration.

We have defined constitutional law as the body of those legal principles which determine the constitution of a state—which determine, that is to say, the essential and fundamental portions of the state's organisation. We have here to face an apparent difficulty and a possible objection. How, it may be asked, can the constitution of a state be determined by law at all? For constitutional law includes amongst other things the basic rules of recognition of a state's legal system. As we have seen, these cannot derive their authority from the legal system itself. Does this mean that the state and its constitution are necessarily prior to the law, and that what passes as constitutional law is in reality not law but a matter of fact and practice?

Admittedly, in certain cases a constitution may be determined by pre-existing law. Or the grant of independence to a colony, the mother country may in accordance with its own legal system enact a constitution for the new state. Again, the existing constitution in a state may allow for its replacement by a new constitution. But apart from such cases, every constitution has an extra-legal origin and the resulting constitutional law depends on the pre-establishment *de facto* of actual usage and operation.

As an illustration of the proposition that every constitution has an extra-legal origin, we may take the United States of America. The original constituent states achieved their independence by way of rebellion against the lawful authority of the English Crown. Each of these communities thereupon established a constitution for itself, by way of popular consent expressed directly or through representatives. By virtue of what legal power or authority was this done? Before these

constitutions were actually established, there was no law in these colonies save that of England, and it was not by the authority of this law, but in open and forcible defiance of it, that these colonial communities set up new states and new constitutions. Their origin was not merely extra-legal, it was illegal. Yet, so soon as these constitutions succeeded in obtaining *de facto* establishment in the rebellious colonies, they received recognition as legally valid from the courts of those colonies. Constitutional law followed hard upon the heels of constitutional fact. Courts, legislatures, and law had alike their origin in the constitution, therefore the constitution could not derive its orign from them. So, also, with every constitution that is altered by way of illegal revolution. By what legal authority was the Bill of Rights passed, and by what legal title did William III assume the Crown? Yet the Bill of Rights is now good law, and the successors of King William have held the Crown by valid titles. *Quod fieri non debet, factum valet.*

But the fact that constitutions of extra-legal origin are not determined by pre-existing law does not prevent the fundamental rules of such constitutions from qualifying as legal rules. Applying the analysis of the concept of " rules " discussed earlier, according to which the existence of a rule consists of the external observance of a usage coupled with an internal respect for the usage as being obligatory, we can see that these criteria could apply to the rules of recognition in a legal system and to the constitution which incorporates them. From ordinary legal rules, however, they differ in one important respect: their authority cannot logically be derived from some more basic legal rule, because they are themselves the basic rules of the legal system. For suppose the constitutional provisions regarding the authority of the legislature were to be enacted by legislation. What would this add? If the legislature has no legal authority, the enactment is void. If it has legal authority, then the enactment is valid but it owes its authority, not to itself, but to the already existing rule conferring authority on the legislature.

The basic rules of a constitution, then, and of a legal system must ultimately be of customary nature. Even in the case of a written constitution this is so; for here the constitution in the

document owes its validity to the fact that there is in the state in question either a simple customary rule to the effect that this written constitution has authority, or else a pre-existing customary rule that the method in which the constitution was made was valid. But any such basic customary rules differ from ordinary customary rules of law in that strictly they are not amenable to alteration by legislation or judicial decision. Ordinary customary rules can be amended or abrogated by such methods. The basic rules of the system too can in fact be altered, but the new rules arising from such alteration owe their validity to the former basic rules, which remain like axioms, from which the whole legal system is derived. On the other hand these fundamental rules are not in the same category as rules of morality. First, as we have seen, there may be no moral justification for having one particular rule of recognition rather than any other; morality may dictate the acceptance of some system of law, but does not tell us which. Secondly, our basic rules share with other legal rules the characteristic of being capable of detailed formalisation. The customary rules relating to legislation, for example, may descend into a mass of precision and detail. Morality, as we saw, is not susceptible to this kind of development.

Now the rules of the constitution actually embodied in the accepted view of the law courts and the legal profession may represent a theory no longer in accord with constitutional practice. For just as practice is prior to law in the first place, so now it may continue to run ahead; and here, as elsewhere, law and fact may be more or less discordant. The constitution as seen by the eye of the law may not agree in all points with the objective reality. Much constitutional doctrine may be true in law but not in fact, or true in fact but not in law. Power may exist *de jure* but not *de facto*, or *de facto* but not *de jure*. In law, for example, the consent of the Crown is no less necessary to legislation, than is that of the two houses of Parliament, yet in fact the Crown has no longer any power of refusing its consent. Conversely, the whole system of cabinet government, together with the control exercised by the House of Commons over the executive, is as unknown in law as it is well established in fact. Even in respect of the boundaries of the state's territories the law and the fact may not agree. A rebellious

province may have achieved its *de facto* independence, that is to say, it may have ceased to be in the *de facto* possession and control of the state, long before this fact receives *de jure* recognition.

Nowhere is this discordance between the constitution in fact and in law more serious and obvious than in England. A statement of the strict legal theory of the British constitution would differ curiously from a statement of the actual facts. Similar discrepancies exist, however, in most other states. A complete account of a constitution, therefore, involves a statement of constitutional custom as well as of constitutional law. It involves an account of the organised state as it exists in practice and in fact, as well as of the reflected image of this organisation as it appears in legal theory.

Although the constitution *de jure* and the constitution *de facto* are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. The objective facts of state organisation tend to mould legal theory into conformity with themselves. They seek expression and recognition through legislation, or through the law-creating functions of the courts. Conversely, the accepted legal theory endeavours to realise itself in the facts. The law, although it necessarily involves a pre-existing constitution, may nevertheless react upon and influence the constitution from which it springs. It cannot create a constitution *ex nihilo*, but it may modify to any extent one which already exists. Constitutional practice may alter, while constitutional law remains the same, and *vice versa*, but the most familiar and effective way of altering the practice is to alter the law. The will of the body politic, as expressed through the legislature and the courts, will commonly realise itself in constitutional fact no less than in constitutional theory (*e*).

(*e*) For the effect of constitutional conventions upon the law see Sir Ivor Jennings, *The Law and the Constitution* (5th ed. 1959), Chap. 3

CHAPTER 2

THE ADMINISTRATION OF JUSTICE

13. Necessity of the administration of justice

" A herd of wolves ", it has been said (*a*), " is quieter and more at one than so many men, unless they all had one reason in them, or have one power over them." Unfortunately they have not one reason in them, each being moved by his own interests and passions; therefore the other alternative is the sole resource. Man is by nature a fighting animal and force is the *ultima ratio*, not of kings alone, but of all mankind. Without " a common power to keep them all in awe ", it is impossible for men to cohere in any but the most primitive forms of society. Without it, civilisation is unattainable, injustice is unchecked and triumphant, and the life of man is, as the author of *Leviathan* tells us, " solitary, poor, nasty, brutish, and short " (*b*). However orderly a society may be, and to whatever extent men may appear to obey the law of reason rather than that of force, the element of force is none the less present and operative. It has become partly or wholly latent, but it still exists. A society in which the power of the state is never called into actual exercise marks, not the disappearance of governmental control, but the final triumph and supremacy of it.

It has been suggested that force as an instrument for the coercion of mankind is merely a temporary and provisional incident in the development of a perfect civilisation. To a large extent already, in all orderly societies, this element in the administration of justice has become merely latent; it is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement.

(*a*) Jeremy Taylor, *Works*, XIII. 306. Heber's ed.

(*b*) Hobbes, *Leviathan*, Chap. 13: " Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. . . . Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry . . . no arts, no letters, no society, and, which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."

A striking illustration of this is the increasing popularity of the action for a declaration, which seeks no relief other than a declaration of the law or of the rights of the parties. It is questionable, however, whether such an action could serve any purpose outside the framework of a legal system which was itself capable of effective enforcement. The constraint of public opinion is not only a valuable support to such enforcement; indeed it is indispensable, for a system of law based entirely on coercion without any degree of popular acceptance would be too insecure to provide stability and permanence. But public opinion alone is no substitute for legal sanctions. A system of law based wholly on public opinion contains within itself elements of weakness that would be speedily fatal to efficiency. The influence of public censure is least felt by those who need it most.

It is also to be observed that the influence of the national conscience, unsupported by that of the national force, would be counteracted in any but the smallest and most homogeneous societies by the internal growth of smaller societies or associations possessing separate interests and separate antagonistic consciences of their own. It is certain that a man cares more for the opinion of his friends and immediate associates, than for that of all the world besides. The censure of ten thousand may be outweighed by the approval of ten. The honour of thieves finds its sanction and support in a law of professional opinion, which is opposed to, and prevails over, that of national opinion. The social sanction, therefore, is an efficient instrument only so far as it is associated with, and supplemented by, the concentrated and irresistible force of the incorporate community. Force is necessary to coerce the recalcitrant minority and prevent them from gaining an unfair advantage over the law-abiding majority in a state.

Without institutionalised law enforcement man tends to redress his wrongs by his own hand. A more civilised substitute for such primitive practice is provided by the modern state's system of administration of justice.

Private vengeance is transmuted into the administration of criminal justice; while civil justice takes the place of violent self-help. As Locke says (*c*), in the state of nature the law

(*c*) *Treatise on Government*, II. Chap. 2.

of nature is alone in force, and every man is in his own case charged with the execution of it. In the civil state, on the other hand, the law of nature is supplemented by the civil law, and the maintenance of the latter by the force of the organised community renders unnecessary and unpermissible the maintenance of the former by the forces of private men. The evils of the state of nature were too great and obvious to escape recognition even in the most primitive communities. Every man was constituted by it a judge in his own cause, and might was made the sole measure of right. Nevertheless the substitution was effected only with difficulty and by slow degrees. The turbulent spirits of early society did not readily abandon the liberty of fighting out their quarrels, or submit with good grace to the arbitrament of the tribunals of the state. There is much evidence that the administration of justice was in the earlier stages of its development merely a choice of peaceable arbitration or mediation, offered for the voluntary acceptance of the parties, rather than a compulsory substitute for self-help and private war. Only later, with the gradual growth of the power of government, did the state venture to suppress with the strong hand the ancient and barbarous system, and to lay down the peremptory principle that all quarrels shall be brought for settlement to the courts of law (*d*).

All early codes show us traces of the hesitating and gradual method in which the voice and force of the state became the exclusive instruments of the declaration and enforcement of justice. In the laws of the Saxon kings, Alfred for instance, we find no absolute prohibition of private vengeance, but merely its regulation and restriction (*e*). In due measure and in fitting manner it was the right of every man to do for himself that which in modern times is done for him by the state. As royal justice grew in strength, however, the law began to speak in

(*d*) For the history of the process see A. S. Diamond, *The Evolution of Law and Order* (London, 1951); also Holdsworth, H.E.L., II. 43 *et seq.*, 99 *et seq.*; Vinogradoff, *Historical Jurisprudence* (1920), I. 344 *et seq.*

(*e*) Laws of King Alfred, 42 (Thorpe, *Ancient Laws and Institutes of England*, I. 91): "We also command that he who knows his foe to be at home fight not before he demand justice of him. If he have such power that he can beset his foe and besiege him, let him keep him within for seven days, and attack him not, if he will remain within. . . . But if he have not sufficient power to besiege him, let him ride to the ealdorman, and beg aid of him. If he will not aid him, let him ride to the king before he fights." See further Holdsworth, H.E.L., II. 43 ff.

another tone, and we see the establishment of the modern theory of the exclusive administration of justice by the tribunals of the state. An interesting stage in the transition was trial by battle, which was a strongly regularised judicial combat introduced into England by the Normans (*f*). In Norman times this mode of trial was classed with the ordeal as *judicium Dei*—the judgment of Heaven as to the merits of the case, made manifest by the victory of the right. But this explanation was an afterthought; it was applied to public war, as the litigation of nations, no less than to the judicial duel, and it is not the root of either practice (*g*).

14. Civil and criminal justice

The distinction between crimes (*h*) and civil wrongs is roughly that crimes are public wrongs and civil wrongs are private wrongs. As Blackstone says: "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community

(*f*) See Pollock and Maitland, H.E.L. (2nd ed. 1898), I. 39–40, 50–51; Diamond, *op. cit.* 163.

(*g*) Upon the doctrine of the King's peace, the chief means by which royal justice supplanted private vengeance, see Pollock, *Oxford Lectures*, 65–90, reprinted in *Select Essays in Anglo-American Legal History*, II, 403–417. As late as the closing years of Henry III it was found necessary to resort to special statutory enactments against a lawless recurrence to the extra-judicial use of force. The statute of Marlborough (52 Hen. III, c. 1) recites that "At the time of a commotion late stirred up within this realm, and also since, many great men and divers other have disdained to accept justice from the King and his Court, like as they ought and were wont in time of the King's noble progenitors, and also in his time, but took great revenges and distresses of their neighbours and of others, until they had amends and fines at their own pleasure." The statute thereupon provides that "All persons, as well of high as of low estate, shall receive justice in the King's Court, and none from henceforth shall take any such revenge or distress of his own authority without award of our Court." See also Holdsworth, H.E.L., I. 506, n. 6. Long after the strength of the law of England had succeeded in suppressing the practice, the right of private war continued to be recognised. See Nys, *Origines du Droit International* (1894) Chap. 5. An interesting picture of the relations between law and private force in the primitive community of Iceland is to be found in *The Saga of Burnt Njal* (Dasent's translation).

(*h*) On the definition of the term crime see Williams (1955) 8 *Current Legal Problems* 107 and the literature there cited, Pollock (1959) 22 M.L.R. 495; Hughes [1959] Crim.L.R. 239, 331; Fitzgerald [1960] Crim.L.R. 257.

considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours " (*i*). A crime then is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual. Murder injures primarily the particular victim, but its blatant disregard of human life puts it beyond a matter of mere compensation between the murderer and the victim's family. Those who commit such acts are proceeded against by the state in order that, if convicted, they may be punished. Civil wrongs such as breach of contract or trespass to land are deemed only to infringe the rights of the individual wronged and not to injure society in general, and consequently the law leaves it to the victim to sue for compensation in the courts.

English law, however, has certain features which prevent us drawing a clear line between these two kinds of wrong. First, there are some wrongs to the state and therefore public wrongs, which are nevertheless by law regarded as civil wrongs. A refusal to pay taxes is an offence against the state, and is dealt with at the suit of the state, but it is a civil wrong for all that, just as a refusal to repay money lent by a private person is a civil wrong. The breach of a contract made with the state is no more a criminal offence than is the breach of a contract made with a subject. An action by the state for the recovery of a debt, or for damages, or for the restoration of public property, or for the enforcement of a public trust, is purely civil, although in each case the person injured and suing is the state itself.

Secondly, some civil wrongs can cause greater general harm than some criminal offences. The negligence of a contractor resulting in widespread injury and damage may be far more harmful than a petty theft. Furthermore, the same act may be a civil injury and a crime, both forms of remedy being available. This is true, for instance, of libel and assault.

From a practical standpoint the importance of the distinction lies in the difference in the legal consequences of crimes and civil wrongs. Civil justice is administered according to one set of forms, criminal justice according to another set. Civil justice is administered in one set of courts, criminal justice in a somewhat

(*i*) *Commentaries* III. 2.

different set. The outcome of the proceedings, too, is generally different. Civil proceedings, if successful, result in a judgment for damages, or in a judgment for the payment of a debt or (in a penal action) a penalty, or in an injunction or decree of specific restitution or specific performance, or in an order for the delivery of possession of land, or in a decree of divorce, or in an order of mandamus, prohibition, or certiorari, or in a writ of habeas corpus, or in other forms of relief known distinctively as civil. Criminal proceedings, if successful, result in one of a number of punishments, ranging from hanging to a fine, or in a binding over to keep the peace, release upon probation, or other outcome known to belong distinctively to criminal law.

Even here, however, the distinction is not clear-cut. For criminal proceedings may result in an order against the accused to make restitution or compensation, while civil proceedings may result in an award of exemplary or punitive damages. It remains true, however, that the basic objective of criminal proceedings is punishment, and that the usual goal of civil proceedings is non-punitive.

Here we must notice that peculiarity of English law, the penal action. At one time it was a frequent practice, when it was desired to repress some type of conduct thought to be harmful, to do so by the machinery of the civil rather than of the criminal law. The means so chosen was called a penal action, as being brought for the recovery of a penalty; and it might be brought, according to the wording of the particular statute creating the penal action, either by the Attorney-General on behalf of the state, or by a common informer on his own account. A common informer was anyone who should first sue the offender for the penalty. Penal actions by common informers are now practically all abolished (*j*), but those of the Attorney-General continue unaffected. Moreover, there are several instances, under old statutes, where a person who has suffered a wrong (for instance, in being kept out of possession by his former tenant) is allowed to recover multiple damages by way of penalty. Since penal actions follow all the forms of civil actions, and are governed by the same rules, we must regard them as civil actions, and ignore for the purpose of classification their resemblances to criminal law.

(*j*) Common Informers Act 1951.

15. The purpose of criminal justice: punishment

We can look at punishment from two different aspects (*k*). We can regard it as a method of protecting society by reducing the occurrence of criminal behaviour, or else we can consider it as an end in itself. Punishment can protect society by deterring potential offenders, by preventing the actual offender from committing further offences and by reforming and turning him into a law-abiding citizen. The problem of punishment consists largely of the competing claims of these three different approaches.

Some would regard punishment as before all things a deterrent. Offences are committed by reason of a conflict between the interests, real or apparent, of the wrongdoer and those of society at large. Punishment prevents offences by destroying this conflict of interests to which they owe their origin—by making all deeds which are injurious to others injurious also to the doers of them—by making every offence, in the words of Locke, "an ill bargain to the offender". Men do injustice because they have no sufficient motive to seek justice, which is the good of others rather than that of the doer of it. The purpose of the criminal law is to supply by art the motives which are thus wanting in the nature of things.

Where punishment is disabling or preventive, its aim is to prevent a repetition of the offence by rendering the offender incapable of its commission. The most effective method of disablement is the death penalty. Imprisonment has not only a deterrent (and possibly reformative) value, but it serves also as a temporary preventive measure. Less dramatic forms of disablement are such measures as disqualification orders; for instance, a person may be disqualified from driving and so forbidden by law to put himself in such a position as to be able to commit motoring offences.

Deterrence acts on the motives of the offender, actual or potential; disablement consists primarily in physical restraint. Reformation, by contrast, seeks to bring about a change in the offender's character itself so as to reclaim him as a useful member of society. Whereas deterrence looks primarily at the potential criminal outside the dock, reformation aims at the actual offender

(*k*) On punishment see Howard Jones, *Crime and the Penal System*; Elkin, *The English Penal System*; Walker, *Crime and Punishment in Britain*, Part 3; Fitzgerald, *Criminal Law and Punishment*, Chap. 6; Hart (1959–1960) Proc.Arist.Soc. 1; Cross (1965) 81 L.Q.R. 205.

before the bench. In this century increasing weight has been attached to this aspect. Less frequent use of imprisonment, the abandonment of short sentences, the attempt to use prison as a training rather than a pure punishment, and the greater employment of probation, parole and suspended sentences are evidence of this general trend. At the same time there has been growing concern to investigate the causes of crime and the effects of penal treatment.

Plainly there is a conflict between these different approaches to punishment. The purely reformative theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling. Death is in this view no fitting penalty; we must cure our criminals, not kill them. Other forms of corporal punishment are rejected as brutalising and degrading both to those who suffer and those who inflict them. The deterrent theory, by contrast, would reject as totally unfitted for any penal system any measures inadequate to dissuade offenders from further offences. If criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons must be turned into dwelling-houses far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn. Further difficulty arises with the incorrigible offender. Some men appear to be beyond the reach of any correctional influences and yet they cannot just be abandoned as totally unfit for punitive treatment of some sort. The protection of society demands at least a measure of disablement to restrain such persons from further harmful activity. The problem ultimately is that suitable methods of reformation might well act not to deter but positively to encourage the commission of crime, whereas on the other hand punishments apt to deter potential offenders may, instead of reclaiming the actual offender, turn him into a hardened criminal.

Between these competing views we have in practice to find a working compromise. Single-minded pursuance of any one of these particular aims of punishment could lead to disaster. The present tendency to stress the reformative element is a reaction against the former tendency to neglect it altogether, and like most reactions it falls into the falsehood of extremes. It is an important

truth, unduly neglected in times past, that to a very large extent criminals are not normal and healthy human beings, and that crime is in great measure the product of physical and mental abnormality and degeneracy. It has been too much the practice to deal with offenders on the assumption that they are ordinary types of humanity. Too much attention has been paid to the crime, and too little to the criminal. Yet we must be careful not to fall into the opposite extreme. If crime has become the monopoly of the abnormal and the degenerate, or even the mentally unsound, the fact must be ascribed to the selective influence of a system of criminal justice based on a sterner principle than that of reformation. The more efficient the coercive action of the state becomes, the more successful it is in restraining all normal human beings from the dangerous paths of crime, and the higher becomes the proportion of degeneracy among those who break the law. Even with our present imperfect methods the proportion of insane persons among murderers is very high; but if the state could succeed in making it impossible to commit murder in a sound mind without being indubitably hanged for it afterwards, murder would soon become, with scarcely an exception, limited to the insane.

If, after this consummation had been reached, the opinion were advanced that inasmuch as all murderers are insane, murder is not a crime which needs to be suppressed by the strong arm of the penal law, and pertains to the sphere of medicine rather than to that of jurisprudence, the fallacy of the argument would be obvious. Were the state to act on any such principle, the proposition that all murderers are insane would very rapidly cease to be true. The same fallacy, though in a less obvious form, is present in the more general argument that, since the proportion of disease and degeneracy among criminals is so great, the reformative function of punishment should prevail over, and in a great measure exclude, its deterrent and coercive functions. For it is chiefly through the permanent influence and operation of these latter functions, partly direct in producing a fear of evildoing, partly indirect in establishing and maintaining those moral habits and sentiments which are possibly only under the shelter of coercive law, that crime has become limited, in such measure as it has, to the degenerate, the abnormal, and the insane. Given an

efficient penal system, crime is too poor a bargain to commend itself, save in exceptional circumstances, to any except those who lack the self-control, the intelligence, the prudence or the moral sentiments of the normal man. But apart from criminal law in its sterner aspects, and apart from that positive morality which is largely the product of it, crime is a profitable industry, which will flourish exceedingly, and be by no means left as a monopoly to the feebler and less efficient members of society.

Although the general substitution of the reformative for the deterrent principle would lead to disaster, it may be argued that the substitution is possible and desirable in the special case of the abnormal and degenerate. It is not possible to draw any sharp line of distinction between the normal and the degenerate human being. It is difficult enough in the cases of insanity and diminished responsibility; but the difficulty would be a thousand-fold increased had we to take account of every lapse from the average type. The law is necessarily a rough and ready instrument, and men must be content in general to be judged and dealt with by it on the basis of their common humanity, and not on that of their special idiosyncrasies. Special difficulty arises with persons who are psychopaths, persons incapable of being influenced by social, penal and medical measures. Of these it has been said that " the inadequacy or deviation or failure to adjust to ordinary social life is not a mere wilfulness or badness which can be threatened or thrashed out of the individual so involved, but constitutes a true illness for which we have no specific explanation "(*l*). In England the defence of diminished responsibility has been held to extend to a psychopath suffering from abnormal difficulty in controlling his impulses, and psychopathy is now recognised as one of the types of mental disorder by the Mental Health Act, 1959.

It is needful, then, in view of modern theories and tendencies, to insist on the importance of the deterrent element in criminal justice. The reformative element must not be overlooked, but neither must it be allowed to assume undue prominence. How much prominence it may be allowed is a question of time, place and circumstance. In the case of youthful criminals and first offenders, the chances of effective reformation are greater than in that of adults who have fallen into crime more than once, and

(*l*) D. K. Henderson, *Psychopathic States* (New York 1947), 16–17.

the rightful importance of the reformative principle is therefore greater also. Some crimes, such as sexual offences, admit more readily of reformative treatment than others. In orderly and law-abiding communities concessions may be safely made in the interests of reformation, which in more turbulent societies would be fatal to the public welfare.

Now while the deterrent, preventive and reformative theories regard punishment as aiming at some further end, the retributive theory regards it rather as an end in itself. According to this view, it is right and proper, without regard to ulterior consequences, that evil should be returned for evil, and that as a man deals with others so should he himself be dealt with. An eye for an eye and a tooth for a tooth is deemed a plain and self-sufficient rule of natural justice. Punishment as so regarded is no longer a mere instrument for the attainment of the public welfare, but has become an end in itself.

Retribution means basically that the wrongdoer pays for his wrongdoing. The suffering which he undergoes restores the balance which his original crime disturbed. This notion is clearly connected with that of revenge. The latter consists of injury inflicted by way of retaliation by one person on another who has wronged him, and plainly requires the existence of a victim as well as a wrongdoer. Retribution might be thought of as an extension of this, society itself feeling sympathy with the victim and sharing his desire for vengeance. But when revenge gives way to retribution, the emphasis is no longer on assuaging the victim's feelings but on seeing that the wrongdoer gets his deserts. There is also the idea, connected with, but different from, revenge, that it would be unjust for the wrongdoer to enjoy undeserved happiness at the expense of his victim. Moreover, retribution can apply even in the absence of a personal victim. Divine retribution, for instance, does not necessarily presuppose the actual injury of the deity. Again, society's exaction of retribution for an offence does not entail that society itself has been harmed by the offender's act

It is questionable, however, whether retribution can be justified. Since punishment involves inflicting suffering on another, prima facie it is wrong and stands in need of justification. Deterrence, prevention and reformation provide a justification in that suffering is inflicted in order that society can protect itself. For

just as it is morally permissible for an individual to use force to defend himself, so, too, society is surely at liberty morally to act in its own defence. The idea, however, that punishment can be justified, not as a means to some laudable end, but as an end in itself, is far from obvious. To force a wrongdoer to compensate his victim may be justified as a means of alleviating the latter's suffering and as bringing about a more just state of affairs between the two, but to exact retribution in order to force offenders to balance the accounts of abstract justice is surely to arrogate to ourselves functions to which we are not entitled.

Society's desire for retribution cannot of course be wholly disregarded. Indeed it is arguable that such desire is necessary for the health of the community and the effectiveness of the law. A society which felt neither anger nor indignation at outrageous conduct would hardly enjoy an effective system of law. But while righteous social anger can fulfil a useful purpose, it must be remembered first that of all procedures the least desirable is to deal with an offender in the heat of the moment; and, secondly, that such anger carries no self-evident title to satisfaction—it may, for example, be based on factual error. While it may be difficult for the authorities to disregard popular clamour, authority is at its best when refusing to bow to it and persisting in acting as itself thinks right.

Akin to the idea of retribution is that of expiation. On this view, crime is done away with, cancelled, blotted out or expiated by the suffering of its appointed penalty. To suffer punishment is to pay a debt due to the law that has been violated. Guilt *plus* punishment is equal to innocence. " The wrong " (*m*), it has been said, " whereby he has transgressed the law of right, has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated . . . This is the first object of punishment—to make satisfaction to outraged law ". This conception marks a stage in the transformation of revenge into criminal justice. Until this transformation is complete, the remedy of punishment is more or less assimilated to that of redress. Revenge is the right of the injured person. The penalty of wrongdoing is a debt which the offender owes to his victim, and when the punishment has been endured the debt is paid, the liability is extinguished, innocence

(*m*) Lilley, *Right and Wrong*, 128.

is substituted for guilt, and the *vinculum juris* forged by crime is dissolved. The object of true redress is to restore the position demanded by the rule of right, to substitute justice for injustice, to compel the wrongdoer to restore to the injured person that which is his own. A like purpose is assigned to punishment, so long as it is imperfectly differentiated from that of retributive vengeance, which is in some way a reparation for wrongdoing. The fact that in the expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law than to the victim of the offence, merely marks a further stage in the refinement and purification of the primitive conception.

Expiation, however, is no easier to justify morally than retribution. To compel the wrongdoer to compensate or make restitution to his victim seems reasonable, but the suggestion that we should compel him to make restitution in the abstract to no actual person suffers not only from a mysticism that should have no place in law and politics but also from the fatal objection that there is no moral right for mere men to enforce this sort of abstract payment.

Enshrined in the retributive and expiative theories, however, are claims which should not be disregarded. The former, which regards punishment as balanced against an offence, acts as an important limiting principle generally in the penal context. Without accepting the view that punishment should be inflicted *because of* the offence (and nothing more), we may nevertheless accept that punishment should *not* be inflicted *unless there has been an offence* and that the punishment should not be out of proportion to that offence. Likewise, the notion of expiation has its own particular value. While not subscribing to the theory that criminals should be punished in order to make them "pay their due", we may still argue that, once their punishment is over, the slate should be wiped clean; in these days when punishment is tending towards individualisation and when the prisoner's previous convictions and record are becoming increasingly important, this is a claim that should not be overlooked.

16. Civil justice; primary and sanctioning rights

We proceed now to the consideration of civil justice and to the analysis of the various forms assumed by it. The first

distinction to be noticed is that the right enforced in civil proceedings is either a Primary or a Sanctioning right. A sanctioning right is one which arises out of the violation of another right. All others are primary; they are rights which have some other source than wrongs. Thus my right not to be libelled or assaulted is primary; but my right to obtain pecuniary compensation from one who has libelled or assaulted me is sanctioning My right to the fulfilment of a contract made with me is primary; but my right to damages for its breach is sanctioning.

The administration of civil justice, therefore, falls into two parts, according as the right enforced belongs to the one or the other of these two classes. Sometimes it is impossible for the law to enforce the primary right; sometimes it is possible but not expedient. If by negligence I destroy another man's property, his right to this property is necessarily extinct and no longer enforceable. The law, therefore, gives him in substitution for it a new and sanctioning right to receive from me the pecuniary value of the property that he has lost. If on the other hand I break a promise of marriage, it is still possible, but it is certainly not expedient, that the law should specifically enforce the right, and compel me to enter into that marriage; and it enforces instead a sanctioning right of pecuniary satisfaction. A sanctioning right almost invariably consists of a claim to receive money from the wrongdoer, and we shall here disregard any other forms, as being quite exceptional.

The enforcement of a primary right may be conveniently termed specific enforcement. For the enforcement of a sanctioning right there is no very suitable generic term, but we may venture to call it sanctional enforcement.

Examples of specific enforcement are proceedings whereby a defendant is compelled to pay a debt, to perform a contract, to restore land or chattels wrongfully taken or detained, to refrain from committing or continuing a trespass or nuisance or to repay money received by mistake or obtained by fraud In all these cases the right enforced is the primary right itself, not a substituted sanctioning right. What the law does is to insist on the specific establishment or re-establishment of the actual state of things required by the rule of right, not of

another state of things which may be regarded as its equivalent or substitute (*n*).

Sanctioning rights may be divided into two kinds by reference to the purpose of the law in creating them. This purpose is either (1) the imposition of a pecuniary penalty upon the defendant for the wrong which he has committed, or (2) the provision of pecuniary compensation for the plaintiff in respect of the damage which he has suffered from the defendant's wrongdoing. Sanctioning rights, therefore, are either (1) rights to exact and receive a pecuniary penalty, or (2) rights to exact and receive damages or other pecuniary compensation.

The first of these kinds is rare in modern English law, though it was at one time of considerable importance both in our own and in other legal systems. But it is sometimes the case even yet, that the law creates and enforces a sanctioning right which has in it no element of compensation to the person injured, but is appointed solely as a punishment for the wrongdoer. This is so where a pecuniary penalty is payable to the state. We have already sufficiently discussed these " penal actions ".

The second form of sanctioning right—the right to pecuniary compensation or damages—is in modern law by far the more important. It may be stated as a general rule, that the violation of a private right gives rise, in him whose right it is, to a sanctioning right to receive compensation for the injury so done to him. Such compensation must itself be divided into two kinds, which may be distinguished as Restitution and Penal Redress. In respect of the person injured, indeed, these two are the same in their nature and operation; but in respect of the wrongdoer they are very different. In restitution the defendant is compelled to give up the pecuniary value of some benefit which he has wrongfully obtained at the expense of the plaintiff; as when he who has wrongfully taken or detained

(*n*) Some forms of so-called specific enforcement may in the last resort become sanctional enforcement. Thus an order for specific performance of a contract represents an attempt by the courts to compel the defendant to perform his duty specifically; but if the order be disobeyed the next step may be to imprison the defendant for contempt of court, which is not specific but sanctional enforcement. In some cases specific enforcement may mean a greater loss to the defendant than the restored gain to the plaintiff. *Cf. Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287.

another's goods is made to pay him the pecuniary value of them, or when he who has wrongfully enriched himself at another's expense is compelled to account to him for all money so obtained.

Penal redress, on the other hand, is a much more common and important form of legal remedy than mere restitution. The law is seldom content to deal with a wrongdoer by merely compelling him to restore all benefits which he has derived from his wrong; it commonly goes further, and compels him to pay the amount of the plaintiff's loss; and this may far exceed the profit, if any, which he has himself received. It is clear that compensation of this kind has a double aspect and nature; from the point of view of the plaintiff it is compensation and nothing more, but from that of the defendant it is a penalty imposed upon him for his wrongdoing. The compensation of the plaintiff is in such cases the instrument which the law uses for the punishment of the defendant, and because of this double aspect it is here called penal redress. Thus if I burn down my neighbour's house by negligence, I must pay him the value of it. The wrong is then undone with respect to him, indeed, for he is put in as good a position as if it had not been committed. Formerly he had a house, and now he has the worth of it. But the wrong is not undone with respect to me, for I am the poorer by the value of the house, and to this extent I have been punished for my negligence.

Some of the American " realists " assert that only sanctioning rights have " reality ", at any rate if we put aside cases of specific enforcement like the equitable remedies of specific performance and injunction. Thus, specific performance apart, there is no primary right that another shall perform his contract with me: there is simply a sanctioning right that he shall pay me damages if he breaks it (*o*). It is true that in fact if the other party breaks his contract, the law enforces my primary right by bringing into play my sanctioning right to damages. To conclude from this, however, that there are no primary rights at all is to betray confusion as to what a right is and to mistake a right for the method of its

(*o*) *Cf.* Holmes, " The Path of the Law," *Collected Legal Papers* (1921) 167.

enforcement (*p*). One might equally say that the sanctioning right to damages is not a right, because its violation may in some cases only be enforced by attachment for contempt of court and again in some cases not be enforceable at all. Equally misguided is it to argue that there are no primary duties and that in the contract case the only duty is to pay damages if I do not perform. Under the existing rules of contract, which specify that I ought to perform my contract, I have a primary duty. If I break this contract and then pay damages, I am still in breach of my primary duty. The fact that its breach now imposes on me another duty does not mean that I had no original primary duty.

So far in this section we have been considering the judicial enforcement of rights, that is to say, their enforcement through the medium of the courts. In addition there are various forms of extra-judicial enforcement, sometimes known as self-help. As with judicial enforcement, extra-judicial enforcement may be either specific or sanctional, though in English law all the examples save one are of specific enforcement. The rights of a landowner, of the owner of a chattel, and of anyone in respect of nuisances, can be specifically enforced without resort to the courts by the ejection of trespassing persons and things, the recaption of chattels, and the abatement of nuisances. The right of personal security can be enforced by self-defence and by the defence of others. The payment of debts can be enforced in appropriate cases through distress for rent and the assertion of liens. The only instance of extra-judicial sanctional enforcement in English law is distress damage feasant, that is, the right to seize animals or inanimate chattels that are doing damage to or (perhaps) encumbering land, and to keep them by way of security until compensation is paid.

17. Secondary functions of courts of law

Hitherto we have confined our attention to the administration of justice in the narrowest and most proper sense of the term. In this sense it means, as we have seen, the application by the state of the sanction of physical force to the rules of

(*p*) On the confusion of the existence of rules and their enforcement see above ss. 4 and 6. On the meaning of "right" and "duty" see below §§ 38–39.

justice. It is the forcible defence of rights and suppression of wrongs. The administration of justice properly so called, therefore, involves in every case two parties, the plaintiff and the defendant, a right claimed or a wrong complained of by the former as against the latter, a judgment in favour of the one or the other, and execution of this judgment by the power of the state if need be. We have now to notice that the administration of justice in a wider sense includes all the functions of courts of justice, whether they conform to the foregoing type or not. It is to administer justice in the strict sense that the tribunals of the state are established, and it is by reference to this essential purpose that they must be defined. But when once established, they are found to be useful instruments, by virtue of their constitution, procedure, authority, or special knowledge, for the fulfilment of other more or less analogous functions. To these secondary and non-essential activities of the courts, no less than to their primary and essential functions, the term administration of justice has been extended. They are miscellaneous and indeterminate in character and number, and tend to increase with the advancing complexity of modern civilisation. They fall chiefly into four groups:

(1) *Actions against the state.* The courts of law exercise, in the first place, the function of adjudicating upon claims made by subjects against the state itself. If a subject claims that a debt is due to him from the Crown, or that the Crown has broken a contract with him, or wrongfully detains his property, he is at liberty to take proceedings in a court of law—formerly by petition of right but now by an ordinary action—for the determination of his rights in the matter. Although the action is tried as if it were a claim between subjects (with some procedural variations), and although the outcome may be a judgment by the court that the plaintiff is entitled to damages, we must notice that the element of coercive force is lacking. The state is the judge in its own cause, and cannot exercise constraint against itself. Nevertheless in the wider sense the administration of justice includes proceedings against the state, no less than a criminal prosecution or an action for debt or damages against a private individual.

(2) *Declarations of right.* The second form of judicial action which does not conform to the essential type is that which results, not in any kind of coercive judgment, but merely in a declaration of a primary right. A litigant may claim the assistance of a court of law, not because his rights have been violated, but because they are uncertain. What he desires may be not any remedy against an adversary for the violation of a right, but an authoritative declaration that the right exists. Such a declaration may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, but in the meantime there is no enforcement nor any claim to it. Examples of declaratory proceedings are declarations of legitimacy, declarations of nullity of marriage, declarations of the legality or illegality of the conduct of state officers, advice to trustees or executors as to their legal powers and duties, and the authoritative interpretation of wills and statutes (*q*).

(3) *Administrations.* A third form of secondary judicial action includes all those cases in which courts of justice undertake the management and distribution of property. Examples are the administration of a trust, the liquidation of a company by the court, and the realisation and distribution of an insolvent estate.

(4) *Titles of right.* The fourth and last form includes all those cases in which judicial decrees are employed as the means of creating, transferring, or extinguishing rights. Instances are a decree of divorce or judicial separation, an adjudication of bankruptcy, an order of discharge in bankruptcy, a decree of foreclosure against a mortgagor, an order appointing or removing trustees, a grant of letters of administration, and vesting or charging orders. In all these cases the judgment or decree operates, not as the remedy of a wrong, but as the title of a right.

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

(*q*) See generally, Borchard, *Declaratory Judgments* (1934); Williams, *Crown Proceedings* (1948), Chap. 4.

BOOK 2

THE SOURCES OF LAW

CHAPTER 3

THE SOURCES OF LAW

18. Legal and historical sources

Sources of law can be classified as either legal or historical. The former are those sources which are recognised as such by the law itself. The latter are those sources lacking formal recognition by the law. This is an important distinction which calls for careful consideration. In respect of its origin a rule of law is often of long descent. The immediate source of a rule of English law may be the decision of an English court of justice. But that court may have drawn the matter of its decision from the writings of some lawyer, let us say the celebrated Frenchman, Pothier; and Pothier in his turn may have taken it from the compilations of the Emperor Justinian, who may have obtained it from the prætorian edict. In such a case all these things—the decision, the works of Pothier, the *corpus juris civilis*, and the *edictum perpetuum*—are the successive material sources of the rule of English law. But there is a difference between them, for the precedent is the legal source of the rule, and the others are merely its historical sources. The precedent is its source, not merely in fact, but in law also; the others are its sources in fact, but obtain no legal recognition as such. The proposition that every principle embodied in a judicial decision has for the future the force of law is not merely a statement of historical fact as to the growth of English law; it is itself a rule of law. But the proposition that much of the law of Rome has become incorporated into the law of England is simply a statement of fact, which has in law no relevance or recognition (*a*).

The legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by the law courts as of right; the latter have no such claim; they influence more or less extensively the course of legal development, but they

(*a*) For a criticism of this distinction see Allen, *Law in the Making* (7th ed.), 269 *et seq.* See also Hart, *The Concept of Law*, 246.

speak with no authority. No rule of law demands their recognition. Thus both the Statute Book and the works of Jeremy Bentham are material sources of English law. The historians of that system have to take account of both of them. Much that is now established law has its source in the ponderous volumes of the great law reformer. Yet there is an essential difference between the two cases. What the Statute Book says becomes law forthwith and *ipso jure*; but what Bentham says may or may not become law, and if it does, it is by no claim of right, but solely through the unconstrained good pleasure of the legislature or the courts. So the decisions of English courts are a legal and authoritative source of English law, but those of American courts are in England merely an historical and unauthoritative source. They are treated with respect by English judges, and are in fact the ground and origin of an appreciable portion of English law, but their operation is persuasive merely, not authoritative, and no rule of English law extends recognition to them.

The legal sources are the only gates through which new principles can find entrance into the law. Historical sources operate only mediately and indirectly. They are merely the various precedent links in that chain of which the ultimate link must be some legal source to which the rule of law is directly attached. For every legal system contains certain rules of recognition determining the establishment of new law and the disappearance of old. That is to say, it contains certain rules to this effect: that all new principles which conform to such and such requirements are to be recognised as new principles of law, and applied accordingly in substitution for, or as supplementary to the old. Thus it is itself a principle of English law that any principle involved in a judicial decision has the force of law. Similar legal recognition is extended to the law-producing effect of statutes and immemorial customs. Rules such as these establish the sources of the law. A source of law, then, is any fact which in accordance with such basic legal rules determines the recognition and acceptance of any new rule as having the force of law. But the line between legal and historical sources is not crystal clear. This is certainly the case in English law. Here

admittedly there are sources lying well to each side of the line: a statute is clearly a legal source which must be recognised; equally clearly the writings of Bentham are without legal authority. But what are we to say for instance of decisions of the Privy Council? No English court is bound to follow these, which are at best of high persuasive value only. But then no decision of the High Court of Justice is binding on other High Court judges, on the Court of Appeal or on the House of Lords. Does this mean that such decisions are legal sources for lower courts like the county court but mere historical sources for the High Court itself and higher tribunals? The best that can be said is that according to the basic rules of English law certain statements of law are absolutely binding, others are binding in some but not all contexts, others are not binding in any context but are of persuasive value, and others yet again lack even persuasive force. The distinction between legal and historical sources, while useful as a starting-point, must not be pressed with too Procrustean zeal.

All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. There must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent. Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. The historians of the constitution know its origin, but lawyers must accept it as self-existent. It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred. So also the rule that judicial decisions have the force of

law is legally ultimate and underived. No statute lays it down. derivative source of law.

These ultimate principles are the grundnorms or basic rules of recognition of the legal system (*b*). The fact that they are underivable from other legal rules must not mislead us into regarding them either as mere matters of practice or as mere hypotheses. The doctrine of parliamentary supremacy in England, for example, involves more than mere usage and practice: it involves acceptance of the view that Parliament's word *ought* to be observed. Nor is it, on the other hand, a mere hypothesis to be assumed for the sake of argument: for Parliament *is* in fact supreme. These ultimate principles are indeed rules of law, though differing in some respects from ordinary less basic legal rules (*c*).

19. The legal sources of English law

We cannot deduce from the nature of law the nature of its legal sources, for these are merely contingent and not necessary; they differ in different systems of law and even in the same system in different periods of its growth. In general, law may be found to proceed from one or more of the following legal sources: from a written constitution, from legislation, from judicial precedent, from custom and from the writings of experts. English law, however, which is without a written constitution, proceeds chiefly from two legal sources, legislation and precedent.

The *corpus juris* is divisible accordingly into two parts by reference to the source from which it so proceeds. One part consists of enacted law, having its source in legislation, while the other part consists of case law, having its source in judicial precedents. Less accurately, owing to certain ambiguities inherent in the term, the first part consists of the statute law—to

(*b*) See *supra*, § 6.

(*c*) *Supra*, § 12. In addition to the historical and legal sources of the law, it is necessary to note and distinguish what may be termed its literary sources, though this is a Continental rather than an English use of the term source. The literary sources are the sources of our knowledge of the law, or rather the original and authoritative sources of such knowledge, as opposed to later commentary or literature. The sources of Roman law are in this sense the compilations of the Emperor Justinian, as contrasted with the works of commentators. So the sources of English law are the statute book, the reports, and the older and authoritative text-books, such as Littleton. The literature, as opposed to the sources of our law, comprises all modern text-books and commentaries.

be found in the Statute Book and the other volumes of enacted law—while the second part consists of the common law—to be found in the volumes of the law reports. The nature and authority of these two great sources of English law will form the subject of separate and detailed consideration later. It is sufficient here to indicate their nature in general terms. Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognised as adequate for that purpose. A precedent, on the other hand, is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra*: case law is developed within the courts themselves.

If we have regard, not merely to the modern and general law of England, but also to that law in earlier times, and to the various forms of special law (*d*) which exist side by side with the general law, it is necessary to recognise two other legal sources in addition to legislation and precedent. These are custom and agreement, being the sources respectively of customary law and conventional law. Customary law is that which is constituted by those customs which fulfil the requirements laid down by law as the condition of their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law *inter partes*, in derogation of, or in addition to, the general law of the land.

Classified, therefore, by reference to their legal sources (*e*), there are four kinds of law:—

(*d*) Special law consists of legal rules so exceptional in their nature, sources or application that it is convenient to treat them as standing outside the general law and as either derogating from it or supplementing it. Examples are: *local law*, which is in force in particular parts of a state's territory only; *conventional law*, which has its source in the agreement of those subject to it, the agreement constituting law for those who make it; and *autonomic law*, having its source in the subordinate legislation of private bodies such as universities, which may make statutes governing their members.

(*e*) The sources of law may also serve as sources of rights. A source of rights is some fact which is legally constitutive of rights. An Act of Parliament for example, is a typical source of law, but there are numerous private Acts which are clearly titles of legal rights, such as an Act of divorce or an Act incorporating a company. A judicial decision is a source of law as regards the world at large. As the former, it is called a judgment: as the latter, a precedent.

(a) Enacted law, having its source in legislation;
(b) Case law, having its source in precedent;
(c) Customary law, having its source in custom;
(d) Conventional law, having its source in agreement.

The first three of these sources will be considered in the three following chapters of this book. The fourth, namely, agreement, will be dealt with more suitably at a later stage, in its other and predominant aspect as a source of rights and obligations rather than of law.

CHAPTER 4

LEGISLATION

20. The nature of legislation

Legislation is that source of law which consists in the declaration of legal rules by a competent authority. The term is sometimes used in a wide sense to include all methods of law-making. To legislate is to make new law in any fashion. In this sense, any act done with the effect of adding to or altering the law is an act of legislative authority. As so used, legislation includes all the sources of law, and not merely one of them (*a*). Thus when judges establish a new principle by means of a judicial decision, they may be said to exercise legislative, and not merely judicial power.

In the strict sense, however, legislation is the laying down of legal rules by a sovereign or subordinate legislator. Here we must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, in so far as they create law, can do so only in application to the cases before them and only in so far as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator.

In another sense, legislation includes every expression of the will of the legislature, whether directed to the making of rules of law or not. In this use, every Act of Parliament is an instance of legislation, irrespective altogether of its purpose and effect. The legislature does not confine its action to the making of rules, yet all its functions are included within the term legislation. An Act of Parliament may do no more than ratify a treaty with a foreign state, or alter the calendar, or establish a uniform time throughout the realm, or make some change in the style and title of the reigning sovereign, or alter the coinage, or appropriate public money, or declare war or make peace, or grant a divorce, or annex or abandon territory.

(*a*) See Austin, *Jurisprudence* (3rd ed.), 555.

All this is legislation in a wide sense, but it is not that declaration of legal principles with which, as one of the sources of law, in the sense of legal rules, we are here alone concerned.

Law that has its source in legislation may be most accurately termed *enacted* law, all other forms being distinguished as *unenacted*. The more familiar term, however, is *statute law* as opposed to the *common law*; but this, though sufficiently correct for most purposes, is defective, inasmuch as the word statute does not extend to all modes of legislation, but is limited to Acts of Parliament. Blackstone and other writers use the expressions *written* and *unwritten* law to indicate the distinction in question. Much law, however, is reduced to writing even in its inception, besides that which originates in legislation. The terms are derived from the Romans, who meant by *jus non scriptum* customary law, all other, whether enacted or unenacted, being *jus scriptum*. We shall see later that according to the older theory, as we find it in Blackstone and his predecessors, all English law proceeds either from legislation or from custom. The common law was customary, and therefore, adopting the Roman usage, unwritten law. All the residue was enacted, and therefore written law (*b*). We shall also see that this classification is not exhaustive.

21. Supreme legislation

Legislation is either *supreme* or *subordinate*. The former is that which proceeds from the supreme or sovereign power in the state, and which is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is therefore dependent for its continued existence and validity on some superior or supreme authority. In other words the sovereign legislator is that which has no rival in the state. Sovereignty does not involve that the legislator's powers are unlimited in every way.

According to the Austinian theory, as we saw, it is logically impossible for there to be any legal limitations on the sovereign's

(*b*) Constat autem jus nostrum aut ex scripto aut ex non scripto. . . . Ex non scripto jus venit, quod usus comprobavit. Just. *Inst.* 1. 2. 3.; 1. 2. 9. "The municipal law of England may with sufficient propriety be divided into two kinds: the lex non scripta, the unwritten or common law; and the lex scripta, the written or statute law." Blackstone, I. 63.

authority. If law is the command of the sovereign and if the sovereign is that body which enjoys general obedience and owes obedience to no other body, then clearly the sovereign cannot be bound by law; for this would mean that the sovereign is bound by and owes obedience to some other body, whereas the sovereign on Austin's definition owes obedience to no one. It follows then that a limited sovereign is logically no sovereign at all.

Austin's argument, by trying to explain law and sovereignty in terms of the fact of obedience, entirely misses the fundamental point that sovereignty is a question of law rather than of fact. For the sovereign is not so much the body enjoying obedience in fact as the body whose decrees qualify as law within a legal system. The existence of a sovereign then entails the existence of rules of law. These will define (1) the identity and composition of the sovereign and (2) the procedure according to which the sovereign is to legislate. These rules serve within a state to identify the law-making body and those of its decrees which are to enjoy legal authority. In addition there may be rules defining (3) the area within which the sovereign is competent to legislate—in other words establishing an area where legislation is either wholly impossible or possible only in accordance with special procedures. In this kind of constitutional limitation on sovereignty there is nothing paradoxical or self-contradictory; in fact this very type of limitation occurs in the written constitutions of many states (*c*).

In England, however, the doctrine of parliamentary supremacy has traditionally been that Parliament is not only supreme but legally omnipotent. An Act of Parliament cannot for instance be held void for unreasonableness or, it seems, upon any other ground. Although at one time the law was thought to be different the present attitude of the courts was expressed in *Lee* v. *Bude, etc. Ry.* (*d*). "We sit here as servants of the Queen and the

(*c*) See above, § 4

(*d*) See *per* Willes J., in *Lee* v. *Bude, etc. Ry.* (1871) L.R. 6 C.P. at 582. At one time the law was thought to be otherwise. "If any general custom were directly against the law of God, or if any statute were made directly against it . . . the custom and statute were void." *Doctor and Student* Dial I, Chap. 6. See to the same effect *Bonham's Case* (1610) 8 Co.Rep. 118a; Coke's 2nd Inst., 587; Hobart, 87; Blackstone, I. 91. There is some difference of opinion on the question whether this doctrine, in its application to statutes, represented actual medieval practice. The literature is collected in Haines,

legislature." This doctrine of parliamentary sovereignty, in the sense that there is no legal limit upon the power of Parliament (except the inability to bind its successors), was expounded by Dicey and became a commonplace of books on constitutional law (*e*).

Difficulty however arises as to whether Parliament can bind its successors. If it could do this then of course the authority of later Parliaments would be limited by, and less than, that of earlier. There have indeed been statutes in which Parliament has purported to achieve this very object. The Statute of Westminster, 1931, enacted that no Act of the United Kingdom Parliament should extend to a Dominion without that Dominion's consent. Is the present English Parliament therefore bound by the Statute? Or is the Statute nothing but a self-denying ordinance which the English Parliament is free to disregard? Speculation about what would happen if Parliament were to pass a statute contrary to the Statute of Westminster tends to distinguish between theory and reality. "Indeed the imperial Parliament could as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities" (*f*).

Good theory, however, can surely only be so by squaring with reality. Why, we may ask, should it be impossible for Parliament to bind itself? Arguments in favour of this impossibility are based partly on logic and partly on law. Any attempt to contend that Parliament can bind itself must show the untenability of these arguments.

The logical argument finds in the notion of Parliament binding its successors the same difficulty as it sees in the idea of the House of Lords being bound by its own decisions. In both situations it detects a vicious circle. According to *London Street Tramways Co.* v. *L.C.C.*, (*g*) the House of Lords is bound by its own

The Revival of Natural Law Concepts (1930), 28 *et seq.* There is also a dispute as to the extent of the controlling power claimed by the judges in *Bonham's case*. See Corwin, "The 'Higher Law' Background of American Constitutional Law" (1929) 42 H.L.R. at 367 *et seq.*; S. E. Thorne, "Dr. Bonham's Case" (1938) 54 L.Q.R. 543.

(*e*) On the sovereignty of Parliament see Marshall, *Parliamentary Sovereignty and the Commonwealth*; Heuston, *Essays in Constitutional Law* (2nd ed.) Chap. 1.; Hart, *The Concept of Law*, 72–77, 145–148.

(*f*) *Per* Lord Sankey L.C. in *British Coal Corp.* v. *The King* [1935] A.C. 500.

(*g*) [1898] A.C. 375. See A. W. B. Simpson "The *Ratio Decidendi* of a Case" in *Oxford Essays in Jurisprudence* (ed. Guest), 148.

decisions. This, however, is itself a House of Lords decision. Accordingly the proposition it enunciated is binding on the House only if there is a rule of law that the House of Lords is bound by its own decisions. Yet this was the point that the case purported to decide. Similarly it would seem that Parliament may bind itself by a statute only if there exists a rule to the effect that Parliament may do this. If no such rule exists, how can Parliament invent such a rule ?

Now the basic rule here is that what Parliament enacts is law. The question is whether Parliament can by enactment modify or alter this basic rule. The rule itself splits up into several sub-rules concerning the composition of Parliament and the procedures necessary for the enactment of a statute. Some of these sub-rules have been dispensed with by statute for certain purposes. The Parliament Act of 1911 has abolished the need for a money Bill to receive the consent of the House of Lords. Could Parliament dispense with all the sub-rules? Parliament could, it has been pointed out (*h*), commit legal suicide by dissolving itself and enacting that it should never be recalled. At the same time it could transfer all its powers to some other body such as the Manchester Corporation. This, it is argued, would be a complete alteration of the fundamental rule of recognition in the English legal system. But if Parliament can do this, why can it not do something less than this? What is to prevent us saying that the Statute of Westminster, 1931, brought about an alteration in the fundamental rule and put certain legislation outside the competence of the United Kingdom Parliament? The difficulty with this approach is that, both in the case of the Parliament Act, 1911, and in the case of the legislative suicide and transfer of power, it can be argued that there has been in fact no alteration of the basic rule of recognition. The rule, that what Parliament enacts is law, still remains, although in the first case Parliament in the full sense will not need to act and in the second case Parliament will not be there to act. In the first case, however, the full Parliament could enact a money Bill and this enactment would qualify as a statute having the force of law. Let us imagine in the second case that Parliament transferred all its powers to the Manchester Corporation without in fact dissolving itself. In such a case it is

(*h*) Hart, *The Concept of Law*, 145–150.

true that the Manchester Corporation would have authority to create law, but this would not extinguish Parliament's own law-making authority; and if Parliament were to resume the practice of enacting statutes, these in logic and on principle, it seems, would qualify as laws.

The problem with regard to the Statute of Westminster is that we have a rule, Rule (1) that what Parliament enacts is law; another rule, Rule (2) that certain types of enactment, legislation extending to a Dominion without its consent, do not count as law; and a hypothetical statute purporting to extend to a Dominion in contravention of Rule (2). Here if the Statute is invalid, this is because it contravenes Rule (2), which itself derives validity from Rule (1). But why should Rule (1) afford validity to Rule (2) without affording equal validity to the Statute? The argument that Parliament can bind itself would contend that Rule (2) invalidates the Statute. Why should we not equally contend that the rule contained in the Statute governs and overrides Rule (2) and that Parliament has not bound itself? Rule (2) is superior to the Statute in that it precedes it in time, but equally the Statute can be said to be superior to Rule (2) in that it is the later; and indeed the rule in England is that a later statute impliedly repeals an earlier one with which it conflicts. The logical difficulty, it is suggested, is more formidable than is sometimes thought. In so far as the case of *London Street Tramways Co.* v. *L.C.C.* and the Statute of Westminster have changed fundamental rules in the English legal system the validity of the new rule lies surely not in its derivation from the old rule but rather in its acceptance as a new customary rule of recognition. To the question whether the Statute of Westminster has given rise to a new rule, the only answer can be that we must wait and see.

The legal argument against the view that Parliament can bind itself is the traditional one that judges cannot look behind the Parliamentary Roll. Authority for this is found in *Edinburgh & Dalkeith Railway Company* v. *Wauchope* (*i*) in which it was observed that " all that a Court of Justice can do is to look at the Parliamentary Roll; if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no Court of Justice can enquire into the mode in which it was introduced into

(*i*) (1842) 8 Cl. & F. 710 at p. 724.

Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses." As has been shown (*j*) the words " if from that it should appear that a Bill has passed both Houses and received the Royal Assent " show that Lord Campbell had in mind a statute which on the face of it is authentic; and where statutes are not so authentic *ex facie*, authorities show that their validity can be questioned by the courts. In England we can say that the rules relating to sovereignty define the composition of Parliament and the procedure for legislation and that there is no rule restricting the ambit of parliamentary legislation. This, however, need not preclude us from contending that Parliament is bound by the Statute of Westminster. Instead of regarding this enactment as a legally impossible attempt to restrict the ambit of Parliament's authority we can look upon it as redefining, for the purposes of certain legislation, the necessary procedure to be followed. Alternatively we may regard it as redefining for this purpose the composition of Parliament. Accordingly, if the United Kingdom Parliament tried to pass a Bill contrary to this Statute, it is arguable that the attempt to present the Bill for Royal Assent would be contrary to the Statute and so unlawful. This being so, courts would have jurisdiction to prevent such presentation by granting an injunction (*k*). Once the Bill has obtained the Royal Assent, however, it is more difficult to say what could be done by way of judicial review. It has been suggested that even after Royal Assent courts could declare the statute to be invalid on the ground that the alleged Act of Parliament is not really an Act at all (*k*). In *The Bribery Commissioner* v. *Ranasinghe* (*l*) the Privy Council held invalid an Act of the Ceylon Parliament which had received the Royal Assent. Here, however, there was a conflict between a fundamental rule of the constitution and an alleged Act of Parliament, and the constitution took precedence over the statute. In the hypothetical problem which we are discussing the conflict would not be one between a fundamental rule of the constitution and a statute but rather a conflict between two statutes. This being so, it is difficult to see how a new statute with the

(*j*) Heuston, *ibid.*
(*k*) See the authorities for these propositions set out in Heuston, *ibid.*
(*l*) [1964] 2 All E.R. 785.

Royal Assent could within our present legal framework be questioned by the courts.

22. Subordinate legislation

Enactments of legislative bodies inferior to the sovereign constitute subordinate legislation. Such legislation is subordinate in that it can be repealed by, and must give way to, sovereign legislation. It may also be, and in many cases is, of a derivative nature, the power to legislate having been delegated by the sovereign to the subordinate. In England all forms of legislative activity recognised by law, other than the power of Parliament, are subordinate and subject to parliamentary control.

The chief forms of subordinate legislation are five in number.

(1) *Colonial.*—The powers of self-government entrusted to the colonies and other dependencies of the Crown are subject to the control of the Imperial legislature. The Parliament at Westminster may repeal, alter, or supersede any colonial enactment, and such enactments constitute, accordingly, the first and most important species of subordinate legislation. It has been held, however, that for the purpose of the maxim *Delegatus non potest delegare* a colonial legislature is not a mere delegate of the Imperial Parliament, and hence can delegate its legislative powers to other bodies that in turn are dependent upon it (*m*).

(2) *Executive.*—The essential function of the executive is to conduct the administrative departments of the state, but it combines with this certain subordinate legislative powers which have been expressly delegated to it by Parliament, or pertain to it by the common law. Statutes, for example, frequently entrust to some department of the executive government the duty of supplementing the statutory provisions by the issue of more detailed regulations bearing on the same matter (*n*). So it is part of the prerogative of the Crown at common law to make laws for the government of territories

(*m*) *Powell* v. *Apollo Candle Co.* (1885) 10 App.Cas. 282.

(*n*) See as to this form of delegated legislation, which is now of very great importance, the Report of the Committee on Ministers' Powers, Cmd. 4060 of 1932; Allen, *Law in the Making* (7th ed.), Chap. 7; Allen, *Law and Orders* (1945).

acquired by conquest or cession, and not yet possessed of representative local legislatures.

(3) *Judicial.*—In the same way, certain delegated legislative powers are possessed by the judicature. The superior courts have the power of making rules for the regulation of their own procedure. This is judicial legislation in the true sense of the term, differing in this respect from the so-called legislative action of the courts in creating new law by way of precedent.

(4) *Municipal.*—Municipal authorities are entrusted by the law with limited and subordinate powers of establishing special law for the districts under their control. The enactments so authorised are termed by-laws, and this form of legislation may be distinguished as municipal.

(5) *Autonomous.* — All the kinds of legislation which we have hitherto considered proceed from the state itself, either in its supreme or in one or other of its many subordinate departments. But this is not necessarily the case, for legislation is not a function that is essentially limited to the state. The declaration of new principles amounts to legislation not because it is the voice of the state, but because it is accepted by the state as a sufficient legal ground for giving effect to those new principles in its courts of justice. In the allowance of new law the state may hearken to other voices than its own. In general, indeed, the power of legislation is far too important to be committed to any person or body of persons save the incorporate community itself. The great bulk of enacted law is promulgated by the state in its own person. But in exceptional cases it has been found possible and expedient to entrust this power to private hands. The law gives to certain groups of private individuals limited legislative authority touching matters which concern themselves. A railway company, for example, is able to make by-laws for the regulation of its undertaking. A university may make statutes binding upon its members. A registered company may alter those articles of association by which its constitution and management are determined. Leglislation thus effected by private persons, and the law so created, may be distinguished as *autonomic*.

There is a close resemblance between autonomic law and conventional law, but there is also a real distinction between them. The creation of each is a function entrusted by the state to private persons. But conventional law is the product of agreement, and therefore is law for none except those who have consented to its creation. Autonomic law, on the contrary, is the product of a true form of legislation, and is imposed by superior authority *in invitos*. The act of a general meeting of shareholders in altering the articles of association is an act of autonomous legislation, because the majority has the power of imposing its will in this respect upon a dissentient minority. All the shareholders may in fact agree, but the law-creating efficacy of their resolution is independent of any such accidental unanimity. We may say, if we please, that with respect to consenting shareholders the resolution is an agreement, while with respect to dissentients it is an act of legislative authority. The original articles of association, on the other hand, as they stand when the company is first formed, constitute a body of conventional, not autonomic law. They are law for all shareholders by virtue of their own agreement to become members of the company, and are not the outcome of any subsequent exercise of legislative authority vested in the majority (*o*).

23. Relation of legislation to other sources

So great is the superiority of legislation over all other methods of legal evolution, that the tendency of advancing civilisation is to acknowledge its exclusive claim, and to discard the other instruments as relics of the infancy of law. Statute law has already become the type or standard, from which the other forms of law are more or less abnormal variations. Nothing is more natural than this from our modern point of view, nothing less natural from that of primitive jurisprudence. Early law is conceived as *jus* (the principles of justice), rather than as *lex* (the will of the state). The function of the state in its earlier conception is to *enforce* the law, not to *make* it. The

(*o*) The mere fact that a person who becomes a shareholder must be taken to have impliedly agreed to be bound not only by the articles as they stand but by any subsequent modification of them, does not render subsequent modifications conventional instead of legislative in their nature. The immediate source of the new rules is not agreement, but imposition by superior authority.

rules so to be enforced are those rules of right which are found realised in the immemorial customs of the nation, or which are sanctioned by religious faith and practice, or which have been divinely revealed to men. It is well known that the earliest codes were the work, not of mortal men, but of the gods (*p*). That the material contents of the law depend upon the express or tacit will of the state, that principles sanctioned by religion or immemorial usage are laws only so long as the prince chooses to retain them unaltered, that it is within the powers and functions of political rulers to change and subvert the laws at their own good pleasure, are beliefs which mark considerable progress along the road of political and legal development. Until such progress has been made, and until the petrifying influence of the primitive alliance of law with religion and immutable custom has been to some extent dissolved, the part played by human legislation in the development of the legal system is necessarily small, and may be even non-existent. As it is the most powerful, so it is the latest of the instruments of legal growth.

In considering the advantages of legislation, it will be convenient to contrast it specially with its most formidable rival, namely, precedent. So considered, the first virtue of legislation lies in its abrogative power. It is not merely a source of new law, but is equally effective in abolishing that which already exists. But precedent possesses merely constitutive efficacy; it is capable of producing very good law—better in some respects than that which we obtain by way of legislation—but its defect is that, in a strict system of binding precedent, its operation is irreversible. What it does, it does once for all. It cannot go back upon its footsteps, and do well what it has once done ill. Legislation, therefore, is the indispensable instrument, not indeed of legal growth, but of legal reform. Precedent, however, need not be absolutely strict. Where courts can overrule their own previous decisions—as is the case in England with the Privy Council and in the United States with the Supreme Court—precedent can unmake as well as make the law.

The second respect in which legislation is superior to precedent is that it allows an advantageous division of labour,

(*p*) Plato, *Laws*, 624. Spencer, *Sociology*, II, 515 *et seq*. Maine, *Ancient Law* (ed. Pollock), Chap. I, and note C. p. 22.

which here, as elsewhere, results in increased efficiency. The legislature becomes differentiated from the judicature, the duty of the former being to make law, while that of the latter is to interpret and apply it. Speaking generally, a legal system will be best administered when those who administer it have this as their sole function. Precedent, on the contrary, unites in the same hands the business of making the law and that of enforcing it.

It is true, however, that legislation does not necessarily involve any such division of functions. It is not of the essence of this form of legal development that it should proceed from a distinct department of the state, whose business it is to give laws to the judicature. It is perfectly possible for the law to develop by a process of true legislation, in the absence of any legislative organ other than the courts of justice themselves. We have already noticed the existence of this judicial legislation, in considering the various forms of subordinate legislative power. The most celebrated instance of it is the case of the Roman praetor. In addition to his purely judicial functions, he possessed the *jus edicendi*, that is to say, legislative powers in respect of the matters pertaining to his office. It was customary for each praetor at the commencement of his term of office to publish an *edictum* containing a declaration of the principles which he intended to observe in the exercise of his judicial functions. Each such edict was naturally identical in its main outlines with that which preceded it, the alterations made in the old law by each successive praetor being for the most part accepted by his successors. By this exercise of legislative power on the part of judicial officers, a very considerable body of new law was in course of time established, distinguished as the *jus praetorium* from the older *jus civile*. Powers of judicial legislation, similar in kind, though less in extent, are at the present day very generally conferred upon the higher courts of justice. Yet though not theoretically necessary it is certainly expedient that, at least in its higher forms, the function of law-making should be vested in a department of the state superior to and independent of the judicature.

A third advantage of statute law is that the formal declaration of it before the commission of the acts to which it applies is generally a condition precedent to its application in courts

of justice. Case law, on the contrary, is created and declared in the very act of applying and enforcing it. Legislation satisfies the requirement of natural justice that laws shall be known before they are enforced; but case law operates retrospectively, being created *pro re nata*, and applied to facts which are prior in date to the law itself (*q*).

This particular distinction must not, however, be overemphasised. Sometimes statutes are made retrospective, though this is not now done in the case of statutes creating criminal offences, the maxim *nulla poena sine lege* being rigidly followed in criminal law (*r*). Even where statutes are not made retrospective as a matter of law, their passing may in fact upset settled expectations. For instance, a person who has bought a house and who intends to let it at a profitable rent, may find, through the passing of a Rent Restrictions Act, that the recoverable rent is much less than he expected (*s*). Again, modern statutes are so numerous and so complicated that the ordinary layman has often little idea of his legal duties until he has broken them, or until he hears of legal proceedings for their breach being taken against others. This difficulty is alleviated in the case of trade regulations by their publication in trade newspapers. Finally, even when the existence of legislation is known, its meaning may be doubtful. In such a case the meaning must be established by the court, and the decision of the court will be retrospective to the date of the operation of the statute. Here the rule as finally established is applied retrospectively even though in theory it rests upon a statute. In each of these respects the general proposition that statutes are not retrospective needs qualification. Turning to case law, it is by no means true that it must be retrospective. A system of precedent would be perfectly feasible in which a court could lay

(*q*) On this and other grounds "judge-made law", as he called it, was the object of constant denunciation by Bentham. "It is the judges", he says in his vigorous way (*Works*, V. 235), "that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me."

(*r*) See on this maxim Williams, *Criminal Law* (2nd ed.), Chap. 12.

(*s*) A more surprising illustration of legislation defeating expectations is *Re Kempthorne, Charles v. Kempthorne* [1930] 1 Ch. 268. Legislation may so easily defeat existing arrangements that in the law of contract impossibility of performance brought about by operation of law is regarded as a defence.

down a new rule but apply the existing rule to the instant case. Such a technique, which would be particularly valuable in criminal, commercial and property law, where justice and the demands of certainty require the avoidance of retroactivity, is in fact practised in certain jurisdictions in the United States (*t*) and advocated by certain lawyers in England (*u*). But even where case law is retrospective, this is softened by the fact that its development is gradual, and limited in scope; new rules grow out of old ones, and rarely represent a clean break with the existing law. Also, much judge-made law is in accordance with ordinary ideas of morality. Thus the decision in *R.* v. *Manley* (*v*), which created or revived the offence of public mischief, was in a sense an infraction of the maxim *nulla poena sine lege*; but the defendant at least knew in advance that she was telling an untruth and confusing the authorities.

The fourth advantage of legislation is that it can by way of anticipation make rules for cases that have not yet arisen, whereas precedent must needs wait until the actual concrete instance comes before the courts for decision (*w*). Precedent is dependent on, legislation independent of, the accidental course of litigation. So far as precedent is concerned, a point of law must remain unsettled, until by chance the very case arises. Legislation can fill up a vacancy, or settle a doubt in the legal system, as soon as the existence of this defect is called to the attention of the legislature. Case law, therefore, is essentially incomplete, uncertain, and unsystematic; while if statute law shows the same defects, it is only through the lethargy or incapacity of the legislature. As a set-off against this demerit of precedent, it is to be observed that a rule formulated by the judicature in view of the actual case to which it is to be applied is not unlikely to be of better workmanship, and more carefully

(*t*) See *Gt. N. Ry.* v. *Sunburst Oil and Refining Co.* (1932) 287 U.S. 358. See also Williams, *op. cit.* § 106, n. 2.

(*u*) *e.g.*, Diplock, *The Courts as Legislators* (Holdsworth Club, University of Birmingham, 1965), 17.

(*v*) [1933] 1 K. B. 529. *Cf.* Williams, *op. cit.*

(*w*) The actual concrete instance may, however, be a case brought before the court for a declaration of rights, not a case in which one party complains that the other has committed a wrong. Generally, English courts are reluctant to make pronouncements as to rights otherwise than in cases where a wrong is alleged; but exceptionally, in a few cases, they do so.

adapted to the ends to be served by it, than one laid down *a priori* by the legislature.

Finally, statute law is greatly superior to case law in point of form. The product of legislation assumes the form of abstract propositions, but that of precedent is merged in the concrete details of the actual cases to which it owes its origin. Statute law is, in general, brief, clear, easily accessible and knowable, while case law is buried from sight and knowledge in the huge and daily growing mass of the records of bygone litigation. Case law is gold in the mine—a few grains of the precious metal to the ton of useless matter—while statute law is coin of the realm ready for immediate use.

This very perfection of form, however, brings with it a defect of substance from which case law is free. Statute law is embodied in an authoritative form of written words, and this literary expression is an essential part of the law itself. It is the duty of the courts in general to apply the letter of the law. They are concerned with the spirit and reason of it only so far as the spirit and reason have succeeded in finding expression through the letter. Case law, on the contrary, has no letter. It has no authoritative verbal expression, and there is no barrier between the courts of justice and the very spirit and purpose of the law which they are called on to administer. In interpreting and applying statute law, the courts are concerned with words and their true meaning; in interpreting and applying case law, they are dealing with ideas and principles and their just and reasonable contents and operation. Statute law, where the words of the statute are clear, is rigid, straitly bound within the limits of authoritative formulæ; case law, with all its imperfections, has at least this merit, that it remains in living contact with the reason and justice of the matter, and draws from this source a flexibility and a power of growth and adaptation which are too much wanting in the *litera scripta* of enacted law.

These last remarks need one qualification. Where the words of the statute are not clear the court has to some extent a discretion to interpret the statute in accordance with its social purpose. But the initial question whether the words of the statute are clear, and the subsidiary question as to its social purpose, may be quite as difficult as ascertaining the *ratio*

decidendi of a case. Thus statute law is not always superior to case law in point of clarity, nor yet always inferior to it in point of flexibility.

24. Codification

The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process which, since the days of Bentham, has been known as codification, that is to say, the reduction of the whole *corpus juris*, so far as practicable, to the form of enacted law. In this respect England lags far behind the Continent. Since the middle of the eighteenth century the process has been going on in European countries, and is now all but complete. Nearly everywhere the old medley of civil, canon, customary, and enacted law has given place to codes constructed with more or less skill and success. Even in England, and the other countries to which English law has spread, tentative steps are being taken on the same road. Certain isolated and well-developed portions of the common law, such as the law of bills of exchange, of partnership, and of sale, have been selected for transformation into statutory form. The process is one of exceeding difficulty owing to the complexity and elaboration of English legal doctrine. Unfortunately, many portions of the law are not yet ripe for it, and premature codification is worse than none at all.

Codification must not be understood to involve the total abolition of precedent as a source of law. Case law will continue to grow, even when the codes are complete. The old theory, now gradually disappearing, but still true in most departments of the law, is that the common law is the basis and groundwork of the legal system, legislation being nothing more than a special instrument for its occasional modification or development. Unenacted law is the principal, and enacted law is merely accessory. The activity of the legislature is called for only on special occasions to do that which lies beyond the constructive or remedial efficacy of the common law. Codification means, not the total disappearance of case law, but merely the reversal of this relation between it and statute law. It means that the substance and body of the law shall be enacted

law, and that case law shall be incidental and supplementary only. In the most carefully prepared of codes subtle ambiguities will come to light, real or apparent inconsistencies will become manifest, and omissions will reveal themselves. No legislative skill can effectually anticipate the complexity and variety of the facts. The function of precedent will be to supplement, to interpret, to reconcile, and to develop the principles which the code contains. Out of the code itself, therefore, a body of case law will grow, as a judicial commentary and supplement. It will be expedient from time to time that this supplementary and explanatory case law be itself codified and incorporated into successive editions of the code. But so often as this is done, the process of interpretation will begin again with the like results (*x*).

An interesting compromise between case law and codification is the American Law Institute's Restatement of American law. The Restatement is in the form of a code, but it is not statutory and has no official sanction. Its authority in the courts of the United States, which is considerable, rests entirely on the eminence of the jurists who have framed it. Generally speaking, the Restatement, as its name implies, merely declares the existing law, without attempting to suggest or incorporate improvements in it. But where the decisions are in conflict, the framers of the Restatement have adopted what they consider to be the preferable rule, not necessarily the one supported by the greatest mass of authority (*y*).

26. The interpretation of enacted law (*z*)

We have seen that one of the characteristics of enacted law is its embodiment in authoritative formulæ. The very words

(*x*) For the Continental controversy on the subject of codification see J. W. Jones, *Historical Introduction to the Theory of Law*, Chap. 2; Seagle, *The Quest for Law* (1941) Chap. 18, and bibliography therein at pp. 435–436. For the history of the attempt to produce a criminal code for England see Williams, *Criminal Law* (2nd ed.), § 187; and for future prospects of codification in England see Dennis Lloyd in (1949) 2 *Current Legal Problems* 155.

(*y*) For the genesis and working of the American Law Institute see H. E. Yntema in (1934) 12 Can. Bar Rev. 319, reprinted in *Essays in Tribute to Orrin Kip McMurray* (ed. Radin and Kidd, 1935) 657. Franklin in (1934) 47 H.L.R. 1367 compares the Restatement with a code, to the disadvantage of the Restatement.

(*z*) On the interpretation of statutes see Odgers, *The Construction of Deeds and Statutes*; Craies, *Statutes*; Maxwell, *Statutes*; Amos, "The Interpretation of Statutes" (1934) 5 C.L.J. 163; D. J. Ll. Davies, "The Interpretation of

in which it is expressed—the *litera scripta*—constitute a part of the law itself. Legal authority is possessed by the letter, no less than by the spirit of the enactment. Other forms of law (with the exception of written conventional law, which in this respect stands by the side of statutory) have no fixed and authoritative expression. There is in them no letter of the law, to stand between the spirit of the law and its judicial application. Hence it is that in the case of enacted law a process of judicial *interpretation* or *construction* is necessary, which is not called for in respect of customary or case law. By interpretation or construction is meant the process by which the courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

Interpretation is of two kinds, which may be distinguished as literal and functional (*a*). The former is that which regards exclusively the verbal expression of the law. It does not look beyond the *litera legis*. Free interpretation, on the other hand, is that which departs from the letter of the law, and seeks elsewhere for some other and more satisfactory evidence of the true intention of the legislature. It is essential to determine with accuracy the relations which subsist between these two methods. In other words, we have to determine the relative claims of the letter and the spirit of enacted law.

The traditional English view is the following. The duty of the judicature is to discover and to act upon the true intention of the legislature—the *mens* or *sententia legis*. The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They

Statutes in the Light of their Policy by the English Courts" (1935) 35 Col.L.Rev. 519; R. A. Eastwood, "A plea for the Historical Interpretation of Statute Law" (1935) *Journal of the Society of Public Teachers of Law* 1; Corry, "Administrative Law and the Interpretation of Statutes" (1935) 1 Univ. of Tor.L.J. 286; E. R. Hopkins, "The Literal Canon and the Golden Rule" (1937) 15 Can. Bar Rev. 689; John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1. Driedger "A New Approach to Statutory Interpretation" (1951) 29 Can. Bar Rev. 838.

(*a*) Sir John Salmond adopted the terms *grammatical* and *logical* from Continental lawyers; the editor has replaced these by the words *literal* and *functional* in the belief that the latter more clearly express the meaning.

must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said. *Ita scriptum est* is the first principle of interpretation. Judges are not at liberty to add to or take from or modify the letter of the law, simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed by it.

In order to determine the literary meaning of a statute the courts make use of various rules of interpretation. These, however, are rough principles or guides rather than strict rules and are not so much the invention of the law as the application within the context of law of ordinary common-sense rules of language. For example to ascertain the ordinary meaning of a word in a statute the court may look at dictionaries or scientific or other technical works in which the words are used. It must also interpret statutory words in the light of definitions provided by the statute itself, by the Interpretation Act, 1889, and by any judicial decisions on the statute in question.

But the meaning of a word is also affected by its context, hence the legal maxim *noscitur a socis* which means that " the meaning of a word is to be judged by the company it keeps," and is therefore merely another rule of language. The context may consist of the surrounding section or sections, the whole Act, or indeed the whole area of legislation. Indeed in a sense the general context of any piece of legislation is the existing common law. Parliament is deemed to have legislated with knowledge of the existing law and courts therefore must interpret statutes in the light of the law as it stood. Context may even give the word a meaning which is not to be found in the dictionary. For example several instances are to be found in the reports in which the technical term " void " as used in a statute has been considered as if it were " voidable ": since this was the meaning required to give effect to the evident requirement of the legislature.

Words must also be considered in the sense which they bore when the statute was enacted. One of the most interesting examples of this rule is the use by the courts of Mill's *Political Economy* to interpret the meaning of the expression " direct tax " in the British North America Act 1867 (*b*). It is assumed that the Parliament of 1867 understood and intended the economic concepts

(*b*) *e.g. Atlantic Smoke Shops Ltd.* v. *Conlon* [1943] A.C. 550 (P.C.).

current at the time. On the other hand, the courts are quite ready to extend the words of statutes to cover new inventions, provided that the new invention falls within the generic conception of what was known at the date of the statute, and falls within the fair meaning of what was expressed. Thus the Engraving Copyright Act, 1734, was held to cover not only engravings but photographs (*c*); the Telegraph Acts of 1863 and 1869 were held to extend to the telephone; and an electric tram-car was held to be a " stage-carriage " within the meaning of an Act of 1832 (*d*).

Another legal maxim which in reality merely enshrines a rule of language is the maxim *expressio unius est exclusio alterius*. Suppose for example that a speaker who is talking about men and women proceeds to make some statement about men: the natural implication is that he intends this statement to refer to men only and not to women. Likewise suppose that a statute makes two provisions, A and B, both of which would normally be taken to have a certain implication. Now suppose, further, that the statute *expresses* this implication for A, but fails to express it for B. According to the maxim, the implication which would normally hold for B is impliedly negatived by the failure to express it, having regard to the fact that it is expressed for A. Another example is where the statute refers both to land and buildings, and then makes a provision for land (without mentioning buildings). Here the provision may be construed not to cover buildings, even though the word " land " would normally be taken to include buildings (*e*). However, the maxim is not a compelling rule of law, but only a phrase that may be used by the court in expounding the probable intent of the legislature. It is, in the oft-quoted words of Lopes L.J., " a valuable servant but a dangerous master " (*f*). Quite frequently the court holds that the express provision made in the one instance is *ex abundanti cautela*, and does not displace the normal implication to the same effect in the second instance (*g*). It may also be noticed that the maxim cannot be used to extend the operation of a statute beyond the

(*c*) *Gambart* v. *Bell* (1863) 32 L.J.C.P. 166.
(*d*) *Att.-Gen.* v. *Edison Telephone Co.* (1881) 6 Q.B.D. 244.
(*e*) Maxwell, *Interpretation of Statutes* (11th ed.), 338.
(*f*) *Colquhoun* v. *Brooks* (1888) 21 Q.B.D. 52.
(*g*) *e.g. Dean* v. *Wiesengrund* [1955] 2 Q.B. 120 (C.A.); but *cf. Marczuk* v. *Marczuk* [1956] P. 217 (C.A.) For another application of the maxim see *Nyali Ltd.* v. *Att.-Gen.* [1957] A.C. 253.

provision that it actually makes. Thus if Parliament enacts for A what is already the law for A and others, this does not impliedly change the law for the others (*h*). Rather than make an implication of this kind, the court will regard the statute as a work of supererogation.

The maxim *expressum facit cessare tacitum* is sometimes used in the same context as the one just considered, but it can be taken as having a distinct meaning. In itself, the proposition that express words put an end to implication is obvious enough, but it has sometimes been used in the past for questionable purposes, particularly that of refusing to pay attention to the general words of statutes where these are accompanied by specific instances (*i*). At the present day it is rarely used for this purpose (*j*) Yet another example of a rule of language in a legal maxim is the *ejusdem generis* rule which serves to restrict the meaning of general words to things or matters of the same kind (genus) as the preceding particular words. So for example where the Sunday Observance Act, 1677, provided that "no tradesman, artificer, workman, labourer or other person whatsoever" should do certain things, the general phrase "other person whatsoever" was held to refer only to persons within the class indicated by the previous particular words and not therefore to include such persons as farmers or barbers (*k*). This, however, is only the application of a common-sense rule of language: if a man tells his wife to go out and buy butter, milk, eggs and anything else she needs, he will not normally be understood to include in the term "anything else she needs" a new hat or an item of furniture.

There are, however, two cases where the letter of the law need not be taken as conclusive. The first of these is where the law is logically defective. A statute may suffer from three different types

(*h*) Maxwell, *Interpretation of Statutes* (11th ed.) 306–308.

(*i*) The use made of the maxim is thus satirised by Fielding (Tom Jones, Book 3, Chap. 6.) "Thwackum was encouraged to the undertaking by reflecting that to covet your neighbour's sister is nowhere forbidden; and he knew it was a rule in the construction of all laws, that *expressum facit cessare tacitum*. The sense of which is, "When a lawgiver sets down plainly his whole meaning we are prevented from making him mean what we please ourselves." As some instances of women, therefore, are mentioned in the divine law, which forbids us to covet our neighbour's goods, and that of a sister omitted, he concluded it to be lawful."

(*j*) See, *e.g.*, *Re Smallwood* [1951] Ch. 869.

(*k*) *Palmer* v. *Snow* [1900] 1 Q.B. 725.

of logical defect. First, it may be defective by virtue of "semantic" ambiguity. A word in an Act of Parliament may be ambiguous as a result of the "open texture" of language. This kind of conceptual ambiguity has been discussed above (*l*). A second kind of ambiguity, which may be termed "syntactic" ambiguity, arises from the ambiguity of formal words like "or", "and", "all" and so forth (*m*). If for instance a court is empowered to "fine or imprison" does this mean that the court can either fine or imprison but not both? Or does it mean that the court can fine, imprison or both? In other words is the word "or" being used exclusively or inclusively? Syntactic ambiguity may also arise from the unfortunate juxtaposition of words and phrases. If for example a statute declares that English law shall apply in a newly independent part of the commonwealth and that such English law as shall apply shall consist of "the rules of common law, the rules of equity and the statutes in force at the date of independence"; does this mean that all rules of common law and equity, even those coming into force after independence, shall be in force in the new territory? Or does it mean that only such rules of common law and equity as are in force at the date of independence shall apply in the territory? In other words the phrase "in force at the date of independence" may govern all three terms "common law, the rules of equity and the statutes" or it may govern merely the term "statutes" (*n*).

In all such cases of ambiguity, whether conceptual or syntactic, the letter of the statute provides no solution. Here the courts must decide between the two alternatives. In such a case it is the right and duty of the courts to go behind the letter of the law and to ascertain from other sources as best they can the principal intention which has thus failed to attain perfect expression.

Thirdly, however, it may be that such ambiguities do not arise from a failure to express accurately the intention of the legislature.

(*l*) *Supra*, § 5, pp. 88–89.

(*m*) On syntactic ambiguity generally see Layman Allen, 66 Yale L.J. 833; Montrose, 59D M.U.L.L. 28, and 62J M.U.L.L. 65; Allen, *ibid.* 119; Allen in *Law and Electronics* (ed. Jones) at 145. Much of the work in this field has been done in connection with the study of jurimetics, which concerns the application of modern logic to law and the use of electronic methods of data retrieval for legal purposes: see generally *Law and Electronics* (ed. Jones)

(*n*) An interesting example of syntactic ambiguity is provided by *R.* v *Casement* [1917] 1 K.B. 98.

Perhaps the legislature speaks ambiguously because there is no single and definite meaning to be expressed. If the words of the legislature are self-contradictory, it is possibly due to some repugnancy and confusion in the intention itself. If the text contains omissions which make it logically imperfect, the reason is more often that the case in question has not occurred to the mind of the legislature, than that there exists with respect to it a real intention which by inadvertence has not been expressed.

What, then, is the rule of interpretation in such cases? May the courts correct and supplement the defective *sententia legis*, as well as the defective *litera legis*? The answer is that they may and must. If the letter of the law is logically defective, it must be made logically perfect, and it makes no difference in this respect whether the defect does or does not correspond to one in the *sententia legis* itself. Where there is a genuine and perfect intention lying behind the defective text, the courts must ascertain and give effect to it; where there is none, they must ascertain and give effect to the intention which the legislature presumably would have had, if the ambiguity, inconsistency or omission had been called to mind. This may be regarded as the *dormant* or *latent* intention of the legislature, and it is this which must be sought for as a substitute in the absence of any real and conscious intention (*o*).

The other case where the letter of the law need not be taken as conclusive is where a literal interpretation of the statute would lead to such absurdity and unreasonableness as to make it self-evident that the legislature could not have meant what it said. For example. there may be some obvious clerical error in the text, such as a reference to a section by the wrong number, or the omission of a negative in some passage in which it is clearly required. But the courts will go much further than this, and, in order to avoid what they regard as absurdity, imply into statutes saving clauses that have not been expressed. This is the so-called "golden rule" of interpretation (*p*). The saving clauses so

(*o*) In the interpretation of contracts, no less than in that of statutes, there is to be noticed this distinction between the real and the latent intention of the parties. The difficulty of construing a contract arises more often from the fact that the parties had no clear intention at all as to the particular point, than from the fact that they failed to express an intention which they actually had.

(*p*) *Mattison* v. *Hart* (1854) 14 C.B. at 385.

implied are generally such as to preserve the previous principles of the common law.

Since a statute is intended to alter or declare the law of the land, it is naturally and properly read in the light of general legal principles. Thus when a statutory order was made transferring the rights and liabilities of a dissolved company to another company, it was held that this did not have the effect of transferring the employees of the dissolved company as though they were chattels, for it was a general principle of law that contracts of personal service were not capable of being assigned (*q*). An Act providing for the distribution of the property of an intestate among his next-of-kin was held not to confer a benefit upon the murderer of the deceased, for it was a general principle of law that no one could profit from his own wrong (*r*). "It is a sound rule," said Byles J., "to construe a statute in conformity with the common law, rather than against it, except where or in so far as the statute is plainly intended to alter the course of the common law" (*s*). The justification for this method of interpretation is twofold; that it is likely to effectuate the intention of the legislature, and that it avoids absurd, unjust or immoral results and preserves the broad principles of the law. However, the principle is abused when it is used as a means of whittling down what was evidently intended by Parliament as a broad reforming measure. It cannot be denied that the presumption of conformity with the common law has sometimes been used in this way in the past. Sir Frederick Pollock expressed this caustically when he wrote:

"There is a whole science of interpretation better known to judges and parliamentary draftsmen than to most members of the legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds" (*t*).

Lord Wright was hardly less emphatic when he criticised what he called "a tendency common in construing an Act which

(*q*) *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014.
(*r*) *Re Sigsworth* [1935] Ch. 89.
(*s*) Quoted by Slesser L.J. in *Lord Eldon* v. *Hedley Bros.* [1935] 2 K.B. 1 at 24 (C.A.).
(*t*) *Essays in Jurisprudence and Ethics* (1882) 85.

changes the law, that is to minimise or neutralise its operation by introducing notions taken from or inspired by the old law which the words of the Act were intended to "abrogate and did abrogate" (*u*).

Where no principle of the common law can be invoked to control a statute, the absurdity rule is less likely to be applied, and numberless instances can be found in the reports in which the judges have construed statutes in such a way as to create obvious absurdities, being felt impelled to come to such a conclusion by the literal words of the statute (*v*). Also, the absurdity rule is almost wholly confined to the restriction of statutes for the avoidance of absurdity; it is rare indeed for statutes to be extended on this ground beyond their express language (*w*).

A completely different approach to statutory interpretation is enshrined in the "mischief" rule. This takes its origin from *Heydon's Case* (*x*) and requires the judges to look at the common law before the Act, and the mischief in the common law which the statute was intended to remedy; the Act is then to be construed in such a way as to suppress the mischief and advance the remedy. Where a statute has been clearly enacted to suppress mischief of one sort this rule will not allow it to be so interpreted as to suppress mischief of a different sort which was quite outside the intention of the legislature. In *Gorris* v. *Scott* (*y*) the court was concerned to interpret a statute providing that animals carried on board ship should be kept in pens. The defendant carrier had failed to enclose in pens the plaintiff's sheep which had accordingly, during a storm, been washed overboard. Had they been safely penned, this could not have happened. The plaintiff's suit for breach of statutory duty was rejected by the court on the ground that this statute had been enacted in order to prevent infection spreading from one owner's animals to those of another, and should not therefore be used to provide a remedy for a totally different mischief.

(*u*) *Rose* v. *Ford* [1937] A.C. 826 at 846.

(*v*) To give only two illustrations: *Cheese* v. *Lovejoy* (1877) 2 P.D. 251 (C.A.); *Grange* v. *Silcock* (1897) 77 L.T. 340.

(*w*) The interpretation of the phrase "single woman" in the Bastardy Acts to include a married woman living apart from her husband is a rare example of judicial valour. See *Jones* v. *Evans* [1944] K.B. 582.

(*x*) (1584) 3 Co.Rep. at 7b.

(*y*) (1874) L.R. 9 Exch. 125.

Judges vary, however, in the extent to which they make use of this rule, which allows a more functional approach to legislation. On the whole comparatively little use has been made of it. Moreover this usefulness is limited by the fact that in seeking the intention underlying a statute, English courts do not permit themselves to consider the preliminary discussions (called on the Continent *travaux préparatoires*) that took place before the enactment was made law. Thus they will not look at debates in Parliament, or, in general, at the reports of commissions to which effect was given in framing the legislation (*z*). The reason advanced for excluding the first is that the motives of different Members of Parliament may vary: *non constat* that those who have spoken represent the intention of the majority. The reason advanced for excluding the second is that it may not have been the intention of Parliament to give precise effect to the report of the commission. Neither reason is fully convincing, and recent cases indicate that the rule of exclusion of commission reports will not always be insisted upon (*a*).

In certain common law countries this restriction does not exist. In the United States courts will look at the legislative history of an Act of Congress. While this assists in finding out the intention of Congress, a price is to be paid in terms of time and effort, for on occasions the whole of the history of a piece of legislation may fall to be investigated. One practical advantage of excluding parliamentary debates is that of saving considerable time and trouble for the litigants, their advisors and the courts.

(*z*) See *Assam Railways & Trading Co.* v. *I.R.C.* [1935] A.C. 445; *Ellerman Lines Ltd.* v. *Murray* [1931] A.C. 126; *Transport & General Credit Corp.* v. *Morgan* [1939] Ch. 531 at 551–552. There are, however, cases where the reports of commissions will be admitted. (1) Such a report was admitted in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* [1898] A.C. 571, and this was explained by Lord Wright in the *Assam Railways* case (at pp. 458–459) as a case where resort was had to the report for the purpose of ascertaining the evil that the statute was designed to remedy, within the principle of *Heydon's Case*. This opens a considerable gap in the general rule, if the courts are willing to employ it. (2) In the construction of Acts relating to what were formerly called the Dominions judges have tended to relax the general rule. Thus in *British Coal Corp.* v. *R.* [1935] A.C. 500 at 523, Lord Sankey referred to the report of the Imperial Conference of 1926, in construing the Statute of Westminster, 1931. See also Kennedy, *Essays in Constitutional Law* (1934), 167, and the same writer in (1943) 8 C.L.J. 152. For a general discussion see D. G. Kilgour in (1952) 30 Can. Bar Rev. 769; Craies, *Statute Law* (6th ed.), 125.

(*a*) *Beard* v. *Beard* [1946] P. at 26–27; *Earl Fitzwilliam's Wentworth Estate* v. *Minister of Town and Country Planning* [1951] 2 K.B. at 810.

CHAPTER 5

PRECEDENT

26. The authority of precedents

The importance of judicial precedents has always been a distinguishing characteristic of English law (*a*). The great body of the common or unwritten law is almost entirely the product of decided cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the thirteenth century. Orthodox legal theory, indeed, long professed to regard the common law as customary law, and judicial decisions as merely evidence of custom and of the law derived therefrom. This was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been created by the decisions of English judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows such a degree of authority to precedent. They see no difference of kind between precedent and any other expression of expert legal opinion. A book of reports and a text-book are in the same legal category. They are both evidences of the law; they are both instruments for the persuasion of judges; but neither of them is anything more (*b*). English law, on the other hand, draws a sharp distinction between them. A judicial precedent speaks in England with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.

It seems clear that we must attribute this feature of English law to the peculiarly powerful and authoritative position which has been at all times occupied by English judges. From the

(*a*) On precedent generally see Cross, *Precedent in English Law*.

(*b*) The importance of reported decisions has, however, been increasing in France, Italy, and Germany for some time, and as a matter of degree the courts of these countries tend to attach greater weight to their own previous decisions than to the views of text-writers. Also, a line of decisions, known as *jurisprudence fixée*, *giurisprudenza constante*, *feststehende Rechtsprechung*, has particularly high persuasive authority. See Lipstein, "The Doctrine of Precedent in Continental Law" (1946) 28 Jrnl.Comp.Leg. (Pt. III) 34.

earliest times the judges of the king's courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law, with little interference either from local custom or from legislation. The centralisation and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable in any other system. The authority of precedents was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England the bench has always given law to the bar; in Rome it was the other way about, for in Rome there was no permanent body of professional judges capable of doing the work that has been done for centuries in England by the royal courts (*c*).

In recent years the value of the doctrine of precedent has been much debated. Some comments have already been made upon the subject in this and the previous chapter, but a few more general observations will not be out of place. It is necessary to point out that the phrase "the doctrine of precedent" has two meanings. In the first, which may be called the loose meaning, the phrase means merely that precedents are reported, may be cited, and will probably be followed by the courts. This was the doctrine that prevailed in England until the nineteenth century, and it is still the only sense in which a doctrine of precedent prevails on the Continent. In the second, the strict meaning, the phrase means that precedents not only have great authority but must (in certain circumstances) be followed. This was the rule developed during the nineteenth century and completed in some respects during the twentieth. Most of the arguments advanced by supporters

(*c*) During the Middle Ages, although cases were reported in the Year Books, there were considerable variations between different MSS., and it was hardly possible to cite precedents by name. However, the law was developed by the judges through the accumulation of tradition, expressed, for instance, in the practice of upholding certain types of writ. With the invention of printing, reports became standardised, and it became the practice to cite not only from the more or less contemporaneous reports but also from the Year Books, which were now available in standard printed editions. The modern theory that precedents are absolutely binding was hardly settled before the nineteenth century. See T. Ellis Lewis, "The History of Judicial Precedent" (1930) 46 L.Q.R. 207, 341; (1931) 47 *ibid.* 411; (1932) 48 *ibid.* 230.

of "the doctrine of precedent", such as Holdsworth, will be found to support the doctrine in the loose rather than in the strict meaning, while those who attack it (such as Dr. A. L. Goodhart) attack it in its strict and never in its loose meaning. Thus the two sides are less at variance than would appear on the surface. The real issue is whether the doctrine of precedent should be maintained in its strict sense or whether we should revert to the loose sense. There is no dissatisfaction with the practice of citing cases and of attaching weight to them; the dissatisfaction is with the present practice of treating precedents as absolutely binding.

In favour of the present practice it is said that the practice is necessary to secure the certainty of the law, predictability of decisions being more important than approximation to an ideal; any very unsatisfactory decision can be reversed for the future by statute. To this it may be replied that pressure on Parliamentary time is so great that statutory amendment of the common law on an adequate scale is not to be looked for; also our experience of statutory amendment in the past has not been happy. When Parliament has intervened to rectify the errors of the common law it has almost always done so not by clean reversal, but by introducing exceptions to the common-law rule, or at best by repealing the common-law rule subject to exceptions and qualifications. What is needed, it is submitted, is a power in the judges to set right their own mistakes. Such a power does exist at the moment in some degree, for a High Court judge may refuse to follow another High Court judge, a higher court may overrule a decision in an inferior court, and any court may restrictively distinguish an obnoxious precedent. But the process of overruling is not in itself an adequate solution, for it is possible only for a higher court, and thus involves the litigant in considerable expense. The power of restrictive distinguishing is also unsatisfactory because it leaves the "distinguished" decision standing, and thus in many cases introduces unnecessary refinements and even illogicalities into the law. Also, the necessity for distinguishing sometimes leads to extraordinary mental gymnastics, as where a court distinguishes a precedent by supposing facts in the precedent that were not stated in the report.

It may be repeated that the present rules do not always promote the certainty of legal administration that is claimed for them, for it depends very much upon the strength of the particular judge whether he will restrictively distinguish a decision that is technically binding upon him.

As a compromise between the two opposing views, it is submitted that the strict doctrine should be retained in so far as it binds a court to follow the decisions of superior courts, but that courts should cease to be bound by decisions of courts of co-ordinate jurisdiction. In other words, the Court of Appeal and House of Lords should be given the power possessed by High Court judges to refuse to follow their own previous decisions (*d*).

According to the older theory the common law is customary, not case law. This doctrine may be expressed by saying that according to it all precedents are declaratory merely, and do not make the law. Hale for example says in his *History of the Common Law*:—

"It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint, yet they do not make a law properly so called: for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times" (*e*).

On this view, any proposition of law laid down by a court, however novel it may appear, is in reality only an affirmation of an already existing rule. In the Court of Chancery this declaratory theory never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court.

(*d*) On the whole question see Goodhart, "Precedent in English and Continental Law" (1934) 50 L.Q.R. 40 (and in book form); Holdsworth, "Case Law," *ibid.* 180; Goodhart, "Case Law: A Short Replication," *ibid.* 196; Allen, "Case Law: An Unwarrantable Intervention" (1935) 51 L.Q.R. 333; Holdsworth, "Precedents in the Eighteenth Century," *ibid.* 441; Lord Macmillan, *ibid.* 587; Cross, *op. cit.* 194–197, 251–258.

(*e*) Hale, *History of the Common Law* (1820 ed.), 89.

There could be no pretence that the principles of equity were founded either in custom or legislation, for it was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each Chancellor made law for himself and his successors.

" It must not be forgotten ", says Sir George Jessel, " that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented " (*f*).

But the declaratory theory is equally inapplicable to common law. It is clear that judges do more at times than apply existing rules: sometimes they widen and extend a rule of law; sometimes they devise a rule by analogy with an existing rule; and sometimes again they create an entirely new principle. Courts then have the power of developing the law at the same time that they administer it (*g*).

Judicial decisions may be distinguished as authoritative and persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. In other words, authoritative precedents are *legal* sources of law, while persuasive precedents are merely *historical*.

The authoritative precedents recognised by English law are the decisions of the superior courts of justice in England, within limits shortly to be stated. Among persuasive precedents are the following:—

(*f*) *Re Hallet* (1879) 13 Ch.D. at p. 710.

(*g*) For further discussion of the declaratory theory of the judicial function see Dickinson, " The Law Behind Law " (1929) 29 Col.L.Rev. 113, 285; Cross, *Precedent in English Law*, 21–30.

(1) Foreign judgments, and more especially those of American courts (*h*).

(2) The decisions of superior courts in other portions of the Commonwealth of Nations, and of countries until recently belonging thereto, for example, Irish courts (*i*).

(3) The judgments of the Privy Council when sitting as the final court of appeal from other members and parts of the Commonwealth (*j*).

(4) Judicial *dicta*, that is to say, statements of law which go beyond the occasion, and lay down a rule that is irrelevant to the purpose in hand, or is stated by way of analogy merely, or is regarded by a later court as being unduly wide.

Persuasive efficacy, similar in kind though much less in degree to the instances enumerated, is attributed by our courts to the civil law and to the opinions of the commentators upon it; also to English and American textbooks of the better sort, and articles in legal periodicals.

The distinction between authoritative and persuasive precedents is rendered somewhat difficult by the fact that the same precedent may be authoritative in one court and persuasive only in another. Thus a decision of the Court of Appeal is authoritative for the High Court but persuasive only for the House of Lords.

The Judicial Committee of the Privy Council does not recognise any precedents except as persuasive, and may even rehear questions affecting property rights (*k*).

Sir John Salmond attempted to solve this apparent contradiction by distinguishing between persuasive precedents and those that, though authoritative, are so only conditionally. He thought that whereas a foreign judgment is never more than persuasive

(*h*) *Castro* v. *R.* (1881) 6 App.Cas. 249; *Scaramanga* v. *Stamp* (1880) 5 C.P.D. 303; *Cory* v. *Burr* (1882) 9 Q.B.D. 469; *M'Alister* (or *Donoghue*) v. *Stevenson* [1932] A.C. 598, 617–618; *Haynes* v. *Harwood* [1935] 1 K.B. 156–157, 163, 167. But see *Re Missouri* (1888) 42 Ch.D. 330; *Fender* v. *Mildmay* [1938] A.C. 25.

(*i*) *Re Parsons* (1890) 45 Ch.D. 62: "Decisions of the Irish Courts, though entitled to the highest respect, are not binding on English judges."

(*j*) In *Leask* v. *Scott* (1877) 2 Q.B.D. 376 at p. 380, it is said by the Court of Appeal, speaking of such a decision: "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it."

(*k*) *Re Transferred Civil Servants (Ireland) Compensation* [1929] A.C. 242; *Mercantile Bank of India* v. *Central Bank of India* [1938] A.C. 287; W. E. Raney, "The Finality of Privy Council Decisions" (1926) 4 Can. Bar Rev. 307.

for English courts, a decision of the Court of Appeal is always authoritative. For lower courts, and for the Court of Appeal itself, the authority is absolute; for the House of Lords the authority is only conditional. A conditionally authoritative precedent was defined by the learned author as follows: "In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied. It may be overruled or dissented from, when it is not merely wrong, but so clearly and seriously wrong that its reversal is demanded in the interests of the sound administration of justice. Otherwise it must be followed, even though the court which follows it is persuaded that it is erroneous or unreasonable".

The value of the distinction is doubtful. First, a decision of the Privy Council, the composition of which may be practically the same as the House of Lords, may have a weight greater than that of many a High Court decision; yet the first, according to this classification, is merely persuasive while the second has conditional authority. In fact the courts of this country may attach much more importance to the first than to the second. But further, the distinction hardly represents with accuracy the practice of the courts. For while higher courts often pronounce themselves reluctant to overrule long-standing decisions of lower courts, their attitude is that they *ought not* to do so rather than that they *cannot*.

Where in fact a precedent is disregarded, this may take two forms. The court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior, jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good

law. In the meantime the matter remains at large, and the law uncertain.

As we have seen, the theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are *res judicatae* (*l*), or accounts that have been settled (*m*) in the meantime (*n*). A repealed statute, on the contrary, remains valid and applicable as to matters arising before the date of its repeal (*o*).

27. Circumstances destroying or weakening the binding force of precedent

We have seen that a precedent that is overruled is deprived of all authority. It will be convenient now to consider the various ways in which a precedent may lose all or much of its binding force.

(1) *Abrogated decisions.* A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court. *Reversal* occurs when the same decision is taken on appeal and is reversed by the appellate court. *Overruling* occurs when the higher court declares in another case that the precedent case was wrongly decided and so is not to be followed.

Since overruling is the act of a superior authority, a case is not overruled merely because there exists some later opposing precedent of the same court or a court of co-ordinate jurisdiction. In such circumstances a court is free to follow either precedent;

(*l*) *Thomson* v. *St. Catharine's College, Cambridge* [1919] A.C. 468. *Cf. Derrick* v. *Williams* [1939] 2 All E.R. 559; 160 L.T. 589; 55 T.L.R. 676.

(*m*) *Henderson* v. *Folkestone Waterworks Co.* (1885) 1 T.L.R. 329. This is because of the rule that money paid under a mistake of law cannot be recovered back. Lord Coleridge's denial in the instant case that there was a mistake of law cannot be supported.

(*n*) In the United States it has been held that where a statute is first held void and later valid, the statute does not apply to transactions entered into before the later decision: see Freeman, "Retroactive Operation of Decisions" (1918) 18 Col.L.Rev. 230; Cardozo, *Nature of the Judicial Process*, 147. *Cf.* as to the prohibition of *ex post facto* penal legislation, *State* v. *Longino* (1915) 109 Miss. 125; 67 So. 902.

(*o*) Interpretation Act, 1889, s. 38.

whereas when a case is overruled in the full sense of the word the courts become bound by the overruling case not merely to disregard the overruled case but to decide the law in the precisely opposite way.

Overruling need not be express, but may be implied. The doctrine of implied overruling is a comparatively recent development. Until the 1940's the practice of the Court of Appeal was to follow its own previous decision even though it was manifestly inconsistent with a later decision of the House of Lords, provided that it had not been expressly overruled (*p*). Lord Wright, in a case in the House of Lords, questioned the correctness of this attitude, and in *Young's Case* the Court of Appeal announced the acceptance of a new principle. This is that the Court of Appeal is not bound by its previous decision if, though not expressly overruled, it cannot "stand with" a subsequent decision of the House of Lords (*q*).

The law so laid down for precedents in the Court of Appeal applies equally to precedents in the Court of Criminal Appeal (*r*) and Divisional Court (*s*), which cease to be binding upon the courts concerned if impliedly overruled in the Lords. Even a lower court could refuse to follow a decision of one of these courts which has been robbed of its authority in this way (*t*).

(2) (*Perhaps*) *affirmation or reversal on a different ground.* It sometimes happens that a decision is affirmed or reversed on appeal on a different point. As an example, suppose that a case is decided in the Court of Appeal on ground A, and then goes on appeal to the House of Lords, which decides it on ground B, nothing being said upon A. What, in such circumstances, is the authority of the decision on ground A in the Court of Appeal?

(*p*) *e.g., Consett, etc., Society* v. *Consett Iron Co.* [1922] 2 Ch. 135 (C.A.).
(*q*) [1944] K.B. 718 at 729 (C.A.). *Cf. Fitzsimmons* v. *Ford Motor Co.* [1946] 1 All E.R. 429 (C.A.).
(*r*) *R.* v. *Porter* [1949] 2 K.B. 128 at 132–133 (C.C.A.).
(*s*) *Younghusband* v. *Luftig* [1949] 2 K.B. 354 at 360.
(*t*) *Colman* v. *Croft* [1947] K.B. 95. See also *Cackett (orse Trice)* v. *Cackett* [1950] P. 253, deciding that where a decision of the C.A. is based on the interpretation of a precedent which the House of Lords later holds to have been mistaken, although the House expresses no opinion on the point covered by the C.A., the decision of the C.A. is deprived of binding authority even for the High Court. The liberty of the High Court in such circumstances is also deducible *a fortiori* from *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711 at 721, where the D.C. held itself not bound by a decision of the C.A. arrived at in ignorance of a prior decision of the Lords, *i.e.*, *per incuriam*. See later on the *per incuriam* rule.

Is the decision binding on the High Court, and on the Court of Appeal itself in subsequent cases?

The question cannot be positively answered. Jessel, M.R., in one case (*u*) said that where the judgment of the lower court is affirmed on different grounds, it is deprived of all authority, giving as his reason the opinion that such conduct on the part of the appellate court showed that the appellate court did not agree with the grounds given below. In other words, the higher court relieved itself of the disagreeable necessity of overruling the court below by finding another ground on which the judgment below could be supported. Although this is sometimes a correct reading of the state of mind of the higher court, it is not so always. The higher court may, for example, shift the ground of its decision because it thinks that this is the easiest way to decide the case, the point decided in the court below being of some complexity. It is certainly possible to find cases in the reports where judgments affirmed on a different point have been regarded as authoritative for what they decided (*v*).

It is the same with cases reversed on another point. Such a case, as decided in the lower court, is not necessarily deprived of its significance as a judicial determination of the law (*w*), on the other hand, the reversal, though on another point, may shake the authority of the point that was decided. It is submitted that the true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it might otherwise have had; but it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.

(3) *Ignorance of statute.* A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, *i.e.*, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*infra*, § 28), and for the Court of Appeal it was given as the leading

(*u*) *Hack* v. *London Provident Building Society* (1883) 23 Ch.D. 103 at 112.
(*v*) *e.g.*, *Griffiths* v. *Fleming* [1909] 1 K.B. 805 at 814; *Hanlon* v. *Port of Liverpool Stevedoring Co.* [1937] 4 All E.R. 39 at 42.
(*w*) In *Curtis Moffat Ltd.* v. *Wheeler* [1929] 2 Ch. 224 at 234, Maugham J. treated himself as bound by a C.A. decision which had been reversed by the H.L. on another ground, in spite of a doubt expressed by Lord Cairns L.C. in the H.L. as to the decision in the C.A. To the same effect *Re Boyer* [1935] Ch. 382 at 386.

example of a decision *per incuriam* which would not be binding on the court (*x*). The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute (*y*). Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such *incuria* as to vitiate the decision (*z*). Even a lower court can impugn a precedent on such grounds.

The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force (*a*).

(4) *Inconsistency with earlier decision of higher court.* It is clear law that a precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court. If, for example, the Court of Appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is *per incuriam*, and is not binding either on itself (*b*) or on lower courts (*c*); on the contrary, it is the decision of the House of Lords that is binding. The same rule applies to precedents in other courts, such as the Divisional Court (*d*).

(5) *Inconsistency between earlier decisions of the same rank.* A court is not bound by its own previous decisions that are in conflict with one another. This rule has been laid down in the Court of Appeal (*e*), Court of Criminal Appeal (*f*) and Divisional

(*x*) *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. at 729 (C.A.).
(*y*) *Cf. Lancaster Motor Co. (London) Ltd.* v. *Bremith Ltd.* [1941] 1 K.B. 675 at 678 (C.A.), *per* Sir Wilfrid Greene M.R.; this was, however, a case of a precedent *sub silentio* (see later).
(*z*) *Cf. per* Denning L.J. in *Gower* v. *Gower* [1950] 1 All E.R. 804 at 806 (C.A.).
(*a*) *Young's Case*, *loc. cit.*; *cf. Royal Crown Derby Porcelain Co. Ltd.* v. *Russell* [1949] 2 K.B. 417 (C.A.).
(*b*) *Young's Case* [1944] K.B. at 729.
(*c*) *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711 at 721.
(*d*) *Younghusband* v. *Luftig* [1949] 2 K.B. at 361.
(*e*) It is one of the exceptions recognised in *Young's Case* [1944] K.B. at 726, 729. For earlier authorities see Winder in (1940) 56 L.Q.R. 457.
(*f*) *R.* v. *Power* [1919] 1 K.B. 572 (C.C.A.).

Court (*g*), and it obviously applies also to the House of Lords. There may at first sight seem to be a difficulty here: how can a situation of conflict occur, if the court is bound by its own decisions? At least two answers may be given. First, the conflicting decisions may come from a time before the binding force of precedent was recognised. Secondly, and more commonly, the conflict may have arisen through inadvertence, because the earlier case was not cited in the later. Owing to the vast number of precedents, and the heterogeneous ways in which they are reported—or are not reported—it is only too easy for counsel to miss a relevant authority. Whenever a relevant prior decision is not cited before the court, or mentioned in the judgments, it must be assumed that the court acts in ignorance or forgetfulness of it. If the new decision is in conflict with the old, it is given *per incuriam* and is not binding on a later court.

Although the later court is not bound by the decision so given *per incuriam*, this does not mean that it is bound by the *first* case. Perhaps in strict logic the first case should be binding, since it should never have been departed from, and was only departed from *per incuriam*. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later. This rule has been laid down for the Court of Appeal (*h*), and it is submitted that it applies also to other courts (*i*). It will be seen, therefore, that this exception to the binding force of precedent belongs both to the category of abrogation by subsequent facts and to the category of what is here called inherent vice. The earlier case

(*g*) *R.* v. *de Gray* [1900] 1 Q.B. 521; *Younghusband* v. *Luftig* [1949] 2 K.B. 354 at 361–362. The rule may explain the cavalier treatment accorded to the precedent in *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zarek* [1951] 2 K.B. 1.

(*h*) *Young's Case*, at p. 726, 729.

(*i*) For the Divisional Court see the authorities assembled by Winder in 9 M.L.R. 270–273. The behaviour of the court is, however, by no means uniform. In *Markham* v. *Markham* [1946] 2 All E.R. 737 at 741, the D.C. held itself bound to follow the later of two inconsistent decisions. In *Wurzal* v. *Dowker* [1954] 1 Q.B. 52, commented upon in (1953) 69 L.Q.R. 316, where the same point of precedent arose, the D.C. held itself bound to follow the earlier of two inconsistent decisions. In both cases the court seems to have acted against its inclinations.

can be disregarded because of the subsequent inconsistent decision on the same level of authority, and the later case can be disregarded because of its inherent vice of ignoring the earlier case.

Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself. The lower court may refuse to follow the later decision on the ground that it was arrived at *per incuriam*, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be. However, it takes a somewhat bold judge to disregard a precedent handed down by a court of higher standing on the ground that the decision was *per incuriam* (*j*).

(6) *Precedents sub silentio or not fully argued.* The previous exceptions to the binding force of precedent can all be summed up as cases where the authority of the precedent either is swept away by subsequent higher or equal authority or is undermined by inconsistency with previous higher or equal authority. We now come to the more subtle attack upon the authority of a precedent involved in saying that the decision was arrived at *sub silentio*.

A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the

(*j*) It can rather easily happen as between a High Court judge and the Divisional Court (see *Savory* v. *Bayley* (1922) 38 T.L.R. 619; *Lemon* v. *Lardeur* [1946] K.B. 613 at 616 (C.A.)), and as between the Divisional Court and Court of Appeal (*R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711 at 721). But few High Court judges would have had the daring to treat a C.A. precedent as Devlin J. did in *Armstrong* v. *Strain* [1951] 1 T.L.R. 856 at 864 (affd. on other grounds [1952] 1 K.B. 232 (C.A.)). The point happened to be one on which Devlin J. had a pronounced opinion, having written an article on it in the L.Q.R. before being elevated to the Bench.

case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*.

A good illustration is *Gerard* v. *Worth of Paris, Ltd.* (*k*). There, a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimant's debt, and, on this argument being heard, the Court of Appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal (*l*), the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed *sub silentio* by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided " without argument, without reference to the crucial words of the rule, and without any citation of authority ", it was not binding and would not be followed.

The rule that a precedent *sub silentio* is not authoritative goes back at least to 1661 (*m*), when counsel said: " An hundred precedents *sub silentio* are not material "; and Twisden, J., agreed: " Precedents *sub silentio* and without argument are of no moment ". This rule has ever since been followed (*n*). But

(*k*) [1936] 2 All E.R. 905 (C.A.).

(*l*) *Lancaster Motor Co.* v. *Bremith Ltd.* [1941] 1 K.B. 675 at 677 (C.A.).

(*m*) *R.* v. *Warner (Ward)* 1 Keb. 66, 1 Lev. 8.

(*n*) *O'Shea* v. *O'Shea and Parnell* (1890) 15 P.D. 59 at 64 (C.A.) (point deliberately withheld from court, the parties not wishing it to be raised); *Ankin* v. *L.N.E. Ry.* [1930] 1 K.B. 527 at 537; *Lindsey C.C.* v. *Marshall* [1937] A.C. 97 at 125; *Yelland* v. *Powell Duffryn Collieries* [1941] 1 All E.R. 278 at 295 (a stage of the case not reported in [1941] 1 K.B. 154); notes by D. W. Logan (1940) 3 M.L.R. 225; Williams (1944) 7 M.L.R. 136, n. 43; Tylor (1947) 10 M.L.R. 398 (but see, for a different interpretation of the particular decision, Marsh in (1952) 68 L.Q.R. 235); Allen, *Law in the Making* (7th ed.) 333; Warnbaugh, *The Study of Cases*, 26. Nearly every decision *sub silentio* can be regarded, from another point of view, as a decision *per incuriam*, because the failure of counsel to argue the point will generally mean that relevant cases or statutes are not brought to the attention of the court. See *Lancaster Motor Co.* v. *Bremith Ltd.* [1941] 1 K.B. 675 at 678 (C.A.); *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300 at 305 (C.A.).

the court before whom the precedent is cited may be reluctant to hold that its predecessor failed to consider a point directly raised in the case before it (*o*), and this reluctance will be particularly pronounced if the *sub silentio* attack is levelled against not one case but a series (*p*).

We now turn to the wider question whether a precedent is deprived of its authoritative force by the fact that it was not argued, or not fully argued, by the losing party. If one looks at this question merely with the eye of common sense, the answer to it is clear. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. Where a judgment is given without the losing party having been represented, there is no assurance that all the relevant considerations have been brought to the notice of the court, and consequently the decision ought not to be regarded as possessing absolute authority, even if it does not fall within the *sub silentio* rule.

This opinion is adopted in the Court of Criminal Appeal, which will reconsider a decision that was not argued on both sides (*q*); presumably, it will also reconsider a decision that, although argued by the winner, was not argued by the loser. The Divisional Court follows the same rule (*r*). In the Court of Appeal, however, the position is somewhat doubtful, because the exception was not specifically mentioned in the judgment in *Young's Case*, which attempted a rather full statement of the law relating to precedents in the Court of Appeal (*s*).

If there is a general exception for unargued cases, the *sub silentio* rule turns out to be merely a particular application of a wider principle.

(*o*) *Gibson* v. *South American Stores Ltd.* [1950] Ch. 177 at 196–197 (C.A.).

(*p*) *Young* v. *Sealey* [1949] 1 All E.R. 92 at 108; *cf. Read* v. *Lyons* [1945] K.B. 216 at 247 (C.A.). Yet see *Re Pratt* [1950] 2 All E.R. 540 at 547; on appeal [1951] Ch. 225 at 234 (C.A.).

(*q*) *R.* v. *Ettridge* [1909] 2 K.B. at 27 (C.C.A.); *R.* v. *Norman* [1924] 2 K.B. at 322 (C.C.A.). *Cf. R.* v. *Neal* [1949] 2 K.B. 590 at 597, 599.

(*r*) This appears from *Edwards* v. *Jones*, in both the All E.R. and L.R. versions. It also appears from the All E.R. report of *Nicholas* v. *Penny* [1950] 2 All E.R. at 91; but Lord Goddard altered his judgment for the *Law Reports* so as to leave the question open ([1950] 2 K.B. 466).

(*s*) For the proposition that a case is not deprived of binding authority merely because it is contended that it was inadequately argued having regard to the complexity of the issues involved, or because of a deficiency of parties, see *Morelle Ltd.* v. *Wakeling* [1955] 2 Q.B. 379 (C.A.).

A precedent is not destroyed merely because it was badly argued, inadequately considered, and fallaciously reasoned. Thus a rather arbitrary line has to be drawn between total absence of argument on a particular point, which vitiates the precedent, and inadequate argument, which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable. There appears to be an exception if the court in deciding the precedent expressly intimated that the matter had not been fully argued or considered (*t*).

(7) *Decisions of equally divided courts.* Where an appellate court is equally divided, the practice is to dismiss the appeal, on the principle *semper praesumitur pro negante*. In such circumstances the rule adopted in the House of Lords is that the decision appealed from becomes the decision in the House (*u*). With other courts, however, the position is less clear. In *The Vera Cruz* (*v*) it was said that the Court of Appeal was not bound by a previous decision of an evenly divided Court of Appeal. Yet in *Hart* v. *The Riversdale Mill Co. Ltd.* (*w*) Scrutton L.J. considered the Court of Appeal bound by the decision of an evenly divided Court of Exchequer Chamber, whose decisions are of co-equal authority with those of the Court of Appeal. This principle was not followed, however, in *Galloway* v. *Galloway* (*x*), where the Court of Appeal refused to treat as binding the decision in a previous case where that Court was evenly divided (*y*).

This kind of problem is in fact rare, since it is now the invariable practice of the House of Lords to sit with an uneven number of members; and this is also the general practice of other appellate courts.

(8) *Erroneous decisions.* We have seen that decisions contrary to statute or to previous higher judicial authority are without binding force. Decisions may also err by being founded on wrong principles or by conflicting with fundamental principles of common

(*t*) *Re a Solicitor* [1944] K.B. 427.
(*u*) *Beamish* v. *Beamish* (1861) 9 H.L.C. 274.
(*v*) (1880) 9 P.D. 96.
(*w*) [1928] 1 K.B. 176.
(*x*) [1954] P. 312.
(*y*) See the controversy between Megarry and Williams in 70 L.Q.R. 318, 469, 471; and see Cross *op. cit.* 91–97.

law. Here, logic would suggest that courts should be free to disregard such decisions. Practical considerations, however, may require that perfection be sacrificed to certainty. Where the decision has stood for some length of time and been regarded as establishing the law, people will have acted in reliance on it, dealt with property and made contracts on the strength of it, and in general made it a basis of expectations and a ground of mutual dealings. In such circumstances it is better that the decision, though founded in error, should stand. *Communis error facit jus.*

Indeed Sir John Salmond considered that a conditionally binding precedent could only be overruled if it was plainly wrong. Judicial practice, however, is less clear. The position appears to be that in some instances courts will refuse to overrule decisions which they consider to be wrong but which have stood the test of time (*z*). So for example courts have shrunk from overruling well-established precedents affecting proprietary rights or affording particular defences to a criminal charge (*a*). On the other hand they may overrule erroneous decisions of long standing which involve injustice to the citizen (*b*) or which concern an area of law such as taxation, where it is important for the citizen that the courts should establish what the correct law is (*c*).

So far we have considered courts overruling or refusing to overrule wrong decisions of lower courts, *i.e.*, decisions of persuasive authority. What, however, is the position with decisions of higher courts, *i.e.*, decisions of binding authority? The rule that courts are bound by decisions of higher courts and in some instances by their own decisions suggests that such decisions, even though wrong, must stand as authority until overruled by yet higher authority. An erroneous decision of the House of Lords on this principle can only be corrected by statute. In *London Transport Executive* v. *Betts* (*d*), however, Lord Denning in a dissenting judgment considered that the House could disregard a prior

(*z*) *Pugh* v. *Golden Valley Ry.* (1880) 15 Ch.D. 330; *Foakes* v. *Beer* (1884) 9 App.Cas. 630; *Ross Smith* v. *Ross Smith* [1963] A.C. 280.

(*a*) *e.g.*, *Vane* v. *Yiannopoullos* [1965] A.C. 486.

(*b*) *Brownsea Haven* v. *Poole Corp.* [1958] Ch. 574.

(*c*) *The Public Trustee* v. *I.R.C.* [1960] A.C. 398; *The Governors of the Campbell College Belfast* v. *The Commissioner of Valuation for Northern Ireland* [1964] 2 All E.R. 705.

(*d*) [1959] A.C. 213.

decision of its own which conflicted with fundamental principles of common law. In *Scruttons Ltd.* v. *Midland Silicones Ltd.* (*e*) the House of Lords by a majority of four to one disregarded their own previous decision in *Elder, Dempster & Co.* v. *Paterson Zochonis & Co.* (*f*). Two of the majority distinguished the prior case on its special facts and based their decision on the obscurity of the *ratio decidendi* in that case. Two of their Lordships, however, considered that they were free to question previous decisions of their own House if out of line with other authorities or established principles. This may well mark a relaxation in the strict rule that the House of Lords is bound by its own decisions (*g*).

28. The hierarchy of authority

The general rule is that a court is bound by the decisions of all courts higher than itself. A High Court judge cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow judgments of the House of Lords. A corollary of the rule is that courts are bound only by decisions of higher courts and not by those of lower or equal rank. A High Court judge is not bound by a previous High Court decision, though he will normally follow it on the principle of judicial comity, in order to avoid conflicts of authority and to secure certainty and uniformity in the administration of justice. If he refuses to follow it, he cannot overrule it; both decisions stand and the resulting antinomy must wait for a higher court to settle.

To this general rule there are several qualifications. First, courts of inferior jurisdiction do not create binding decisions even for courts lower in rank. Thus the magistrates' courts are not bound by decisions of courts of quarter sessions, even though appeal lies from the former to the latter. The county court registrar is not forced to follow previous decisions of the county court judge, even though appeal lies from the registrar to the judge. Courts of inferior jurisdiction are bound only by decisions of courts of superior jurisdiction, *e.g.*, the High Court, Court of Appeal and House of Lords.

(*e*) [1962] A.C. 446.
(*f*) [1924] A.C. 522.
(*g*) For discussion of this case see Dworkin (1962) M.L.R. 163. See also on the whole of this topic Cross, "Stare Decisis in Contemporary England" (1966) 82 L.Q.R. 203.

Secondly, several courts have established that they are bound by their own decisions. The House of Lords, the Court of Appeal, the Court of Criminal Appeal and the Divisional Court of the High Court regard themselves as bound by their own decisions.

These auto-limitations raise problems in legal theory related as we have seen to the similar problem concerning the power of Parliament to bind its successors. How is it logically possible for a court which is not bound by its own decisions to impose this sort of limitation on itself? We know that in fact these rules operate as normally as any other legal rules and that no logical paradox seems to arise. Nevertheless, the theoretical problem remains: where a decision of a court lays down that the court is bound by its own decisions, that decision itself can only be mandatory if there is already a rule that the court is so bound; if there is no such rule, the court remains at liberty to disregard the decision.

Some theorists have argued that since precedent cannot logically lift itself up by its own bootstraps, the limiting rules are not strictly rules at all, but are mere statements of practice (*h*). When, for instance, in 1898 (*i*) the House of Lords held that it was bound by its own decisions, the House was merely announcing how it intended to act for the future. If tomorrow the House of Lords held that it was free to disregard its own decisions, this would be a mere change of practice and not an alteration of law. It is still open, therefore, to the House to change its mind, for the original decision did not and cannot prevent a change of this sort. The same holds true of the Court of Appeal, the Court of Criminal Appeal and the Divisional Court.

As against this we may argue that this contention would extend to all the rules regarding precedent. We regard it as a rule of law that the High Court is bound by the Court of Appeal, but no decision of the latter tribunal could logically establish such a rule; for the High Court would only be bound by the decision if there was already a rule that the High Court is bound by decisions of the Court of Appeal. Equally no decision of the High Court

(*h*) Williams in 70 L.Q.R. 471. Cross, *op. cit.*, 245–250 appears to incline to this view. See discussion by Simpson in "The *Ratio Decidendi* of a Case and of the Doctrine of Binding Precedent" in *Oxford Essays in Jurisprudence* (ed. Guest), 148.

(*i*) In *London Street Tramways* v. *L.C.C.* [1898] A.C. 375.

could establish such a rule, for the High Court is not bound by its own decisions. The same difficulty arises with the proposition that the High Court and Court of Appeal must follow decisions of the House of Lords. And finally the same problem arises with the rule that the courts must accept the law as laid down by Parliament.

None of these rules can be established by precedent, yet all of them would appear to have the force of law. Deny authority to the *London Strect Tramways* case and we end by losing all authority; for the problem about the House of Lords binding itself is only one facet of the general problem about the sources of a legal system. We have seen earlier that whereas ordinary rules in a legal system can be derived from the ultimate principles, the latter can only rest on observance and acceptance: in other words they cannot escape being customary by nature. They are nonetheless rules, since they are followed in practice and regarded as obligatory. One ultimate principle in English law concerns the authority of the House of Lords. In 1898 the House purported to modify this principle. Whether the new principle incorporating the limitation amounts to a legal rule depends on whether it is merely followed in practice or is also considered as a standard to which judicial practice should conform. It would seem that the rules of auto-limitation here considered have become accepted as basic rules of the English legal system and are therefore rules of law.

Does this mean that the House of Lords and the other courts have lost their earlier power for ever? Certainly on the view suggested they cannot regain this power without changing the law. Suppose tomorrow the House of Lords refused to follow the *London Street Tramways* decision and declared itself free, like the Privy Council, to change its mind: what would be the legal effect? To this we can only say that if the new decision were accepted, then the law would have changed back to the prior position and the House would have unfettered itself. If, however, the decision failed to gain acceptance, then the bid for freedom would not have succeeded, the new decision would be considered contrary to law and there would have been no change. Such alteration in the law, if alteration there were, would be brought about not by one precedent but by the general attitude of the

court, the legal profession and the community. To imagine that basic legal rules can never alter in this way results from failing to discern that they are in essence customary.

We must now consider in more detail the position of particular courts in the judicial hierarchy.

(1) *The House of Lords.* In the first part of the nineteenth century no court was absolutely bound by its own decisions, or at any rate there was no unbroken practice to this effect (*j*).

In 1898, in *London Street Tramways* v. *London County Council* (*k*), the matter was finally settled for the House of Lords, when the House decided that it was bound by its own decisions. This has been the position ever since.

The situation has not gone without adverse comment. Pollock wrote that " no other court of last resort in the world, it is believed, has fettered its own discretion in this way. Certainly the Judicial Committee of the Privy Council has not "(*l*). The rule has also been powerfully criticised by Lord Wright (*m*) and Dr. Goodhart (*n*).

The rule, however, is subject to various qualifications. First, the House is not bound by a decision made in ignorance of a statute. This exception was admitted by Lord Halsbury in the

(*j*) See *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895 at 922, and *Bright* v. *Hutton* (1852) 3 H.L.C. 341 at 389 for statements to the effect that the House of Lords can correct its own errors, and also for statements to the opposite effect.

(*k*) [1898] A.C. 375. See further, on the history, the arguments in this case, and add: *Metropolitan Ry.* v. *Jackson* (1877) 3 App.Cas. at 209; *Darley Main Colliery* v. *Mitchell* (1886) 11 App.Cas. at 134, in both of which the House was said to be bound. See generally Landon in (1951) 63 *Juridical Review* 222.

(*l*) Preface to vol. 126 of the Revised Reports. That the Appellate Division of the Supreme Court of South Africa is not bound by its own decisions was not decided until *Harris* v. *Minister of the Interior*, 1952 (2) S.A. 428 (A.D.). [1952] 1 T.L.R. 1245. The attitude of the Irish Supreme Court is not clear: see (1953) 69 L.Q.R. 25.

Pollock repeated his view in his *First Book of Jurisprudence*, 6th ed. 333: " On the other side it is said that certainty in the rules of law by which men have to guide themselves is of greater importance than arriving at the rule which is best in itself or most logically harmonious as part of a system. This seems a good reason why a court of final appeal should not decide without full deliberation, and should be slow to disturb any doctrine it has once laid down or approved, but hardly a sufficient reason why it should disclaim any power of correcting its own errors in case of need." Quoting this passage with approval, Dr. Goodhart said: " There is an obvious antithesis between rigidity and growth, and if all the emphasis is placed on absolutely binding cases then the law loses the capacity to adapt itself to the changing spirit of the times which has been described as the life of the law " (64 L.Q.R. 41).

(*m*) (1942) 4 Univ. of Toronto L.J. 247, reprinted in (1943) 8 C.L.J. 118.

(*n*) (1947) 9 C.L.J. at 349–350.

London Street Tramways case itself (*o*). Secondly, the House may not perhaps be bound by previous decisions in peerage claims (*p*). Thirdly, where there are two conflicting decisions, the House of Lords cannot of necessity be bound by both; and though nothing has been laid down by the House itself, the position must be analogous to that of the Court of Appeal, which is free in such circumstances to choose between the two. Fourthly, where the *ratio decidendi* of a previous decision is so obscure as to be undiscoverable, the House need not strain to find in it some principle in order to be bound (*q*).

A special problem arises as to the effect of decisions of the House of Lords on the Scottish side of its appellate jurisdiction. Domestically England and Scotland have different systems of law, and a decision of the House as final court of appeal from Scotland is not generally binding on the House as final court of appeal from England, or on lower English courts, because it is then deciding a point of Scots law that may be differently determined according to the law of England (*s*). This is quite clear and indeed obvious. However, it has been judicially suggested that there is an exception where the Scottish case is decided in the House on the same principles as apply in English law (*t*). The obvious example is *Donoghue* v. *Stevenson* (*u*), which was an appeal from Scotland, where the House of Lords announced that the principles to be applied were the same as in English law. It is usually assumed that this decision is, in consequence, binding upon English courts. Certainly it has become binding by subsequent adoption, and there was never any doubt that it would be followed and applied. *Donoghue* v. *Stevenson* was far too weighty a decision to stand in any need of support from a doctrine of precedent. But the theoretical question remains whether such

(*o*) at 380.

(*p*) *Viscountess Rhondda's Peerage Claim* [1922] 2 A.C. 339, though *contra* Cross, *op. cit.* 109.

(*q*) *The Mostyn* [1928] A.C. 57.

(*s*) See *per* Lord Lyndhurst in *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488 at 561 (H.L.(Sc.)).

(*t*) *Per* Lord Dunedin in *R.* v. *Minister of Health, ex p. Yaffé* [1931] A.C. 494 at 502; *per* Lord Porter in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356 at 401.

(*u*) [1932] A.C. 562. Among other Scottish appeals that have affected English law are *Udny* v. *Udny* (1869) L.R. 1 Sc. & Div. 441, and *Bourhill* v. *Young* [1943] A.C. 92.

a decision is technically binding in the other jurisdiction, if the opinion subsequently arises that it did not truly apply the principles of English law. It seems inevitable that the answer to this question must be in the negative. Even on the strictest doctrine of precedent, no ruling of the House in a Scottish case can ever be binding in an English case, for the simple reason that no *obiter dictum* is binding and that such a ruling must, for English law, be *obiter*. When the House has before it an appeal from Scotland, as in *Donoghue* v. *Stevenson*, the question for it to decide is a question of Scots law, and any statement that English law is the same is an *obiter dictum*. That this is so was recognised in a case where the House held that its own decision on an English appeal was not binding upon Scottish courts, notwithstanding that the English appeal had purported to be decided partly on the Scottish precedents (*v*). Lord Simonds expressly said that any observations made by the House in the English appeal must, so far as they related to the law of Scotland, be *obiter dicta*. If this is the true view, as it is submitted it is, the converse must also hold good. Quite apart from the technical rule relating to *obiter dicta*, the decision cannot be regarded as binding in the other jurisdiction for the substantial reason that it may not have been argued by advocates trained in the law of that jurisdiction, so that relevant authorities may not have been called to their Lordships' attention.

There is, however, one respect in which this logic must be restricted. Although a Scottish decision of the Lords is not binding upon English courts, it can be followed by English courts; and when their Lordships have announced that English and Scots law are the same, their judgment on the Scottish appeal can, it is submitted, be taken, if the English court so wishes, as being of the same weight as a decision of the House in an English appeal. For example, it would be proper for an English court to say that *Donoghue* v. *Stevenson* has " overruled " certain English decisions arrived at previously (*w*). This

(*v*) *Glasgow Corpn.* v. *Central Land Board*, 1956 S.L.T. 41, noted and discussed in (1956) 19 M.L.R. 427.

(*w*) Thus even a county court judge could hold that *Donoghue* v. *Stevenson* has overruled *Earl* v. *Lubbock* [1905] 1 K.B. 253, though but for *Donoghue* v. *Stevenson* (and the cases following it) he would perhaps be bound by *Earl* v. *Lubbock*. (I say " perhaps ", because it is not quite clear that a county court judge is bound by High Court cases, now that appeal lies direct from the county court to the Court of Appeal. A county court judge who wished to

makes *Donoghue* v. *Stevenson* something more than an *obiter dictum* for English law, because an *obiter dictum* cannot overrule a decision. The Scottish appeal occupies an intermediate position, being something that *need not* be followed by English courts but *can* be followed notwithstanding previous English authority to the contrary. In the same way, when the House of Lords is faced with conflicting decisions of its own, one an English case and another a Scottish case in which English and Scots law were assumed to be the same, the House can, it seems, even in an English appeal, prefer the Scottish decision (*x*). This intermediate status of the Scottish appeal in the doctrine of precedent may be said to be illogical, but it represents a practical compromise between opposing arguments.

Finally, we have already seen that there is some authority for the proposition that the House of Lords need not follow its own previous decisions if they are clearly contrary to fundamental legal principles (*y*). How far this exception is to gain acceptance is at present a matter of speculation, but it could go far to relax the rigidity of the present position. The argument in favour of a strictly bound House of Lords is that any other situation would result in uncertainty. Lower courts would be uncertain which of two conflicting decisions to follow, and no one could predict whether the House would follow its own decisions. The reply to this argument is that lower courts could adopt the rule of always following the later decision, and the practice of the House of Lords need not be expected to be completely unpredictable. The reluctance with which higher courts overrule decisions of lower courts, and the relative uniformity of practice in the Privy

anticipate the decision of the Court of Appeal, and so save the parties the expense of an appeal, would not follow a High Court case if he thought the Court of Appeal would not do so.)

(*x*) This is what in effect happened in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, though the English precedent was distinguished rather than dissented from. See note in (1942) 6 M.L.R. at 79.

(*y*) *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446 where the House of Lords refused to follow the *Elder, Dempster Case* [1924] A.C. 522. Lord Reid, with whom Lord Keith concurred, refused to follow the case partly on the ground that it was contrary to fundamental principles concerning privity of contract and partly on the ground that its *ratio* was obscure (at 476–477, 479). Viscount Simonds considered that a decision of the House should not be taken as departing from long-established principle or creating an exception to it unless the decision made this abundantly clear, and this the *Elder, Dempster* case did not do. See the discussion by Dworkin in (1962) 25 M.L.R. 163.

Council, which can overrule its own decisions, suggest that a relaxation of the *London Street Tramways* rule would not lead to completely undesirable results. On the other hand it would permit the House to abrogate previous decisions which were arrived at in different social conditions and which are no longer adequate in present circumstances. It would allow the House to do this without resorting to excessive subtleties in order to distinguish unpopular decisions. Over-subtle distinguishing itself leads to uncertainty and brings the law into disrepute.

(2) *The Court of Appeal.* That the Court of Appeal is bound by its own decisions is taken to have been authoritatively settled in *Young* v. *Bristol Aeroplane Co.* (1944) (*z*). Even before 1944 there was a stream of authority for this view, broken only by a few dissentient voices. Greer and Slessor L.JJ. consistently denied the rule (*a*), and the court as a whole held in *Wynne-Finch* v. *Chaytor* (1903) (*b*) that it was not bound by its previous decision. These minority opinions, as they became, were disapproved in *Young's* case, which is now regarded as the leading authority and as settling the law.

Usually the Court of Appeal sits with three judges (rarely two); occasionally, for the determination of a point of exceptional difficulty and importance, it may sit as a "full court" of five judges. It was held in *Young's* case that this full court has no greater powers than any division of that court, and is therefore bound by a decision of such division (*c*). Also, it is clear from later decisions that full binding force attaches even to unreported decisions of the court (*d*).

It seems that the Court of Appeal is also bound by decisions of its predecessors, the Court of Exchequer Chamber and the Lords Justices of Appeal in Chancery. The contrary was held

(*z*) [1944] K.B. 718 (C.A.); on appeal [1946] A.C. 163. See Cross, *op. cit.* 109–112, 133–140.

(*a*) (1939) 3 M.L.R. 66.

(*b*) [1903] 2 Ch. 475 at 485. See also (1941) 57 L.Q.R. 177.

(*c*) *Cf. Morelle Ltd.* v. *Wakeling* [1955] 2 Q.B. 379. But where counsel intimates that he wishes to argue that a previous decision of the C.A. was *per incuriam* (see later), the case may be adjourned for consideration by a full court; and this course is particularly likely where the argument is initially raised before a court which is substantially the same as that which decided the impugned case. See *Berkeley* v. *Papadoyannis* [1954] 2 Q.B. 149 at 150 (C.A.).

(*d*) *Gibson* v. *South American Stores* [1950] Ch. 177 (C.A.); *cf. King* v. *King* [1943] P. 91 (C.A.) (precedent reported only in *The Times* newspaper).

in a case in 1880 (*e*) where the Court of Appeal refused to follow a decision of the Lords Justices of Appeal in Chancery; but in *Young's* case the doctrine was stated to extend to decisions of " courts of co-ordinate jurisdiction " with the Court of Appeal, which must have been intended as a reference to its predecessors.

The various exceptions to the rule in *Young's* case which occasion great difficulty, will be considered later. In some cases the argument in the Court of Appeal turns almost entirely on the question whether it is bound by a previous decision, the merits of the question hardly being examined (*f*). This is another illustration of how the doctrine of precedent may cause debate and uncertainty. Cases are not infrequent in which the Court of Appeal expresses regret at being bound by its own decision, and in effect advises the loser to appeal to the House of Lords, which duly reverses the decision of the Court of Appeal (*g*). As Dr. Goodhart puts it, there is " some doubt concerning the end which is achieved by requiring litigants to engage in such expensive appeals when the result is known, for all practical purposes, to be inevitable when the case reaches the House of Lords " (*h*). On other occasions the court manages to " distinguish " itself, sometimes by saying that the earlier decision was on a " question of fact "—even though it was actually decided as one of law (*i*).

It appears from all this that the argument used for the doctrine of *Young's* case, that otherwise " there would be no finality in the law " is not wholly convincing. As observed before, it is often more difficult to predict when a court will distinguish a precedent than when (if it had the power) it would refuse to follow it. Moreover, to speak of " finality " in connection with the Court of Appeal is somewhat out of place, because any decision of the Court of Appeal can be overruled by the

(*e*) *Mills* v. *Jennings*, 13 Ch.D. 639 (C.A.).

(*f*) *e.g.*, *Consett, etc., Society* v. *Consett Iron Co.* [1922] 2 Ch. 135. For a prolonged and inconclusive discussion of a point of precedent see the case noted by Olive Stone in 14 M.L.R. 493.

(*g*) In *Olympia Oil Cake Co.* v. *Produce Brokers Co. Ltd.* (1915) 112 L.T. 744 at 750 (C.A.), where the court held itself to be bound by its previous ruling, Phillimore L.J. said: " With reluctance, I might almost say sorrow, I concur in the view that this appeal must be dismissed. I trust the case will proceed to the House of Lords ". The case did proceed to the House of Lords, which sympathetically reversed the decision of the Court of Appeal.

(*h*) (1948) 64 L.Q.R. 485.

(*i*) See (1946) 62 L.Q.R. 110–111.

House of Lords. A person who is projecting a course of conduct, and who considers the possible effect of a debatable decision of the Court of Appeal, has always to contemplate the possibility of that decision being overruled by the House of Lords. Therefore it can hardly be that he places implicit reliance upon the law as formulated in the Court of Appeal, unless indeed he thinks that that law has sufficient argument in its favour to commend itself to the House of Lords. From the point of view of the security of transactions there would seem to be no reason why the Court of Appeal should not be given the same freedom from the binding effect of its own decisions as the House of Lords.

The objection to the present rule is particularly strong because the Court of Appeal gives so many unreserved decisions, *i.e.*, decisions not reduced to writing and rendered immediately after the conclusion of argument. Although, as will be shown, there is some relaxation from the binding force of precedent when it was decided *per incuriam*, the limits of this exception are somewhat tightly drawn, and the court is bound by its previous decision even if it was the result of overlooking the decisions of lower courts.

Young's case recognised three exceptions to the general rule. First, where there are conflicting Court of Appeal decisions, the court is bound to choose which of them it will follow. Secondly, the court is not bound by a decision of its own which, though not expressly overruled, cannot stand with a decision of the House of Lords. Thirdly, the court is not bound to follow a decision of its own given *per incuriam*

(a) The first exception raises the problem whether a conflict between decisions in the Court of Appeal is ever closed. If there are two conflicting decisions, A and B, and then a later decision, C, which follows A, is the court ever afterwards bound to follow A and C ? Or can the court in a later decision, D, hold that there is a conflict between A and C on the one hand and B on the other, and so choose between them ? One solution would be to adopt the rule that in such a case the conflict must be regarded as settled and that A and C must be followed. This solution, however, has not been established beyond doubt by authority.

A similar problem concerns the situation arising where the Court of Appeal decides that two previous decisions are not in

conflict. Can the court later decide that the two earlier decisions are in conflict and that it must therefore choose between them ? In *Fisher* v. *Ruislip-Northwood U.D.C.* (*j*) the court chose to regard as in conflict the cases of *Morrison* v. *Sheffield Corporation* (*k*) and *Lyus* v. *Stepney Borough Council* (*l*). *Lyus's* case had decided that there was no conflict between *Morrison's* case and *Wodehouse* v. *Levy* (*m*), which *Fisher's* case considered to be indistinguishable from *Lyus*. The result is that *Fisher's* case chose to reopen a conflict where *Lyus's* case had decided no conflict existed. By contrast in *Hogan* v. *Bentinck Collieries* (*n*) the court held itself bound by its previous decision in *Rothwell* v. *Caverswall Stone Co.* (*o*), which had decided that no conflict existed between the cases of *Humber Towing Co.* v. *Barclay* (*p*) and *Dunham* v. *Clare* (*q*). Here the Court of Appeal considered itself unable to reopen the matter. The view taken in *Hogan's* case is likely to produce more certainty than that taken in *Fisher's* case and seems more in accord with the spirit of *Young's* case.

It could be argued that *Young's* case itself conflicts with earlier decisions notably *Wynne-Finch* v. *Chaytor* (*r*), and that therefore the Court of Appeal is free to choose between these decisions and overrule *Young's* case. If in fact the court wanted to free itself from the rule in *Young's* case, this would now involve a change in a fundamental rule of precedent. Whether the court could bring about such a change would depend on whether it was approved and accepted. Meanwhile it would seem more in conformity to the tenor of the judgment in *Young* v. *Bristol Aeroplane Co.* to regard this particular conflict as closed (*s*).

(b) It is clear from the judgment in *Young's* case that the second exception was meant to extend only to Court of Appeal decisions inconsistent with *subsequent* House of Lords decisions.

(*j*) [1945] K.B. 584.
(*k*) [1917] 2 K.B. 866.
(*l*) [1941] 1 K.B. 134.
(*m*) [1940] 2 K.B. 561.
(*n*) [1948] 1 All E.R. 129.
(*o*) [1944] 2 All E.R. 350.
(*p*) 5 B.W.C.C. 142.
(*q*) [1902] 2 K.B. 292.
(*r*) [1903] 2 K.B. 475.
(*s*) On this exception see Goodhart " Precedents in the Court of Appeal," 9 C.L.J. 339; Gooderson " *Young* v. *Bristol Aeroplane Company* ", 10 C.L.J. 432.

This was the view taken by the court in the later case of *Williams* v. *Glasbrook Bros.* (*t*) where the court refused to accede to the argument that it could disregard its previous decision in *Wilds* v. *Amalgamated Anthracite Collieries Ltd.* (*u*) on the ground that this case was inconsistent with the earlier House of Lords decision in *Jones* v. *Amalgamated Collieries Ltd.* (*v*). On the other hand in *Fitzsimmons* v. *The Ford Motor Co. Ltd.* (*w*) the Court of Appeal refused to follow two of its own decisions on the ground that they were inconsistent with an earlier House of Lords decision which had been considered in both of these cases. Here again the practice of the Court of Appeal is not wholly settled, but the decision in *Williams* v. *Glasbrook Bros.* would seem to be preferable in the interests of certainty and because it is more in line with the rule in *Young's* case.

(c) In order that a case can be said to be decided *per incuriam*, it is not enough that it was inadequately argued. It must have been decided in ignorance of a rule of law binding on the court, such as a statute or House of Lords decision. The fact that an inadequately argued case does not qualify as one decided *per incuriam* should not mean that such a case is in all circumstances binding on the court. This would be to construe the judgment in *Young's* case like a statute whereas the exceptions listed there need not necessarily be taken to be exhaustive. In so far as there is a general rule that unargued cases are without full binding authority, such a case could be disregarded without going against the rule in *Young's* case (*x*).

(3) *The Court of Criminal Appeal.* The Court of Criminal Appeal regards itself as bound by its own previous decisions (*y*) and by those of its predecessor, the Court for Crown Cases Reserved (*z*). Since it is a heavily overworked court and since the majority of its judgments are unreserved, a strict rule of *stare decisis* would work badly. The court has recognised this by allowing extra exceptions to the doctrine in addition to the standard

(*t*) [1947] 2 All E.R. 884.
(*u*) [1947] 1 All E.R. 551.
(*v*) [1944] 1 All E.R. 1.
(*w*) [1946] 1 All E.R. 429.
(*x*) See *supra* § 27.
(*y*) See Winder in (1941) 5 *Journal of Criminal Law* 242; Seaborne Davies (1951) J.S.P.T.L. 439; Lord Goddard C.J. (1952) *ibid.* 8.
(*z*) *R.* v. *Cade* [1914] 2 K.B. at 211–212.

exceptions discussed above. The court will for instance reconsider a decision not argued on both sides (*a*). A further exception was laid down in *R.* v. *Taylor* (*b*), where it was held that the full court was not bound by its own previous decisions, because the liberty of the subject was involved.

This development was due to the court itself. The Criminal Appeal Act, 1907, which set up the court, made no such distinction between a full court and an ordinary court. Various questions now arise, which have not yet been answered. Would a full Court of Criminal Appeal be bound by previous decisions of a full court ? All that can be said is that so far practice does not suggest otherwise. Is the exception in *R.* v. *Taylor* confined to cases where the previous decision affirmed a conviction ? In order to avoid an infringement of the principle *nulla poena sine lege* it is probable that the exception will only be allowed to operate in favour of the accused.

The Court of Criminal Appeal is not bound by decisions of the Court of Appeal, nor are its own decisions binding on that court (*c*).

(4) *The Divisional Court.* The Divisional Court of the High Court exercises both civil and criminal jurisdiction. Its decision on the civil side is usually subject to appeal to the Court of Appeal, whereas its decision in the exercise of criminal jurisdiction used to be final. Formerly, this distinction had an effect in the doctrine of precedent, it being held that the Divisional Court was bound by its own decisions only in civil cases where the judgment was subject to appeal, and where, therefore, any error could be set right by a higher court. In criminal cases, where the judgment was unappealable, the court was not bound by its own decisions (*d*). This distinction seems to have disappeared since the decision in *Police Authority for Huddersfield* v. *Watson* (*e*),

(*a*) *R.* v. *Ettridge* [1909] 2 K.B. at 27; *R.* v. *Norman* [1924] 2 K.B. at 322.

(*b*) [1950] 2 K.B. 368.

(*c*) In *Hardie & Lane* v. *Chilton* [1928] 2 K.B. 306 the Court of Appeal refused to give effect to the decision of the Court of Criminal Appeal in *R.* v. *Denyer* [1926] 2 K.B. 258. The Court of Criminal Appeal, however, announced that it would consider that *R.* v. *Denyer* was binding on it until overruled by the House of Lords (20 Cr.App.R. 186).

(*d*) See Winder in (1946) 9 M.L.R. at 262–263, 265 *et seq.*

(*e*) [1947] K.B. 842. The rule was criticised by Dr. Goodhart in (1948), 64 L.Q.R. 40, by Mr. Winder in (1948) 11 M.L.R. 95, and by Sir Carleton Allen in (1953) 69 L.Q.R. 316.

which held that a precedent was binding even where the decision of the Divisional Court was final (*f*). The fact that such a determination was final was, indeed, made the very reason for the decision. Lord Goddard C.J. remarked that he knew that in the writings of various eminent people the doctrine of *stare decisis* had been canvassed from time to time, but that, in his opinion, " if one thing is certain it is that *stare decisis* is part of the law of England, and in a system of law such as ours, where the common law and equity largely are based on decisions, it seems to me it would be very unfortunate if a court of final appeal has given a decision and has laid down a definite principle and it cannot be said the court has been misled in any way by not being referred to authorities, statutory or judicial, which bear on the question, that it should then be said that that decision was not to be a binding authority ".

Since Lord Goddard used as an argument that the Divisional Court ought to be bound where it is the final court, it may be thought that *per contra* it is not bound where it is not the final court, *i.e.*, in most civil cases. This, however, is not the law: the court regards itself as bound equally in civil cases where its decision is subject to appeal (*g*).

Logically the rule in *R.* v. *Taylor* should apply to the Divisional Court of the High Court, and if so it constitutes a most important exception to the rule in the *Huddersfield* case. Hitherto, however, there has been no mention of any such exception.

It seemed at one time that Lord Goddard C.J. was prepared to recognise an exception to the rule in the *Huddersfield* case where the court before which the precedent was cited was larger in numbers than the earlier court. In a case of 1947, as reported in the *All England Reports* (*h*), he said, of an earlier Divisional Court decision—

" I should have no hesitation, if necessary, in differing from

(*f*) The *Huddersfield* case was a civil one, but, exceptionally, the decision of the Divisional Court was unappealable. It was followed in *Younghusband* v. *Luftig* [1949] 2 K.B. 354, a criminal case.

(*g*) However, in *Southgate Borough Council* v. *Park Estates (Southgate) Ltd.* [1953] 1 W.L.R. 1274 at 1278, Lord Goddard C.J., delivering the judgment of the Divisional Court, said that he followed a precedent decision of the court because it had stood for 55 years, a fact that he twice emphasised. It is difficult to see its relevance if the precedent was binding in any case.

(*h*) *Edwards* v. *Jones* [1947] 1 All E.R. at 833. It is reported to the same effect in [1948] L.J.R. 1003 and 111 J.P. 324.

the decision in that case, not merely because we are sitting now as a court of three, and that was a court of two, but also because the case was not argued for the defendants, who did not appear, and when a case has been argued only on one side, it has not the authority of a case which has been fully argued."

The two reasons given by the Chief Justice in this report seem to be alternative, so that each is sufficient in itself. However, in the report of the judgment in the *Law Reports* (which is revised by the judge), the words " merely " and " also " are omitted, so that the sentence reads as a denial of the first reason (*i*). It is difficult to imagine that the sentence was originally uttered as it appears in the *Law Reports*, and the revision appears to indicate a change of mind. In a later case (*j*), Lord Goddard took occasion to say that " a Divisional Court of five judges has no greater powers than one of three or even two. This court is bound by its own decisions as is the Court of Appeal, whatever the number of judges that may constitute it ". He added, perhaps somewhat inconsistently, that " when re-argument is directed, it is often desirable that it should take place in full court ". As one writer remarks, " the learned Lord Chief Justice did not enlarge upon the reasons why re-argument should be desirable before a full court which has no greater powers than any of its divisions "(*k*).

The Divisional Court exercising criminal jurisdiction is bound by decisions of the Court of Criminal Appeal (*l*) and by those of the Court of Appeal (*m*). When exercising civil jurisdiction it is bound by decisions of the Court of Appeal (*n*) and presumably of the Court of Criminal Appeal.

It is not clear how far the Divisional Court binds a High Court judge. Just as one High Court judge cannot bind another, so, with much stronger reason, a High Court judge cannot bind a Divisional Court, consisting of two or more High Court judges (*o*). Here, again, although the Divisional Court can refuse to follow

(*i*) [1947] K.B. 659 at 664.
(*j*) *Younghusband* v. *Luftig* [1949] 2 K.B. 354 at 360.
(*k*) Olive M. Stone in (1951) 14 M.L.R. 222.
(*l*) *Ruse* v. *Read* [1949] 1 K.B. 370 at 384.
(*m*) *Carr* v. *Mercantile Produce Co. Ltd.* [1949] 2 K.B. 601.
(*n*) *Read* v. *Joannon* (1890) 25 Q.B.D. 300 at 302–303.
(*o*) *R.* v. *Watson, ex p. Bretherton* [1945] K.B. 96; *Bretherton* v. *U.K. Totalisator Co. Ltd.* [1945] K.B. 555; but see, for a former view, Winder in (1946) 9 M.L.R. at 259.

the earlier decision of the puisne judge, it cannot overrule that decision; and another puisne judge may prefer the judgment of his brother to that of the Divisional Court (*p*).

It would seem to follow from what has just been said that the Divisional Court is not regarded as superior to a puisne judge in the judicial hierarchy, and, if so, the Divisional Court cannot bind a puisne judge. However, the law, except in one instance, is not clear. The one instance is in respect of matters of procedure, where the determination of a puisne judge is subject to appeal to the Divisional Court; here, since there is a relation of subordination between the single judge and the Divisional Court, the decision of the latter would clearly be binding on other judges in like cases. On ordinary questions of substantive law, however, no appeal lies from a High Court judge to the Divisional Court—the appeal is to the Court of Appeal, or in criminal matters to the Court of Criminal Appeal. It is perhaps not finally settled whether, on such questions, the Divisional Court is able to bind single judges of the High Court, where there is no conflicting authority. Since, as will be shown later, the Divisional Court is bound by its own decisions, so that two judges can bind two judges, it would seem to follow as a matter of logic that two judges ought to be able to bind a single judge; and this is the view usually taken (*q*). But against this it may be said that the High Court judge sitting as a judge of first instance has a different jurisdiction from the Divisional Court sitting (usually) as an appellate tribunal from courts below the rank of the High Court, and that, since his relation to his brother judges in the Divisional Court is one of equality and not of subjection, he ought not to be regarded as strictly bound by their decisions. This opinion is further supported by the fact that the Divisional Court cannot

(*p*) *Elderton* v. *U.K. Totalisator Co. Ltd.* (1945) 61 T.L.R. 629; on appeal [1946] Ch. 57 (C.A.).

(*q*) *Village Main Reef, etc., Ltd.* v. *Stearns* (1900) 5 Com.Cas. 246 at 247–248; *Police Authority for Huddersfield* v. *Watson* [1947] K.B. 842 at 848; *cf.* 9 M.L.R. 258–259, 11 M.L.R. 96. In *Chandris* v. *Isbrandtsen-Moller Co., Inc.* [1951] 1 K.B. 240 at 243, Devlin J. said: "I can decide this last question at once. In *Podar Trading Co. Ltd.* v. *Tagher* the Divisional Court answered the same question in the negative. Whether or not I am technically bound by a decision of the Divisional Court, I propose to follow this one as a recent and authoritative pronouncement on the law, and I have not, therefore, invited argument on it." The case went up to the Court of Appeal, which did not comment on the learned judge's failure to hear argument. It may be respectfully submitted that if he was not bound by the decision of the Divisional Court he should have invited argument.

overrule a decision of a judge of the High Court, but can only create a divergence of authority. But, however the theoretical question may stand, it is only on rare occasions that a High Court judge will consider departing from a precedent in the Divisional Court.

(5) *The Privy Council.* When sitting as highest appeal court from overseas territories the Privy Council is considered as legally part of the judicial system of the territory from which the appeal comes (*r*). As such, it cannot bind the English courts, and indeed there have been occasions when the High Court has refused to follow decisions of the Privy Council (*s*). On the other hand, its decisions usually command the greatest respect, as is only natural, since the court is largely staffed by the same personnel as the House of Lords. In case of conflict between a Privy Council decision, therefore, and a decision of the Court of Appeal, the latter in strict theory is binding on English courts until overruled by the House of Lords. Yet in *Smith* v. *Leech Brain & Co. Ltd.* (*t*) Lord Parker C.J. sitting as judge of first instance considered that he would be free, if necessary, to disregard the Court of Appeal decision in *Re Polemis* (*u*) because of the Privy Council decision in *The Wagon Mound* (*v*); and in *Doughty* v. *Turner Manufacturing Co.* (*w*) the Court of Appeal considered *Re Polemis* no longer good law.

Since in theory the Privy Council is an advisory body rather than a court, it is not bound by its own decisions and thus enjoys a measure of flexibility unhappily lacking in the English system of precedent.

29. The ratio decidendi

Having considered the extent to which courts are bound by previous decisions, we must now examine what constitutes the decision in a case and what it is that is actually binding on later courts (*x*).

(*r*) *Ibralebbe* v. *The Queen* [1964] A.C. 900.
(*s*) In *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [1958] 2 Q.B. 146. Diplock J., as he then was, refused to follow *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926] A.C. 108.
(*t*) [1962] 2 Q.B. 405.
(*u*) [1921] 3 K.B. 560.
(*v*) [1961] A.C. 388.
(*w*) [1964] 1 Q.B. 518.
(*x*) See generally Simpson, "The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent" in *Oxford Essays in Jurisprudence* (ed. Guest),

First, however, we must distinguish what a case decides generally and as against all the world from what it decides between the parties themselves. What it decides generally is the *ratio decidendi* or rule of law for which it is authority; what it decides between the parties includes far more than just this. Since it would be obviously impracticable if there were no end to litigation and if either party to a legal dispute were at liberty to reopen the dispute at any time, the law provides that once a case has been heard and all appeals have been taken (or the time for appeal has gone by) all parties to the dispute and their successors are bound by the court's findings on the issues raised between them and on questions of fact and law necessary to the decision of such issues. According to this principle these matters are now *res judicata* (*y*) between them and cannot be the subject of further dispute. But the court's findings will not be conclusive except as between the same parties. If A sues B in negligence relating to a motor accident, each will be bound as against the other by the findings in the case. Third parties not involved in the original case, however, will not be bound, nor will either of the original parties be bound in a subsequent dispute with a third party. So if B is later prosecuted for careless driving, neither he nor the prosecutor will be bound by any findings of fact in the original action. In certain circumstances the findings in an action may be conclusive even as against third parties. This is so with actions concerning status, where the judgment acts *in rem*, *i.e.*, against all the world. In the case of a petition for declaration of nullity of a marriage, the court's decision will be valid not only against the petitioner and respondent but against all third parties.

As we have seen, the parties are bound by findings of fact and law necessary for the resolution of issues between them. A problem that can arise is the following. A applies for judicial relief against B. The court holds that while it has general jurisdiction to grant the relief sought, it should not do so in the present case on account of A's failure to take certain preliminary steps. A remedies the defect and reapplies. Is B bound by the original finding

148; Cross, *Precedent in English Law*, Chap. II: Dias, *Jurisprudence* (2nd ed.), Chap. III.

(*y*) *Cf.* Dias, *op. cit.* 28–29.

that the court had general jurisdiction to grant the relief in question? In *Penn-Texas Corporation* v. *Murat Anstalt and Others* [No. 2] (*z*) the plaintiff, a foreign company, applied for an order that an English company should produce certain documents. The court held that there was power in the court to order a limited company to produce documents but only if they were specially identified, and since this was not the case no order was made. Subsequently the plaintiff remedied the defect and applied again. At this point the English company wished to contend that the court had no such general power as was previously decided, but was met by the argument that this had already been decided in the first application and was *res judicata*. The Court of Appeal, to which both applications were finally taken, rejected the plaintiff's contention on this point, Lord Denning holding that the earlier finding was in the event unnecessary to the decision, as could be shown by the fact that it was unappealable. The fact that it was unappealable, however, because the English company was successful in the first application and therefore had no order against which to appeal, would hardly seem to render the finding unnecessary to the decision; for without that finding the earlier court could hardly have proceeded to make its final decision. Nor surely should the fact that the English company had no appeal against the Court of Appeal's finding allow them to reopen the matter in the Court of Appeal. On the other hand it would be illogical and unfortunate if in the second application the company had no right of appeal to a higher court simply because this particular point had been decided against them in earlier proceedings in which they were generally successful (*a*). In this type of case perhaps a compromise would be to regard both proceedings as part of one continuing action, so that the general finding in the first application would be conclusive in the second, but only in courts of lower or equal status and not in higher tribunals to which an appeal should still lie.

As against persons not parties to the suit, the only part of a case which is conclusive (with the exception of cases relating to status) is the general rule of law for which it is authority. This

(*z*) [1964] 2 Q.B. 647.

(*a*) The decision might for instance have been merely that of a master in chambers.

rule or proposition, the *ratio decidendi*, may be described roughly as the rule of law applied by and acted on by the court, or the rule which the court regarded as governing the case.

One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application. This means that they are created by judges and not by teachers and other academic lawyers, however learned they may be. It also means that they are created by judges only when acting as judges, *i.e.*, when deciding cases and not for example when giving lectures or other addresses; statements made by judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

In the course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situations and the law which he considers to apply to them. Here of course, since the issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision. Or again, having decided the case on one point, the judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, *obiter dicta*, are without binding authority, but are nonetheless important: not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by the courts. Indeed *dicta* of the House of Lords or of judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the *rationes* of lesser judges (*b*).

(*b*) In *Triefus & Co. Ltd.* v. *Post Office* [1957] 2 Q.B. 352 the Court of Appeal held that Lord Mansfield's observation to the effect that the acceptance of parcels for transmission through the post does not give rise to a contract between the sender and the Postmaster-General, was clearly *obiter*, but it had been accepted since 1778 as good law, was therefore entitled to the highest respect, and would be followed.

The *ratio decidendi*, as opposed to *obiter dicta*, is the rule acted on by the court in the case. But since the common law practice is that courts should explain and justify their decisions, we normally find the rule which is applied actually stated in the judgment of the court. Later courts, however, are not content to be completely fettered by their predecessors, and wisely so: for the development of the common law has been an empirical one proceeding step by step. When a court first states a new rule it cannot have before it all possible situations which the rule as stated might cover, and there may well be situations to which it would be quite undesirable that it should apply. If such a situation should come before a later court, that court might well take the view that the original rule had been too widely stated and must be restricted in application. Or again the original court when stating a rule is neither concerned nor obliged to formulate all possible exceptions to it. Such exceptions must be dealt with as and when they arise, by later courts. In *Bridges* v. *Hawkesworth* (*c*) for example, where a customer found some money on the floor of a shop the court applied the rule of " finders-keepers " and awarded possession of the money to him rather than to the shopkeeper. In *South Staffordshire Water Company* v. *Sharman* (*d*) where the defendant found two gold rings in a mud pool owned and occupied by the plaintiffs, the court refused to apply the rule expressed in the earlier case. The ground of this refusal was that in that case the money had been found in a public part of the shop, whereas in the present case the pool was not open to the public. We can look at this argument either as a way of narrowing the rule in *Bridges* v. *Hawkesworth* to cases where the property is found in places to which the public have access, or as a method of creating an exception to that general rule with regard to property found on land in someone's occupation (*e*).

But while this freedom to distinguish previous decisions makes the operation of precedent more flexible, it has given rise to the view that the *ratio decidendi* of a case is in fact what later cases

(*c*) (1851) 21 L.J.Q.B. 75. (*d*) [1896] 2 Q.B. 44.

(*e*) No emphasis was laid in *Bridges* v. *Hawkesworth* itself on the fact that the money was found in a public part of the shop. Lord Russell's stressing of this factor in *Sharman's* case, however, was not a misunderstanding of the earlier case but a way of distinguishing it. See Harris " The Concept of Possession in English Law " in *Oxford Essays in Jurisprudence* (ed. Guest), 69 at 92.

consider it to be, because it is always possible that a later court may hold that the rule stated and acted on by the judge in a case is wider than necessary for the decision. Now if we use the term *ratio decidendi* to refer to the proposition of law for which a case is authority, then there is no doubt that this view is correct. Cases cannot be looked at in isolation but must be interpreted in the light of later authority which may have widened, restricted, distinguished or explained them; and a case which was once authority for proposition X may end up being authority for some much narrower rule of law. If on the other hand we use the term *ratio* to refer not to the rule for which the case is authority but the rule which the court applied, then it is misleading to suggest that the *ratio* of a case is what later cases hold it to be. This would lead to the absurd conclusion that no case could have a *ratio* till later courts had pronounced on it, that it would be logically impossible for a later court to misunderstand the *ratio* of an earlier case, and that a case's *ratio* could change over the years—or even that the same case could have at the same time conflicting *rationes* if there were different judicial interpretations of what it decided (*f*). For the sake of clarity it is preferable to retain the term *ratio* for the rule acted on by the court while remembering that though this will never change, the law itself and the rule for which the case is authority may. If we think of the rule of law as a line on a graph, then the case itself is like a point through which that line is drawn.

While it is fairly simple to describe what is meant by the term *ratio decidendi*, it is far less easy to explain how to determine the *ratio* of any particular case. Though we know that it is the rule the judge acted on, we cannot always tell for certain what that rule was. In some cases all we are presented with is an order or judgment unsupported by reasons of any sort. In others we are furnished with lengthy judgments in which may be embedded several different propositions, all of which support the decision. Another difficulty is that any general rule of law must *ex hypothesi* relate to a whole class of facts similar to those involved in the case itself: but just what this class is will depend on how widely we

(*f*) See Simpson, *op. cit.* 169. According to Montrose in (1953) *Annual Law Review of the University of Western Australia* 319, the term *ratio decidendi* bears both meanings. Until a case has been subsequently interpreted, of course, there will in fact be no difference between the two.

abstract the facts in question. The facts in *Donoghue* v. *Stevenson* could be described in considerable particularity by stating that the defendant manufactured a ginger-beer bottle, let it go out on the market with the remains of a snail inside and in such circumstances that there was no likelihood of intermediate inspection, that the bottle was sold by a retailer to a customer, and that the customer's friend drank some of the ginger beer and became ill as a result. Or one could state the facts extremely widely by saying that the defendant acted in such a way that anyone in his position could have anticipated that another person would suffer harm as a result and that such a person did suffer harm (*g*). At what level are we to abstract the facts?

Various methods of determining the *ratio* have been advanced. The "reversal" test of Professor Wambaugh suggested that we should take the proposition of law put forward by the judge, reverse or negate it, and then see if its reversal would have altered the actual decision (*h*). If so, then the proposition is the *ratio* or part of it; if the reversal would have made no difference, it is not. In other words the *ratio* is a general rule without which the case would have been decided otherwise. This test, however, will not help us in cases where no proposition of law is given and where all that is contained in the reports is a statement of the facts together with the order that was made. Nor is it very helpful where a court gives several reasons for its decision. In such cases we could reverse each reason separately and the decision would remain unaltered, since it could still rest on the other grounds. Logically it might seem that the first reason, therefore, is the *ratio* and the rest mere *obiter dicta*. Quite often, in fact, where a case is argued on several grounds the judge will decide it on one of these and merely indicate his views on the remaining points, so that here his first proposition of law alone will constitute the *ratio*. Sometimes, however, he will declare that he is deciding the case on more than one ground, and here each proposition on which he bases the decision will qualify as a *ratio* (*i*).

(*g*) Dias, *op, cit.* 53–54, discusses the different levels at which the facts in this famous case can be abstracted.

(*h*) Wambaugh *Study of Cases* (2nd ed.), 17–18.

(*i*) Where he does this, both reasons are *rationes* according to the House of Lords in *Jacobs* v. *L.C.C.* [1950] A.C. 361. For judicial discussion of when a judge makes the second reason a *ratio* and when a mere *dictum* see *Behrens* v. *Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1 at 25.

Another test is that suggested by Dr. Goodhart (*j*). According to this the *ratio* is to be determined by ascertaining the facts treated as material by the judge together with his decision on those facts. This test directs us away from what judges say towards what in fact they do, and indeed it is the only way of deriving a *ratio* in cases where no judgment is given. Where a judgment is given, however, it is from this that we must discover which facts the judge deemed material and which not. Goodhart's essay, in which he advances this test, catalogues various types of fact which may be assumed, in the absence of anything in the judgment to the contrary, to be immaterial—facts which he terms impliedly immaterial. The " material facts " test is also valuable in stressing that propositions of law are only authoritative in so far as they are relevant to facts in issue in a case: a judicial statement of law therefore must be read in the light of the facts of the case (*k*). Further, it is valuable in pointing out that we cannot always rely on the judge's reasoning in a case since this may be patently at fault. This is especially likely to be so in cases where the judge backs up his decision with arguments of policy and justice. The only shortcoming of Goodhart's test is that while it provides a very useful method of ascertaining the *ratio decidendi* of a case, this does not appear to be quite the same method as that in current use in practice. For in practice the courts seem to pay more attention to the judge's own formulation of the rule of law than Dr. Goodhart's test would allow; the courts look at this, it seems, not just to discover the material facts but to discover the rule which the judge thought himself to be applying. On the other hand it is true that any such rule must be evaluated in the light of the facts considered by the court to be material.

We have already seen that rules of law based on hypothetical facts are mere *dicta*. Cases may, however, be decided on assumed

(*j*) Goodhart, *Essays in Jurisprudence and the Common Law*, 1.

(*k*) And of course in the light of the issues raised in the pleadings. For the importance of this see a note in 69 L.Q.R. 817 on the case of *Dann* v. *Hamilton* [1939] 1 K.B. 509, in which a passenger in a car sued the driver for damages suffered in an accident caused by the driver's intoxication. The defendant's plea of *volenti non fit injuria* was rejected. It was later suggested that the defendant could have succeeded on contributory negligence, but the judge in the case pointed out in the note cited that this defence was never pleaded and could not therefore arise.

facts. It is open to the parties in a civil action to have a point of law decided as a preliminary matter, and here the only facts are hypothetical ones. This was the case in *Donoghue* v. *Stevenson* (*l*), which faced the courts with the question whether, given the facts alleged by the plaintiff, the defendant owed her any duty of care in negligence. Or again the court may give a ruling in law without disposing of all the facts. It may for instance decide that the plaintiff is entitled to judgment whether the facts are A or B without deciding which they are. Again the court may deal first with the law and enunciate a certain rule, but then find that on the facts this rule does not apply because the defendant comes within an exception to it. This happened in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* (*m*), where the House of Lords held that if a person gives advice to another in the course of business or professional affairs in such circumstances that a reasonable man would know that this advice is being relied on, then there is a duty, even in the absence of any contractual relationship, to take reasonable care that the advice is good; but that in the present case the defendant had no such duty because he had disclaimed responsibility for his advice. Finally there are cases where several points are raised, success on any one of which will decide the case in favour of one party. Suppose the court decides one point in favour of the plaintiff and the other in favour of the defendant, but gives judgment for the defendant since success on any point means success for him (*n*). In this case the decision on the first point was strictly unnecessary to the decision and had no part in the court's arriving at it. All these cases, where the court deals with the law without first finding the facts, differ from the normal situation where rule of law is enunciated and applied to the facts as found. In these cases the facts are assumed and in some the actual facts are found to operate to take the case out of the rule as stated by the court, so that in a sense the rules stated are not necessary for the decision. To regard them as *obiter dicta* however, would be unrealistic and

(*l*) [1932] A.C. 562. See the discussion in Cross, *op. cit.* at 54–59, 80–86.

(*m*) [1964] A.C. 465. The same could be said of *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130. In fact the first formulation of a rule has often been made in a case in which the rule itself was not applied. Perhaps it was this very fact that emboldened the court to propound the rule.

(*n*) As for instance in *Perry* v. *Kendrick's Transport* [1956] 1 W.L.R. 85.

contrary to current practice. The rule in *Donoghue* v. *Stevenson* is certainly regarded as *ratio* not *dictum*, and there is every reason to believe that the rule laid down in *Hedley Byrne's* case will be accorded the same status (*o*).

Where there are several different judgments, as in a case on appeal, the *ratio* must be ascertained from the judgments of those in favour of the final decision. A dissenting judgment, valuable and important though it may be, cannot count as part of the *ratio*, for it played no part in the court's reaching their decision. It may happen in an appeal court that all the judges concur in the decision but each one gives different reasons for it. In such a case one can only follow the advice of Lord Dunedin, who said that if it is not clear what the *ratio decidendi* was, then it is no part of a later tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it (*p*).

30. Judicial reasoning (*q*)

We have seen that according to the declaratory theory of law it is no part of a judge's function to create rules of law: his only task is to apply already established rules. In deciding a case, therefore, all that he need do is to ascertain the relevant rule and apply it to the facts of the case. On this view judicial reasoning assumes a fairly simple syllogistic form of the following pattern:

1. All fact situations of type A entail legal consequence B.
2. This is a fact situation of type A.
3. Therefore the legal consequence is B.

It is true that this form of argument is used by lawyers both in and outside courts in all those numerous instances where the law is perfectly clear; and we have seen that these are far more

(*o*) See Stevens "*Hedley Byrne* v. *Heller*: Judicial Creativity and Doctrinal Possibility," (1964) 27 M.L.R. 121. Yet in the *Penn-Texas* case Lord Denning regarded the ruling in *Penn-Texas* (No. 1) that the court had jurisdiction to order a company to produce specified documents as not necessary to the decision and so not binding precedent. *Supra*, p. 176.

(*p*) In *The Mostyn* [1928] A.C. 57 at 73.

(*q*) On judicial reasoning generally see Cardozo, *The Nature of the Judicial Process*; Lloyd, *Introduction to Jurisprudence* (2nd ed.), Chap. 10; Levi, *Introduction to Legal Reasoning*; Jensen, *The Nature of Legal Argument*; Wasserstrom, *The Judicial Decision*; Cross, *Precedent in English Law*, Chap. 6; Guest, "Logic in the Law", *Oxford Essays in Jurisprudence* (ed. Guest), 176.

common than the American realist would allow. For in the vast majority of cases the rule of law that applies is obvious and clear enough to allow us simply to subsume the facts of the case under the rule and draw the consequence automatically.

In the rarer case, however, where the law is not clear beyond doubt, this mechanical type of reasoning will not suffice, because in order for it to suffice it is necessary that both of the premises be clear. But in the uncertain case where the court has to break new ground, this will not be so. It may be that the first premise is unclear: there may be no well-established rule that situations of type A entail consequence B in this context, so that the court's main task will be to try and work out just what this rule should be. In *Rylands* v. *Fletcher* (*r*) for instance there was no rule already in existence to the effect that if a person accumulates on his land anything likely to do harm if it escapes, then he is liable if it escapes and causes damage; and the court's problem in that case was to develop just such a rule. Once this is done, we have our first premise and may be able to apply the syllogism automatically, but in cases creating new law the chief difficulty is to establish the premises of the syllogism: the court must decide whether fact situations of type A *do* entail consequence B.

It may be, however, that though the first premise is clear, the second is not. While the general rule may be well established, it may not be certain whether the facts of the present case bring it within the rule. We have already considered examples of this with reference to statutory interpretation. A statute may lay down a clear rule concerning driving without insurance, but the case before the court may raise the question whether what this defendant did—steering a car on tow—counts as driving within the rule. This type of uncertainty can arise equally well with common law rules. The common law provides for instance that if a wild animal escapes and does damage, then the person in control of the animal is liable. The case of *M'Quaker* v. *Goddard* (*s*) however posed the problem whether a camel qualified as a wild animal for the purposes of the rule; *Behrens* v. *Bertram Mills Circus Ltd.* (*t*) turned partly on whether a trained circus elephant came within the rule. In such

(*r*) (1868) L.R. 3 H.L. 330.
(*s*) [1940] 1 K.B. 687.
(*t*) [1957] 2 Q.B. 1.

cases the court's problem is to establish the second premise, to decide whether this particular fact situation is of type A.

Since courts cannot use deductive reasoning to solve such problems, what sort of reasoning do they use? In other words how does a judge arrive at a decision in such a case? The fact that his reasoning is not purely deductive may tempt us to imagine it to be inductive. Inductive reasoning takes the following form:

1. $A_1\ A_2\ A_3 \ldots A_n$ is B,

2. Therefore all A is B,

(Or 2A. Therefore this $A-A_{n+1}-$ is B).

It is a process, then, whereby we argue from the observed to the unobserved, concluding that some quality found to reside in all observed members of a class must therefore reside in all members of it. Unlike deduction it may lead to erroneous conclusions, for later evidence may show that the quality does not extend to the unobserved members; in other words the generalisation may be wrong.

It is true that judicial reasoning may to some extent resemble induction. In *Rylands* v. *Fletcher* for example we can see the court starting from the fact that there were rules regarding the escape of cattle and various other things and ending by positing a rule for all things whose escape is liable to cause damage. Still this is hardly a true case of induction. A true case of inductive reasoning would exist if for example a non-lawyer, having discovered a rule about the escape of cattle, a rule for fire, and rules for various other things, went on to infer that in English law there is a strict rule regarding all things whose escape might cause harm. But notice here that further evidence about English law might show his conclusion to be wrong. In a case like *Rylands* v. *Fletcher* itself, however, there is no such possibility that further evidence may show the rule developed to be wrong; for here the court was not *inferring* that English law contains such a rule; it was *deciding* that English law *shall* contain this rule.

What then does a judge look at in order to decide a case not already covered by an existing rule of law? *Ex hypothesi* there is no binding authority to provide him with a clear solution. Nevertheless one of the most important factors to be taken into account will be the existing law. For judicial lawmaking differs from legislation in that whereas the latter starts with a clean slate and can

frame whatever rules policy suggests, the former works within the framework of existing law, which, though not dictating the answer, may nonetheless limit the range of answers which the judge can give.

Existing law will be relevant to the decision in various different ways. In deciding a novel point, a court may find it helpful to consider persuasive authorities in the shape of foreign decisions which may show how other jurisdictions have solved the problem in question. More important perhaps are decisions of the domestic law on closely related topics. *Donoghue* v. *Stevenson* (*u*) had decided that a manufacturer owes a duty of care to the ultimate consumer. In *Malfroot* v. *Noxal* (*v*) the question was whether a repairer owed a duty of care to third parties who might be injured as a result of negligent repair work. Clearly the two cases are different, yet close enough for the court to proceed by analogy to apply the rule concerning manufacturer's liability to the case of repairers. In this way, the courts by framing similar rules for analogous cases, promote consistency and uniformity in law and develop in fact broad principles which serve as the underlying basis of the various particular rules.

Arriving at a decision by analogy with existing rules provides a fairly obvious example of the way in which existing law is taken into account. There is, however, another way in which existing law may be relevant to the decision. A decision in one branch of law is not an isolated fact but is something that may have repercussions on other parts of the law. Consideration for example of the problem whether a party can be estopped by a promise as opposed to a statement of fact will raise questions beyond the boundaries of estoppel itself, because of the effect that the acceptance of estoppel in such cases would have on the doctrine of consideration in contract. The question whether there should be liability for negligent statements cannot be divorced entirely from a consideration of the law of deceit, since the existence of liability in negligence may entirely obviate the necessity of a tort of deceit. A decision in a civil action for conversion may have fundamental effects on the law of larceny.

This is an aspect of the role played in law by legal concepts. For practical and theoretical purposes it proves useful to divide

(*u*) [1932] A.C. 598. (*v*) (1935) 51 T.L.R. 551.

and sub-divide the law into various branches, such as the law of property, the criminal law and so on. These, however, far from being entirely unrelated, are connected at various points by concepts, which occur and figure in several of the different branches. Thus the concept of " possession " plays an important role in the law of property, in landlord and tenant, in the law of larceny and in the torts of trespass, detinue and conversion. Indeed it is by using and developing such concepts that lawyers can analyse and organise what would otherwise be a bewildering mass of disparate rules and regulations into some sort of rational system and order. Not unnaturally then, if a case with a novel point involves a certain legal concept, the judge may consider the meaning of this concept and its application in various fields of law.

But, as Professor Lloyd has pointed out, concepts are good servants but bad masters (*w*). Out of rules, originally designed to fit social needs, have grown concepts, which then proceed to take on a life of their own to the detriment of legal development. The resulting " jurisprudence of concepts " produces a slot-machine approach to law whereby new points posing questions of social policy are decided, not by reference to the underlying social situation, but by reference to the meaning and definition of the legal concepts involved. For example, the question whether a member should be able to sue his trade union involved important social questions concerning the relations between a member and his union. What would be the effect of any decision on this question on labour relations and on the trade union movement? What does justice require in terms of fairness to and protection of the individual? Lawyers, however, are inclined to approach the problem from a conceptual standpoint arguing that since in law an unincorporated association is merely a group of individuals all parties to a contract, then to allow a member to sue his union would be tantamount to allowing a man to sue himself. This formalistic *a priori* approach confines the law in a strait-jacket instead of permitting it to expand to meet the new needs and requirements of changing society.

Courts, then, should look in such cases, not only at existing law and legal concepts, but at the broader underlying issues of policy; and in fact judges can be seen paying increasing attention

(*w*) Lloyd, *The Idea of Law*, 293 *et seq.*

to such matters as the possible effect of a decision one way or the other on commerce, on industry, on labour relations, on society in general. When considering whether or not to impose liability for negligent statements, the courts have discussed the effect of such an imposition on professions whose business consists largely in giving advice. When faced with such problems as whether a company largely controlled by enemy shareholders has enemy character, courts have been less concerned with the legal doctrine that a company is a separate person from its members than with the practical results of allowing such companies to continue their operations in time of war (*x*). But while this more empirical approach is to be welcomed, two comments may be made. First, judicial inquiry into the general effects of a proposed decision tends itself to be of a fairly speculative nature; unlike the Supreme Court of the United States, which will consider factual evidence on such matters, English courts confine themselves to drawing conclusions from common sense and their own knowledge about such matters. Secondly, it should not be forgotten that one social need may be the need for a reasonably logical, *i.e.*, consistent system of law. Too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions; and while it is true that " the life of the law has not been logic, it has been experience " (*y*) and that we should not wish it otherwise, nevertheless we should remember that " no system of law can be workable if it has not got logic at the root of it " (*z*).

Cases involving novel points of law, then, cases of first impression, have to be decided by reference to several things. The judge must look at existing law on related topics, at the practical social results of any decision he makes, and at the requirements of fairness and justice. Sometimes these will all point to the same conclusion. At others each will pull in a different direction; and here the judge can only weigh one factor against another and decide between them. The rationality of the judicial process in such cases consists in fact of explicitly and consciously weighing the pros and cons in order to arrive at a conclusion.

(*x*) See *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (*Gt. Britain*) *Ltd.* [1916] 2 A.C. 307.
(*y*) Holmes, *The Common Law*, 1.
(*z*) Per Lord Devlin in *Hedley Byrne & Co.* v. *Heller* [1964] A.C. 465 at 516.

CHAPTER 6

CUSTOM

31. The early importance of customary law

Although custom is an important source of law in early times (*a*), its importance continuously diminishes as the legal system grows. As an instrument of the development of English law in particular, it has now almost ceased to operate, partly because it has to a large extent been superseded by legislation and precedent, and partly because of the stringent limitations imposed by law upon its law-creating efficacy. In earlier times it was otherwise. It was long the received theory of English law that whatever was not the product of legislation had its source in custom. Law was either the written statute law, or the unwritten, common, or customary law. Judicial precedent was not conceived as being itself a legal source of law at all, for it was held to operate only as evidence of those customs from which the common law proceeded. *Lex et consuetudo Angliæ* was the familiar title of our legal system. The common law of the realm and the common custom of the realm were synonymous expressions. It may be confidently assumed, indeed, that this doctrine did not at any time express the substantial truth of the matter, and that from the earliest period of English legal history the common law was in fact to a very large extent created and imposed by the decisions of the royal courts of justice, rather than received by these courts from the established customs of the community. However this may be, the identification of the common law with customary law remained the accepted doctrine long after it had

(*a*) See Vinogradoff, "The Problem of Customary Law," *Collected Papers*, II. 410; Pollock, note "B" to his edition of Maine's *Ancient Law*; Allen, *Law in the Making* (7th ed.) 67 *et seq.*; W. G. Sumner, *Folkways* (1906); E. Westermarck, *Origin and Development of Moral Ideas* (1907); and particularly A. S. Diamond, *The Evolution of Law and Order* (1951). Custom is still of great importance in India. See S. Roy, *Customs and Customary Law in British India* (1911) 22 *et seq.*; L. J. Robertson, "The Judicial Recognition of Customs in India" (1922) 4 J.C.L. (3rd ser.) 218. See also A. Vandenbosch, "Customary Law in the Dutch East Indies" (1932) 14 J.C.L. (3rd ser.) 80. For the importance of custom (legal and non-legal) in modern society, see Ehrlich, *Fundamental Principles of the Sociology of Law* (tr. Moll, 1936).

ceased to retain any semblance of truth. For some centuries past the true sources of the bulk of our law have been statute and precedent, not statute and custom, and the common law is essentially judge-made law, not customary law (*b*). Yet we find Hale in the seventeenth century, and Blackstone in the eighteenth, laying down the older doctrine as still valid (*bb*). In the words of Blackstone, "The municipal law of England . . . may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law. The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom; and likewise those particular laws that are by custom observed only in certain courts and jurisdictions". Such language is an echo of the past, not an accurate account of the facts of the present day. Nevertheless, even now custom has not wholly lost its law-creating efficacy. It is still to be accounted one of the legal sources of the law of England, along with legislation and precedent, but far below them in importance (*c*).

32. Reasons for the reception of customary law

There is more than one reason for thus attributing to custom the force of law. In the first place, custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. The fact that any rule has already the sanction of custom, raises a presumption that it deserves to obtain the

(*b*) This does not mean that the medieval common law was the result of a system of precedent. It was, however, the result of the practice of the courts—*mos iudicium*. See above, p. 163, n. (*b*).

(*bb*) Hale, *History of the Common Law*, ch. II.; Blackstone, *Commentaries*, I. 63.

(*c*) This relation between law and custom is not confined to English jurisprudence, but it is a familiar feature of legal systems in general, more especially in the earlier stages of their development. In Roman law we find the same relation recognised between *mos* and *jus*, *lex* and *consuetudo*. In Justinian's Institutes it is said (I. 2. 9): Ex non scripto jus venit, quod usus comprobavit; nam diuturni mores, consensu utentium comprobati, legem imitantur. Similarly in the Digest (I. 3. 32): Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus quod dicitur moribus constitutum. So in D. 23. 2. 8.: Hoc jus moribus non legibus introductum est. So Gaius at the commencement of his Institutes: Omnes populi qui legibus et moribus reguntur.

sanction of law also. *Via trita via tuta.* Speaking generally, it is well that courts of justice, in seeking for those rules of right which it is their duty to administer, should be content to accept those which have already in their favour the prestige and authority of long acceptance, rather than attempt the more dangerous task of fashioning a set of rules for themselves by the light of nature. The national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign.

Custom is to society what law is to the state. Each is the expression and realisation, to the measure of men's insight and ability, of the principles of right and justice. The law embodies those principles as they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the state, but by the public opinion of the society at large. Nothing, therefore, is more natural than that, when the state begins to evolve out of the society, the law of the state should in respect of its material contents be in great part modelled upon, and coincident with, the customs of the society. When the state takes up its function of administering justice, it accepts as valid the rules of right already accepted by the society of which it is itself a product, and it finds those principles already realised in the customs of the realm. In this connection it must be remembered that at first the state is so weak that its judicial authority depends partly, at least, on voluntary submission, whilst custom is so closely linked with religion and taboo that any departure from it is almost unthinkable. This influence of custom upon law, however, is characteristic rather of the beginnings of the legal system than of its mature growth. When the state has grown to its full strength and stature, it acquires more self-confidence, and seeks to conform national usage to the law, rather than the law to national usage. Its ambition is then to be the source not merely of the form, but of the matter of the law also. But in earlier times it contents itself with conferring the form and nature of law upon the material contents supplied to it by custom.

A second ground of the law-creative efficacy of custom is to be found in the fact that the existence of an established usage is the basis of a rational expectation of its continuance

in the future. Justice demands that, unless there is good reason to the contrary, men's rational expectations shall, so far as possible, be fulfilled rather than frustrated. Even if customs are not ideally just and reasonable, even if it can be shown that the national conscience has gone astray in establishing them, even if better rules might be formulated and enforced by the wisdom of the judicature, it may yet be wise to accept them as they are, rather than to disappoint the expectations which are based upon established practice.

Considerations such as these are sufficient, even in modern times and in fully developed legal systems, to induce the legislature on due occasion to give express statutory authority to bodies of national or local custom. Thus in California the customs developed on the gold-fields for the regulation of the mining industry were given the authority of law by the legislature (*d*). Similarly in New Zealand, when English government and English law were introduced on the founding of the Colony, the legislature thought fit that the aboriginal Maoris should to a large extent continue to live by their own tribal customs, and to this extent those customs were given by statute, and still retain, the authority of law. By the Native Rights Act, 1865, it was enacted that " every title to or interest in land over which the native title has not been extinguished, shall be determined according to the ancient custom and usage of the Maori people, so far as the same can be ascertained ".

33. Kinds of custom

All custom which has the force of law is of two kinds, which are essentially distinct in their mode of operation. The first kind consists of custom which is operative *per se* as a binding rule of law, independently of any agreement on the part of those subject to it. The second kind consists of custom which operates only indirectly through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties.

These two kinds of customs may be conveniently distinguished as legal and conventional. A legal custom is one whose legal authority is absolute—one which in itself and *proprio vigore*

(*d*) Gray, *The Nature and Sources of the Law* (2nd ed. 1921) 296.

possesses the force of law. A conventional custom is one whose authority is conditional on its acceptance and incorporation in agreements between the parties to be bound by it.

In the language of English law the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as usage. The distinction so drawn, however, between the terms custom and usage, which in popular speech are synonymous, is by no means universally observed even by lawyers. In any talk of custom, therefore, it is always carefully to be noticed whether the matter referred to is legal custom or conventional custom—custom *stricto sensu* or usage. Occasional failure to appreciate and bear in mind the essential nature of this distinction has been responsible for a good deal that is obscure and difficult in the history and theory of customary law.

Legal custom is itself of two kinds, being either local custom, prevalent and having the force of law in a particular locality only, or the general custom of the realm, in force as law throughout all England. We shall consider in their order, therefore, the three classes of custom, namely (1) conventional custom or usage, (2) local custom, and (3) the general custom of the realm.

35. Conventional custom

A usage or conventional custom is, as has been indicated, an established practice which is legally binding, not because of any legal authority independently possessed by it, but because it has been expressly or impliedly incorporated in a contract between the parties concerned. Where two men enter into an agreement, they do not commonly set out in words, whether oral or written, the whole terms of that agreement. Most agreements consist of two parts, namely, the terms expressed and the terms implied. The larger part of most contracts is implied rather than expressed. The expressed terms are merely the framework or skeleton which has to be filled up and transformed into a complete and workable contract by the addition of further terms supplied by implication. It is for the law to supply those implied terms in supplement of the terms expressed by the parties, and a considerable portion of the legal system consists of rules for this purpose—rules, that is to say, for the completion and interpretation of contracts imperfectly

and partially expressed by the parties. On a sale of goods, for example, the only expressed terms may be that A will sell his black horse to B for £20; but the additional implied terms supplied by the law take up a considerable portion of the statute known as the Sale of Goods Act. The law, in thus supplementing the expressed intentions of the parties, endeavours to ascertain and conform to their presumed intentions—the intentions which they presumably would have expressed in their contract had the matter been called to their attention and expressly dealt with. This presumed intention is gathered from two chief sources—first, from that which is reasonable, and second, from that which is customary. We are here concerned with the latter consideration only. The law presumes that where persons enter into a contract in any matter in respect of which there exists some established usage, they intend to contract with reference to that usage, and to incorporate it as a term of the contract in the absence of any expressed indication of a contrary intention. He who makes a contract in any particular trade, or in any particular market, is presumed to intend to contract in accordance with the established usages of that trade or market, and he is bound by those usages accordingly as part of his contract (*dd*). Similarly, where there exist in any locality established usages of agriculture as between landlord and tenant, he who grants or takes a lease of land in that locality is presumed to have accepted these usages as impliedly incorporated in the lease. *In contractibus tacite veniunt ea quae sunt moris et consuetudinis* (*e*). This legal presumption of the conventional acceptance and incorporation of customary rules has resulted in the development of a considerable body of customary law determining the meaning and effect of contracts. The bulk of the law as to bills of exchange and other negotiable instruments, bills of lading and marine insurance, has originated in this manner as customary law. Law so derived from the conventional custom of merchants is known as the law merchant.

Law so originating passes normally through three successive historical stages. In the first stage, the existence of the usage

(*dd*) But as a general rule both parties must belong to the trade or business before the implication will be made: *Eastern Counties Building Soc.* v. *Russell* [1947] 1 All E.R. 500 at 504, affd. [1947] 2 All E.R. 734 (C.A.).

(*e*) Pothier, *Obligations*, § 95.

is a question of fact to be determined by the jury upon evidence in the particular case in which it arises. In the old days, for example, a plaintiff suing on a bill of exchange pleaded that the bill had been drawn and accepted in accordance with the custom of merchants—*secundum consuetudinem mercatorium*—and set out the nature and meaning of that custom, and at the trial mercantile witnesses were called to prove it (*f*). The second stage of development is reached when the courts take judicial notice of the custom in question, so that it no longer requires to be specially pleaded or proved in the particular case. It has already been sufficiently proved in previous cases, and has received the authority of the precedents established by those earlier cases. The law derived from that custom has accordingly passed out of its earlier stage as customary law pure and simple, and has become case law, having its immediate source in precedent, though its ulterior and original source was custom. "When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognise" (*g*). The third and last stage of historical development which is or may be reached, is that in which the law which has thus its original source in conventional custom, and its secondary source in precedent, is embodied in a statute and so assumes its ultimate form as enacted law. The law of bills of exchange, and the law of marine insurance, which were both in their origin part of the customary law merchant, have now completed this normal course of legal development, and have become *jus scriptum* embodied in the Bills of Exchange Act and the Marine Insurance Act.

It remains to consider the legal requirements which must be fulfilled by a usage or conventional custom before it can thus serve as a source of law and of legal rights and obligations. In the first place, what must be its duration? Must it be an ancient immemorial custom, or is recent custom equally effective? When we come later to deal with legal as opposed to conventional custom, we shall see that the law imposes on the former the requirement of immemorial antiquity. A legal custom—a custom *stricto sensu*—must have endured from time

(*f*) Holdsworth, *H.E.L.*, V. 144, VIII. 159 *et seq.*
(*g*) *Brandao* v. *Barnett* (1846) 12 Cl. & F. 787, 805, *per* Lord Campbell.

whereof there is no memory. In the case of conventional custom, however, there is no such requirement. No specified duration is legally necessary, nor is any distinction drawn between ancient and modern custom. All that is necessary is that in point of duration the custom shall be so well established, and therefore so notorious, as to render reasonable the legal presumption that it is impliedly incorporated in agreements made in respect of the subject-matter (*h*). In practice, however, it is hard to establish the existence of a new conventional custom that is universally recognised as binding in the particular trade or locality. The difficulty relates to the evidence required to be called. "The witness", says one judge, "who seeks to prove the custom will be asked to cite instances in which a party has submitted willy-nilly to what is said to be the customary mode of performance or the customary claim, thereby recognising the binding force of the custom. If he cites what he thinks is an instance, he will be asked for the terms of the relevant contract, which he rarely knows; for unless it can be shown that a party has submitted to something beyond the express or implied requirements of his contract, he cannot be said to have paid tribute to the custom. Universality is a stiff test too; one witness of repute who says he has never recognised the custom may be fatal" (*i*).

What must be the extent of a conventional custom? Must it be a general custom of the realm, or is it enough that it should be local merely? We shall see later that a legal custom may be either local or general. So, also, may a conventional custom. It may prevail throughout the realm (and even beyond the realm), as in the case of mercantile customs as to negotiable instruments, or it may be limited to particular localities, as in the case of local usages of agriculture and tenancy. Both classes are sources of law and rights within the scope of their application. Local usages, however, cannot, like general usages, become part of the general or common law of the land.

(*h*) Thus in the early case of *Noble* v. *Kennoway* (1780) 2 Douglas 510, where the usage of the fishing trade on the coasts of Newfoundland was implied by law as incorporated in and governing a contract of marine insurance, an objection based on the recent origin of the custom was overruled, and Lord Mansfield distinguished in this respect a conventional from a legal custom. "It is no matter if the usage has only been for a year . . . The point is not analogous to a question concerning a common law custom."

(*i*) Sir Patrick Devlin in (1951) 14 M.L.R. at 251; *cf. ibid.* 264–266.

How far can conventional custom operate as a source of law and rights in conflict with, and in derogation of, the general law of the land? The answer is that it may do so to the same extent as express agreement may, and no further. It operates, like express agreement, within the limits of the maxim *modus et conventio vincunt legem*. Certain parts of the law are absolute, and do not admit of being excluded or modified by the agreement of the parties interested; these parts are equally beyond the operation of conventional custom. Other parts of the law are operative only so far as they are not excluded or modified by agreement; and within these portions of the law conventional custom operates in the same manner as agreement. No rule can be established by a usage which could not be established by an express agreement to the same effect (*j*).

In one respect, however, the operation of usage seems to be more restricted than that of express agreement. When a general usage has once been received by judicial recognition into the body of the common law, so that it has now its immediate source in judicial precedent as a rule of case law, it appears that the law so constituted cannot be altered by the growth of any later usage in conflict with it. The case law of bills of exchange, for example, had its original source in the customs of merchants, but when once established it is permanent and does not alter with the growth of new and inconsistent usages. If any rule of law so established is to be excluded or modified in any particular case, it must be done by the express agreement of the parties, and not by reliance on any new usage which derogates from the law so constituted. The *consuetudo mercatoria* may make law, but it must for the future conform to the law when once so made (*k*).

(*j*) *Crouch* v. *Crédit Foncier* (1873) L.R. 8 Q.B. 374.

(*k*) *Edie* v. *East India Company* (1761), 2 Burr. 1216; *Goodwin* v. *Roberts* (1875) L.R. 10 Ex. 357: "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the Courts, have become by such adoption part of the common law. . . And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself." However, it is perhaps open to argument that the proposition is confined to customary rules that the parties could not affect by express agreement, and does not apply to conventional custom. See Chorley, "The Conflict of Law and Commerce" (1932) 48 L.Q.R. at 59–64.

35. Local custom

We proceed now to the consideration of legal custom as opposed to conventional custom—of custom in the stricter sense as opposed to usage. Such custom is that which is effective as a source of law and legal rights directly and *per se*, and not merely indirectly through the medium of agreement in the manner already explained.

Legal custom is itself of two kinds, being either local custom or the general custom of the realm. The former is that which prevails in some defined locality only, such as a borough or county, and constitutes a source of law for that place only (*l*). The latter is that which prevails throughout England, and constitutes one of the sources of the common law of the land. The term custom in its narrowest sense means local custom exclusively. The general custom of the realm is distinguished from custom in this sense as the common law itself. We shall deal in the first place with local custom, and thereafter with the general custom of the realm (*m*).

At the present day local customs consist for the most part of customary rights vested in the inhabitants of a particular place to the use for divers purposes of land held by others in private ownership (*n*).

In order that a local custom may be valid and operative

(*l*) *Fitch* v. *Rawling* (1795) 2 H.Bl. 393. See H. E. Salt, "The Local Ambit of a Custom", in *Cambridge Legal Essays* 279.

(*m*) The term custom, therefore, has three distinct meanings of various degrees of generality:

(a) As including both legal and conventional custom;

(b) As including legal custom only, conventional custom being distinguished as usage;

(c) As including only one kind of legal custom, namely local custom, as opposed to the general custom of the realm. Thus in Co. Litt. 110 b: "Consuetudo is one of the maine triangles of the lawes of England, these lawes being divided into common law, statute law, and custom."

(*n*) A custom, for example, for the inhabitants of a parish to enter on certain land for the purpose of dancing, games, and recreation, *Hall* v. *Nottingham* (1875) L.R. 1 Ex.D. 1; a custom for the inhabitants of a township to enter on certain land and take water from a spring there, *Race* v. *Ward* (1855) 24 L.J.Q.B. 153; a custom for fishermen in a parish to dry their nets on private land within the parish, *Mercer* v. *Denne* [1905] 2 Ch. 538. Customs of this class are closely analogous to prescriptive easements and profits à prendre vested in individual persons. Before 1926 there were special customs in some places relating to the descent of land (see Co. Litt. 110 b); but these were abolished by the Administration of Estates Act, 1925, s. 45 (1).

as a source of law, it must conform to certain requirements laid down by law. The chief of these are the following:—

1. *Reasonableness.* A custom must be reasonable (*o*). *Malus usus abolendus est.* The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility. It is not meant by this that the courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgment. This would be to deprive custom of all authority, either absolute or conditional. The true rule is, or should be, that a custom, in order to be deprived of legal efficacy, must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity (*p*). We have already seen how the authority of judicial precedents is, in general, similarly conditional rather than absolute; a precedent which is plainly and seriously unreasonable may be overruled instead of followed. We are told in the old books that a similar rule obtains in respect of the authority of Acts of Parliament themselves. It was once held to be good law, that an unreasonable Act of Parliament was void (*q*). This, indeed, is no longer so, for the law creating authority of Parliament is absolute. Certain forms of subordinate legislation, however, are still subject to the rule in question; an unreasonable by-law, for example, is as void and unauthoritative as an unreasonable custom or precedent.

2. *Conformity with statute law.* In the second place, a custom must not be contrary to an Act of Parliament. In the

(*o*) Co. Litt. 141 a; *The Case of Tanistry* (1608) Dav.Rep. 32; Blackstone, I. 77; *Walstanton Ltd.* v. *Newcastle-under-Lyme Corpn.* [1940] A.C. 860.

(*p*) It must be admitted, however, that the judges have not always behaved so generously towards customs as this mode of stating the rule would require. In *Johnson* v. *Clark* [1908] 1 Ch. 303, Parker J. went so far as to hold unreasonable a custom whereby a married woman could dispose of her realty without her separate examination and acknowledgment. It is worth noting that this "unreasonable" abolition of the separate examination and acknowledgment has since been effected by the legislature: Law of Property Act, 1925, s. 167. For a criticism of the requirements of "reasonableness" see Bentham, *Comment on the Commentaries* (ed. Everett, 1928) 227–230.

(*q*) *Supra*, § 21 n. (*d*).

words of Coke, "No custom or prescription can take away the force of an Act of Parliament" (*r*). By no length of desuetude can a statute become obsolete and inoperative in law, and by no length of contrary usage can its provisions be modified in the smallest particular. The common law will yield to immemorial local custom, but the enacted law stands for ever (*s*).

It must not be supposed that this rule is one of necessity, derived by logical inference from the nature of things. It is nothing more than a positive principle of the law of England, and a different rule was adopted by Roman law and by the various Continental systems derived from it (*t*). There the recognised maxim is *lex posterior derogat priori*. The latter rule prevails over the earlier, regardless of their respective origins. Legislation has no inherent superiority in this respect over custom. If the enacted law comes first, it can be repealed or modified by later custom; if the customary law is the earlier, it can be similarly dealt with by later enacted law. "If", says Savigny (*u*), "we consider customs and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may complete, modify, or repeal a statute; it may create a new rule, and substitute it for the statutory rule which it has abolished." So Windscheid (*a*): "The power of customary law is equal to that of statutory law. It may, therefore, not merely supplement, but also derogate from the existing law. And this is true, not merely of rules of customary law *inter se*, but also of the relations of customary to statute law" (*b*).

3. *Observance as of right.* The third requisite of the operation of a custom as a source of law is that it must have been observed as of right. This does not mean that the custom

(*r*) Co. Litt. 113 a.

(*s*) Blackstone, I. 76.

(*t*) Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur. D. I. 3. 32. 1. Considerable doubt, however, exists as to the true relation between custom and statute in Roman law, owing to a passage in the Code (C. 8. 53. 2.) which, if read literally, conflicts with the doctrine expressed in the Digest, and declares custom to be destitute of legal effect if contrary to statute law. The ingenuity of German jurists has suggested numerous solutions of the apparent inconsistency, but with no convincing result. See Savigny, *System*, Vol. I, Appendix II; Vangerow, *Pandekten* I, Sect. 16: Dernburg, *Pandekten* I, Sect. 28.

(*u*) *System*, Sect. 18.

(*a*) *Pandektenrecht*, Vol. I, Sect. 18.

(*b*) For the similar doctrine of Scottish law see Erskine, *Institutes*, I. 19.

must be acquiesced in as a matter of moral right. Merchet, for instance (a fine due to the lord by a tenant in villeinage for leave to give his daughter in marriage), was a well-established custom of many if not all manors, but was always regarded as odious, not only by the tenants, but also by the Church. What the rule means is that the custom must have been followed openly, without the necessity for recourse to force, and without the permission of those adversely affected by the custom being regarded as necessary. These requisites are expressed in the form of the rule that the user must be *nec vi nec clam nec precario*—not by force, nor by stealth, nor at will.

4. *Immemorial antiquity.* The fourth and last requirement of a legal custom relates to the length of time during which it has been established. Such custom, to have the force of law, must be immemorial. It must have existed for so long a time that, in the language of the law, "the memory of man runneth not to the contrary". Recent or modern custom is of no account. In the words of Littleton (*c*): "No custom is to be allowed, but such custom as hath been used by title of prescription, that is to say from time out of mind". This idea of immemorial custom was derived by the law of England from the canon law, and by the canon law from the civil law. Time immemorial means in the civil and canon law and in the systems derived therefrom, and originally meant in England also, time so remote that no living man can remember it or give evidence concerning it. Custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist (*d*). In the course of the development of English law, however, a singular change took place in the meaning of this expression. The limit of human memory ceased to be a question of fact and was determined by a curious rule of law which still remains in force. Time of legal memory became

(c) Co. Litt. 113 a.

(d) Both in English and foreign law, however, the time of memory was extended by the allowance of tradition within defined limits. A witness might testify not only to that which he had himself seen, but to that which he had been told by others who spoke of their own knowledge. D. 22. 3. 28. Bracton f. 373 a, 318 b. By French law time of memory was held to extend for one hundred years. Pothier, *De la Prescription*, sects. 278–288. For a further discussion of the history of the rule, see the 7th, 8th or 9th edition of this work, § 68.

distinguished from time of human memory. By an analogical extension of the rule of limitation imposed on actions for the recovery of land by the Statute of Westminster passed in the year 1275, it became an established legal principle that the time of memory reached back as far as the accession of Richard I in 1189, and no further. From that day to this the law has remained unaltered. The discordance between the memory of man as it is in fact, and as it is in law, has steadily grown with the lapse of years, so that at the present day the law of England imputes to living men a faculty of remembrance extending back for seven centuries (*e*).

The rule, therefore, that a custom is invalid unless immemorial means in practice this: that if he who disputes its validity can prove its non-existence at any time between the present day and the twelfth century, it will not receive legal recognition. Thus in the year 1872 a claim by custom to erect stalls for hiring servants at the statute sessions was defeated in the Court of King's Bench by showing that such sessions were first introduced by the Statute of Labourers in the reign of Edward III, and that the custom therefore could not be immemorial as having existed since the reign of Richard Cœur de Lion (*f*). It is not necessary, however, for the upholder of a custom to prove affirmatively that it has existed during the whole period of legal memory. If he can prove that it has existed for a substantial period, such as the time of actual human memory, this will be sufficient to raise a presumption of immemorial antiquity, which must be rebutted by him who disputes it (*g*).

(*e*) The statute of Westminster I, c. 39, imposed a limitation upon actions for the recovery of land. It provided that no such action should lie, unless the claimant or his predecessor in title had had possession of the land claimed at some time subsequent to the accession of Richard I. The original common law rule of limitation for such actions was no other than the rule as to time immemorial. At common law the claimant had to prove his title and his seisin by the testimony of living men; therefore he or his predecessors must have been in possession within time of human memory. The enactment in question was accordingly construed as laying down a statutory definition of the term time of memory, and this definition was accepted by the courts as valid in all departments of the law in which the idea of time immemorial was relevant. See Blackstone II. 31; Co. Litt. 113 a. The Statute of Quo Warranto, 18 Edw. I, stat. 2, recognised the possession of franchises from the accession of Richard I, as a good prescriptive title. See further Holdsworth, *H.E.L.* III. 166, VII 343–5.

(*f*) *Simpson* v. *Wells* (1872) L.R. 7 Q.B. 214.

(*g*) *R.* v. *Joliffe* (1823) 2 B. & C. 54: *Bryant* v. *Foot* (1868) L.R. 3 Q.B. 497; *Lawrence* v. *Hitch* (1868) L.R. 3 Q.B. 521; Allen, *op. cit.* 134.

It is not difficult to understand the motives which induced the law to impose this stringent limitation upon the efficacy of customs. It was designed in the interests of a uniform system of common law for the whole realm. Had all manner of recent customs been recognised as having the force of local law, the establishment and maintenance of a system of common law would have been rendered impossible. Customary laws and customary rights, infinitely various and divergent, would have grown up so luxuriantly as to have choked that uniform system of law and rights which it was the purpose of the royal courts of justice to establish and administer throughout the realm (*h*).

36. Custom and prescription

The relation between custom and prescription is such as to demand attention here, although the theory of the latter will receive further consideration in another place. Custom is long practice operating as a source of law; prescription is long practice operating as a source of rights. That all the lands in a certain borough have from time immemorial, on the death of an owner intestate, descended to his youngest son, is a custom, and is the source of a rule of special and customary law excluding in that borough the common law of primogeniture. But that John Styles, the owner of a certain farm, and all his predecessors in title, from time immemorial have used a way over the adjoining farm, is a prescription, and is the source of a prescriptive right of way vested in John Styles.

(*h*) For a discussion of these requirements for local custom see Allen, *Law in the Making*. (7th ed.) 129 *et seq*. Sir Carleton Allen seems to make light of the requirement of antiquity, saying that it is only one of "various modes of weighing the evidence for and against the existence of alleged customs". He adds: "A mere habit, practice, or fashion which has existed for a number of years nobody supposes to be *ipso facto* an obligatory custom: antiquity is the only reliable proof of resistance to the changing conditions of different ages" (p. 129). This remark, as applied to the extraordinary length of time demanded by English law, seems unconvincing. The learned author also seems unduly to belittle the requirement of reasonableness. Some of the cases on unreasonableness he prefers to regard as turning on a requirement that a custom should not be contrary to the "fundamental" rules of the common law. But the question what rules of the common law are "fundamental" is for the judge to decide, and in its practical working this latter requirement seems to be not a separate requirement but only a species of, or alternative statement of, the requirement of reasonableness. For replies to these criticisms see Allen, *op. cit.* 131, 133 and 614.

Regarded historically, the law of prescription is merely a branch of the law of custom. A prescription was originally conceived as a *personal* custom, that is to say, a custom limited to a particular person and his ancestors or predecessors in title. It was distinguished from a local custom, which was limited to an individual place, not to an individual person. Local and personal customs were classed as the two species of *particular* customs, and as together opposed to the general customs of the realm. Coke distinguishes as follows between custom (*i.e.*, local custom) and prescription (*i*): "In the common law, a prescription which is personal is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors. . . . And a custome, which is local, is alleged in no person, but layd within some mannor or other place."

Since prescription and custom were thus regarded as two species of the same thing, we find, as might be expected, that they are originally governed by essentially similar rules of law. The requisites of a valid prescription were in essence the same as those of a valid custom. Both must be reasonable, both must be immemorial, both must be consistent with statute law, and so on. It was only by a process of gradual differentiation, and by the later recognition of other forms of prescription not known to the early law, that the difference between the creation of customary law and the creation of prescriptive rights has been brought clearly into view. In the case of custom, for example, the old rule as to time immemorial still subsists, but in the case of prescription it has been superseded to some extent by the fiction of lost modern grant (*k*) and to a much greater extent by the statutory rules contained in that most unfortunate specimen of legislative skill, the Prescription Act. A prescriptive right to light, for instance, is now finally acquired by enjoyment for twenty years. User during this period is now an absolute title, instead of, as at common law, merely evidence of user during time of memory. Prescription at common law is, however, still possible if the statutory rules are of no assistance.

(*i*) Co. Litt. 113 b.

(*k*) Holdsworth, *H.E.L.* VII. 345 *et seq.*: *Hulbert* v. *Dale* [1909] 2 Ch. 570; *Poley's Charity Trustees* v. *Dudley* [1910] 1 K.B. 317.

37. The general custom of the realm

As already indicated legal custom is of two kinds, being either local custom in particular portions of the realm, or general custom prevailing through the realm at large. The first of these has now been sufficiently considered, and it remains to deal with the second. It has been already said, but must be here repeated, that though in modern times the general law of England has its source in legislation and precedent and consists accordingly of enacted law and case law, the earlier doctrine was that the true sources were statutes and the general customs of the realm, and that the law of England, save so far as statutory, was in its true nature customary. English law, like Roman law, was conceived as being *legibus et moribus constitutum*. This was set forth by Blackstone as late as the latter part of the eighteenth century as the authentic doctrine of our law. He says (*l*): "The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom". Such language, although no longer true in substance, was a correct expression of the established tradition of English law. In the royal writs by which from the earliest days actions were commenced in the King's courts, the wrongs for which the plaintiff sought redress were alleged to have been committed *contra legem et consuetudinem regni nostri et contra pacem nostram* (*m*). In the law reports of the reign of Henry IV we find it said (*n*): "The common law of the realm is the common custom of the realm". So in the reign of Edward IV (*o*): "A custom which runs through the whole land is the common law". So the King's judges were sworn to execute justice "according to the law and custom of England" (*p*). So in much later days we find the same doctrine judicially recognised. "Such a custom", says Tindal, C.J. (*q*), "existing beyond the time of legal memory

(*l*) *Commentaries*, I. 63.

(*m*) See, for example, in Fitzherbert's *Natura Brevium*, 90, the writ for a wrongful distress in the king's highway: "Quare bona et catalla ipsius A in regia via cepit . . . contra legem et consuetudinem regni nostri et contra pacem nostram".

(*n*) Y.B. 2 H. IV. 18.

(*o*) Y.B. 8 Edw. IV. 18, 19. *Blundell* v. *Catterall* (1821) 5 B. & Ald. 297.

(*p*) 12 Co.Rep. 64.

(*q*) *Veley* v. *Burder* (1841) 12 Ad. & El. 265, 302.

and extending over the whole realm, is no other than the common law of England." So it is said by Best, J. (r): "The practice of a particular place is called a custom. A general immemorial practice through the realm is the common law."

No doubt this traditional doctrine did in its origin contain a substantial measure of the truth. Doubtless when, in the earliest days of our law, the King's courts set out about their business of enforcing the King's peace and the King's justice throughout his realm of England, the legal system developed by those courts was largely modelled upon the customs which they found already established there. But doubtless also much of the law so formulated had an entirely different source. While professing to declare and enforce the common custom of the realm, those courts must even in the earliest days have imposed on the realm much law which had in truth no warrant in national usage, but was derived from the Civil or Canon Law, or natural reason, or some other *fons juris* which commended itself to the royal judges. And this divergence between the early tradition of English law as *moribus constitutum* and the actual truth of the matter has widened from year to year, until that tradition has no longer any substantial conformity with fact. The common law of England has long since ceased to be customary law and become a body of case law instead.

This conclusion leads us to the consideration of a question of some importance and difficulty. We have seen that a legal custom must, if merely local, be of immemorial antiquity. We have also seen that a conventional custom or usage is not subject to any such requirement, and that modern usages are effective as creating law through the medium of contracts in which they are impliedly incorporated. What shall be said in this respect of the general customs of the realm? In order to operate as legal custom, giving rise to law *proprio vigore* and not merely through the medium of agreement, must such a general custom be immemorial, or is a modern or recent custom equally effective to this end?

On this question there is a direct conflict of judicial decision. The particular point in issue was whether the modern custom

(r) *Blundell* v. *Catterall* (1821) 5 B. & Ald. 268, 279.

of merchants could transform bonds and debentures expressed to be payable to bearer into negotiable instruments, contrary to the common law. A negotiable instrument, of which bills of exchange, promissory notes, and cheques are the most important instances, means a security for money which is transferable by delivery so as to confer upon a holder for value in good faith an unimpeachable title, notwithstanding any defect in the title of the last holder from whom he received it. An instrument which is so negotiable conflicts with the common law in two respects. In the first place, a debt is not at common law transferable at all. In the second place, at common law the transferee of property cannot obtain, save in special cases such as the transfer of current coin, any better title than that possessed by the transferor. He who acquires goods from a thief, even for value and in good faith, cannot hold them as against the true owner. Notwithstanding these rules of the common law, it became recognised in the seventeenth century that bills of exchange were negotiable by virtue of the custom of merchants. In the year 1873, in the case of *Crouch* v. *Crédit Foncier of England* (*s*), the question arose in the Court of Queen's Bench whether by recent mercantile custom the same quality of negotiability could be conferred on debentures payable to bearer. It was held by a court of four judges, including Blackburn, J., that this was impossible—that a custom, to produce such an effect, must be an ancient immemorial custom of the realm—and that recent mercantile custom could only operate as a conventional usage, and therefore could not make an instrument negotiable in defiance of the common law. The judgment of the court contains the following passage:

"Incidents which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the

(*s*) L.R. 8 Q.B. 374.

ancient law merchant, which forms part of the law, and of which the courts take notice. Nor, if the ancient law merchant annexes the incident, can any modern usage take it away. . . . It is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though the transferee took it *bona fide* and for value. As these stipulations if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual."

In the year 1875, in the case of *Goodwin* v. *Robarts* (*t*), the contrary conclusion was reached by the Court of Exchequer Chamber. Cockburn, C.J., delivering the judgment of the court, speaks as follows after referring to the argument that modern custom cannot make an instrument negotiable:

" Having given the fullest consideration to this argument we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing

(*t*) L.R. 10 Ex. 33.

generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it."

In view of this striking conflict of judicial opinion, what conclusion is to be drawn on this important question as to the operation of modern custom as a source of law? The conclusion here suggested as correct is that, on the general principle (leaving aside for the time being the particular case of negotiable instruments), the reasoning of Blackburn, J., and the Court of Queen's Bench in the earlier case of *Crouch* v. *Crédit Foncier of England* is logically unanswerable. The only custom which can operate as a legal custom creating law *proprio vigore* in derogation of the common law, is ancient immemorial custom. It is only *consuetudo praescripta* which can in this manner derogate from the *jus commune*. Modern usage operates only as conventional custom, and therefore only through the medium of terms implied in a contract between the parties concerned. In strict logic, therefore, modern custom, as pointed out in *Crouch* v. *Crédit Foncier*, cannot establish any rule which the parties to a contract could not establish as conventional law between themselves. It cannot, therefore, logically be regarded as operating *inter alios* so as to make an instrument negotiable in violation of the principles of the common law. To hold, in opposition to this reasoning, that the modern custom of merchants or of any other class of the community possesses any general authority to derogate from the common law, except so far as express agreement may derogate from it, would be to establish a far-reaching and revolutionary principle of unknown extent and consequence, for which there is no sufficient justification in principle or authority, and which would be inconsistent with the permanence and uniformity of the established law of the land. The very same considerations of public interest which induced our early law to impose upon local custom the requirement of immemorial antiquity are applicable with equal force to the general customs of the realm. The public interest requires that modern custom shall conform to the law, and not that the law shall conform automatically to newly established customs.

A logical application of this general principle would necessitate the conclusion reached in *Crouch* v. *Crédit Foncier* that modern custom was powerless to make instruments negotiable. The law, however, is not always logical. It is often drawn from the straight course by accidents of historical development. There can be little doubt that, in the special case of negotiable instruments, the authority of the Exchequer Chamber in *Goodwin* v. *Robarts* will prevail over that of the Queen's Bench in the earlier case, and in fact it has been followed in two later cases (*u*). Negotiability by modern mercantile usage obtained recognition in the seventeenth century in the case of bills of exchange by an anomalous and illogical application of the doctrine of conventional custom, and it is in all probability too late now to question the application of the rule so recognised to all other instruments payable to bearer by the custom of merchants. Almost all the *lex mercatoria* which has been derived from mercantile usage was derived by a correct and logical application of the general principle of conventional custom as already explained. For those rules were for the most part such as might have been established by express agreement, and therefore were equally within the operation of usage. Here and there, however, by an illogical and anomalous extension, the courts allowed, as derived from conventional custom, certain rules which in strictness could only be derived from that immemorial custom which operates *proprio vigore*. One of these cases is the recognition of the rule that the delivery of an instrument can operate as an assignment of the debt represented thereby, in breach of the rule of common law that debts are not assignable. Had the true limits of the operation of conventional custom or usage as formulated in *Crouch* v. *Crédit Foncier* been strictly adhered to by the courts of the seventeenth century, bills of exchange would not have been recognised as assignable at law. The courts would have maintained the dissentient doctrine of Holt, C.J., that Lombard Street could not to this extent give laws to Westminster Hall (*a*). After much hesitation and conflict of opinion, however, mercantile

(*u*) *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q.B. 658; *Edelstein* v. *Schuler* [1902] 2 K.B. 144.
(*a*) 6 Mod. 29.

custom was ultimately recognised as operative for this purpose. Finally, in *Miller* v. *Race* (*b*), in the year 1758, the courts recognised that instruments so transferable by custom were negotiable in the full sense that the transferee acquired a title independent of the title of the transferor. This rule was an analogical extension of the common law rule as to the title to coin of the realm. Bills of exchange and bank notes were recognised as equivalent to coin for this purpose. The rule as to coin was extended to all securities for money which by mercantile usage passed from hand to hand as if they were money. These rules, though anomalous, and though received by an illogical application of the doctrine of commercial usage, must nevertheless be now accepted as an authentic part of the common law. In all probability the law is that all securities for money which by mercantile usage are transferable by delivery, are in law negotiable instruments. But the allowance of this exceptional and anomalous rule, as now established by authoritative precedent, does not involve the allowance of the general doctrine, repudiated by *Crouch* v. *Crédit Foncier*, that modern mercantile usage has any general authority whereby it can add to or derogate from the common law in matters in which express agreement is not similarly competent (*c*).

Accepting, therefore, as true the proposition that the general custom of the realm must, like local custom, be of immemorial antiquity in order to constitute legal custom having in itself the force of law, it follows that general custom is no longer at the present day a living and operative source of English law. It may be taken as certain that all of the general and immemorial customs of the realm have long since received judicial notice and application by the courts of law, and have therefore been transformed into case law which has its immediate source in precedent. The ancient doctrine that the common law of the realm consists of the common custom of the realm (which was

(*b*) 1 Burr. 452.

(*c*) It is sometimes argued that *Goodwin* v. *Roberts* and the cases following it can be justified as cases of conventional custom. This is not so. *Goodwin* v. *Roberts* recognises recent mercantile custom as conferring rights on someone who is no party to the original contract. Hence it cannot be an example of conventional custom. See further Chorley, "The Conflict of Law and Commerce" (1932) 48 L.Q.R. at 52–55.

never at best more than an approximation to the truth), has now been transformed into the sounder doctrine that the common law of the realm consists of the law which has been declared and created by the reported decisions of the superior courts of justice.

BOOK 3

LEGAL CONCEPTS

CHAPTER 7

LEGAL RIGHTS

38. Wrongs

We have seen that the law consists of certain types of rules regulating human conduct and that the administration of justice is concerned with enforcing the rights and duties created by such rules. The conception of a right is accordingly one of fundamental significance in legal theory, and the purpose of this chapter is to analyse it, and to distinguish its various applications. Before attempting to define a right, however, it is necessary to define two other terms which are closely connected with it, namely, wrong and duty.

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

Wrongs or injuries are divisible for our present purpose into two kinds, being either moral or legal. A moral or natural wrong is an act which is morally or naturally wrong, being contrary to the rule of natural justice. A legal wrong is an act which is legally wrong, being contrary to the rule of legal justice and a violation of the law. It is an act which is authoritatively determined to be wrong by a rule of law, and is therefore treated as a wrong in and for the purposes of the administration of justice by the state. It may or may not be a moral wrong, and conversely a moral wrong may or may not be a wrong in law. Natural and legal wrongs, like natural and legal justice, form intersecting circles, this discordance between law and fact being partly intentional and partly the result of imperfect historical development.

In all ordinary cases the legal recognition of an act as a wrong involves the suppression or punishment of it by the physical force of the state, this being the essential purpose for which the judicial action of the state is ordained. We shall see

later, however, that such forcible constraint is not an invariable or essential incident, and that there are other possible forms of effective legal recognition. The essence of a legal wrong consists in its recognition as wrong by the law, not in the resulting suppression or punishment of it. A legal wrong is a violation of *justice according to law*.

39. Duties

A duty is roughly speaking an act which one ought to do, an act the opposite of which would be a wrong. The duty and the act, however, are not strictly identical. We have duties, may be under a duty, can be in breach of a duty. We cannot have acts, be under, or in breach of, acts. To ascribe a duty to a man is to claim that he ought to perform a certain act.

Yet not all the acts which a man ought to do constitute duties (*a*). His duties he owes to others by virtue of his position or station. The servant has a duty (*debitum*) to serve his master, the child to obey his parent and so on. Moreover a duty consists in positive acts, not in mere abstaining from acting: a duty not to do something, except in so far as this is a manner of describing a duty to do something else—a duty not to reveal something is a negative way of describing a positive duty to keep it secret—is a duty of a rare and unusual sort.

With duties we may contrast obligations. These a man has through having taken them upon himself of his own choosing. The typical example is the obligation that results from making a promise.

But there may be many other things which a man ought to do, but which fit into neither of these categories. Many dictates of common morality, such as that one should not kill or steal, hardly constitute duties or obligations in the strict sense. Lawyers, however, tend to speak loosely of anything which one ought, or ought not, to do as a duty, and it is in this wide sense that we shall use the term.

Duties, like wrongs, are of two kinds, being either moral or legal. These two classes are partly coincident and partly distinct.

(*a*) A detailed analysis of the concept of "obligation" and "duty" is provided in Brandt, "The Concept of Obligation and Duty" (1964) 73 *Mind* 374.

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

When the law recognises an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognised, not necessarily because it is legally enforced or sanctioned. There are legal duties of imperfect obligation, as they are called, which will be considered by us at a later stage of our inquiry.

40. Rights

We have seen that in the strict sense a duty is something owed by one person to another. Correspondingly the latter has a right against the former. The master has a right against his servant, the parent against his child and so on. To ascribe a right to one person is to imply that some other person is under a corresponding duty.

But the term "right", like "duty", can be used in a wider sense. To say that a man has a right to something is roughly to say that it is right for him to obtain it. This may entail that others ought to provide him with it, or that they ought not to prevent him getting it, or merely that it would not be wrong for him to get it. What exactly is being claimed by the assertion that he has a right is not always clear.

Rights are concerned with interests, and indeed have been defined as interests protected by rules of right, that is by moral or legal rules. Yet rights and interests are not identical. Interests are things which are to a man's advantage: he has an interest in his freedom or his reputation. His rights to these, if he has such rights, protect the interests, which accordingly form the subject of his rights but are different from them. To say he has an interest in his reputation means that it is to his advantage to

enjoy a good name; to say he has a right to this is to imply that others ought not to take this from him (*b*).

Now since law and morals are primarily concerned with human interests, every wrong involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists (*c*). The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist *de facto* and not also *de jure*; they receive no recognition or protection from any rule of right. The violation of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected. Whether his interest amounts to a right depends on whether there exists with respect to it a duty imposed upon any other person.

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognised and protected by a rule of morality—an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognised and protected by a rule of law—an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty.

Bentham set the fashion still followed by many of denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law. "Natural law, natural rights", he says (*d*), "are two kinds of fictions or metaphors, which play so great a part in books of legislation, that they deserve to be examined by themselves. . . . Rights properly so called are the creatures of law properly so called; real laws give rise to real rights. Natural rights are the

(*b*) For a full discussion on the analysis of such terms as "right" and "duty" see Hart, "Definition and Theory in Jurisprudence," (1954) 70 L.Q.R. 37.

(*c*) This statement, to be strictly correct, must be qualified by a reference to the interests of the lower animals. It is unnecessary, however, to complicate the discussion at this stage by any such consideration. The interests and rights of beasts are moral, not legal.

(*d*) *Theory of Legislation* (Dumont, Hildreth's trans. 8th ed.), pp. 82-84. See also *Works*, III. 217.

creatures of natural law; they are a metaphor which derives its origin from another metaphor." Yet the claim that men have natural rights need not involve us in a theory of natural law. In so far as we accept rules and principles of morality prescribing how men ought to behave, we may speak of there being moral or natural duties; and in so far as these rules lay down that men have certain rights, we may speak of moral or natural rights. The fact that such natural or moral rights and duties are not prescribed in black and white like their legal counterparts points to a distinction between law and morals; it does not entail the complete non-existence of moral rights and duties.

It is to be noticed that in order that an interest should become the subject of a legal right, it must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by the law, inasmuch as cruelty to animals is a criminal offence. But beasts are not for this reason possessed of legal rights. The duty of humanity so enforced is not conceived by the law as a duty *towards* beasts, but merely as a duty *in respect* of them. He who ill-treats a child violates a duty which he owes to the child, and a right which is vested in him. But he who ill-treats a dog breaks no *vinculum juris* between him and it, for there is no bond of legal obligation between them. Similarly a man's interests may obtain legal protection as against himself, as when drunkenness or suicide is made a crime. But he has not for this reason a legal right against himself. The duty to refrain from drunkenness is not conceived by the law as a duty owing by a man to himself, but as one owing by him to the community.

It should also be noticed that the foregoing statement of the connection between rights and human interests is merely a generalisation based upon Western legal systems, and may be found contradicted in some parts of the world. There is nothing in the nature of things to prevent a legal system from regarding right as inhering in animals or idols, and in fact some Eastern systems do regard rights as inhering in idols (*e*). Rights may also be bestowed by law on artificial persons such as corporations. Yet in both cases the ultimate effect concerns the interests of human beings.

Although a legal right is commonly accompanied by the power

(*e*) *Infra*, § 61.

of instituting legal proceedings for the enforcement of it, this is not invariably the case. As we shall see, there are classes of legal rights which are not enforceable by any legal process; for example, debts barred by prescription or the lapse of time. Just as there are imperfect and unenforceable legal duties, so there are imperfect and unenforceable legal rights.

The question has been debated whether rights and duties are necessarily correlative. According to one view, there can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife, or a father without a child. For, on this view, every duty must be a duty *towards* some person or persons, in whom therefore, a correlative right is vested. And conversely every right must be a right *against* some person or persons, upon whom, therefore, a correlative duty is imposed. Every right or duty involves a *vinculum juris* or bond of legal obligation, by which two or more persons are bound together. There can therefore be no duty unless there is some one to whom it is due; there can be no right unless there is some one from whom it is claimed; and there can be no wrong unless there is some one who is wronged, that is to say, whose right has been violated (*f*).

The opposite school distinguishes between *relative* and *absolute* duties, the former being those which have rights corresponding to them, and the latter being those which have none (*g*). This school conceives it to be of the essence of a right that it should be vested in some determinate person, and be enforceable by some form of legal process instituted by him. On this view, duties towards the public at large or towards indeterminate portions of the public have no correlative rights; the duty, for example, to refrain from committing a public nuisance.

The truth is surely that duties in the strict sense have corresponding rights, and duties in the wider sense do not. To say that a debtor owes a duty to his creditor and that the latter has a corresponding right stresses the fact that the creditor is intimately concerned, that he will be personally injured by breach of the duty, and that by law the choice of attempting to compel obedience is his. To say that a duty to refrain from committing a

(*f*) This was the view taken by Sir John Salmond (7th ed. § 72).
(*g*) See Austin, *Lect* 17; Allen, *Legal Duties* (1931) 183–193.

public nuisance is owed to the society or to the crown or to the prosecutor either adds nothing to the statement that it is enjoined by law; or else it mistakenly suggests that this case is of the same kind as the former, thus blurring the distinction between them and preventing us from gaining true insight into either. For in the second case these three factors of concern, injury and choice do not obviously relate to one and the same person in the same way as they do in the first.

41. The characteristics of a legal right

Every legal right has the five following characteristics:—

(1) It is vested in a *person* who may be distinguished as the *owner* of the right, the *subject* of it, the person *entitled*, or the *person of inherence*.

(2) It avails against a *person*, upon whom lies the correlative duty. He may be distinguished as the person *bound*, or as the *subject* of the duty, or as the *person of incidence*.

(3) It obliges the person bound to an *act* or *omission* in favour of the person entitled. This may be termed the *content* of the right.

(4) The act or omission relates to some *thing* (in the widest sense of that word), which may be termed the *object* or *subject-matter* of the right.

(5) Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Thus if A buys a piece of land from B, A is the subject or owner of the right so acquired. The persons bound by the correlative duty are persons in general, for a right of this kind avails against all the world. The content of the right consists in non-interference with the purchaser's exclusive use of the land. The object or subject-matter of the right is the land. And finally the title of the right is the conveyance by which it was acquired from its former owner (*h*).

(*h*) The terms subject and object are used by different writers in a somewhat confusing variety of senses:

(a) The subject of a right means the owner of it; the object of a right means the thing in respect of which it exists. This is the usage which has been here adopted: Windscheid, I. sect. 49.

(b) The subject of a right means its subject-matter (that is to say, its object in the previous sense). The object of a right means the act

Every right, therefore, involves a threefold relation in which the owner of it stands:—

(i) It is a right *against* some *person* or persons.

(ii) It is a right *to* some *act* or omission of such person or persons.

(iii) It is a right *over* or *to* some *thing* to which that act or omission relates.

An ownerless right does not appear to be recognised by English law (*i*). This is not because an ownerless right is an impossibility, for there would be nothing to prevent such a concept being used in legal reasoning if lawyers chose to employ it. However, the fact is that they do not appear to do so. Yet although ownerless rights are not recognised, the ownership of a right may be merely contingent or uncertain. The owner of it may be a person indeterminate. He may even be a person who is not yet born, and may therefore never come into existence. Although every right has an owner, it need not have a *vested* and *certain* owner. Thus the fee simple of land may be left by will to a person unborn at the death of the testator. To whom does it belong in the meantime? We cannot say that it belongs to no one for the reasons already indicated. We must say that it is presently owned by the unborn person, but that his ownership is contingent on his birth.

Who is the owner of a debt in the interval between the death of the creditor intestate and the vesting of his estate in an administrator? Roman law in such a case personified the inheritance itself, and regarded the rights contingently belonging to the heir as presently vested in the inheritance by virtue of its fictitious personality. According to English law before the Judicature Act, 1873, the personal property of an intestate, in

or omission to which the other party is bound (that is to say, its content): Austin, pp. 47, 712.

(c) Some writers distinguish between two kinds of subjects—active and passive. The active subject is the person entitled; the passive subject is the person bound: Baudry-Lacantinerie, *Des Biens*, sect. 4.

(i) A possible exception is in the case of the parson's glebe land; here there appears to be an "abeyance of seisin" when a parson dies and before his successor is appointed. See Maitland, "The Corporation Sole", in his *Selected Essays*, at pp. 98–99.

the interval between death and the grant of letters of administration, was deemed to be vested in the Judge of the Court of Probate, and since 1925 both the real and the personal property of an intestate vests in the President of the Probate, Divorce and Admiralty Division (*j*). But neither the Roman nor the English fiction is essential. There is no difficulty in saying that the estate of an intestate is presently owned by an *incerta persona*, namely by him who is subsequently appointed the administrator of it. The law, however, abhors a temporary vacuum of vested ownership. It prefers to regard all rights as presently vested in some determinate person, subject, if need be, to be divested on the happening of the event on which the title of the contingent owner depends (*k*).

Certain writers define the object of a right with such narrowness that they are forced to the conclusion that there are some rights which have no objects. They consider that the object of a right means some material thing to which it relates; and it is certainly true that in this sense an object is not an essential element in the conception. Others admit that a person, as well as a material thing, may be the object of a right; as in the case of a husband's right in respect of his wife, or a father's in respect of his children. But they go no further, and consequently deny that the right of reputation, for example, or that of personal liberty, or the right of a patentee, or a copyright, has any object at all.

The truth seems to be, however, that an object in the wide sense adopted here is an essential element in the idea of a right. A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs. A right, as we have said, serves to protect an interest; and the object of the right is the thing in which the owner has this interest. It is the thing, material or immaterial, which he desires to keep or to obtain, and which he is enabled to keep or to obtain by means of the duty which the law imposes on other persons.

(*j*) Administration of Estates Act, 1925, ss. 9, 55 (1) (xv). The rule for personal property between 1875 and 1925 was in some doubt, but Sir John Salmond suggested that such property vested either in the President of the Probate, Divorce and Admiralty Division, or in the Judges of the High Court collectively. Real property before 1926 vested in the heir. Where an executor is appointed all property vests in him at the moment of the death.

(*k*) As to ownerless rights, see Windscheid, I. sect. 49. n. 3. Dernburg, *Pandekten*, I. sect. 49.

The possible objects of a right are many and various. A man may have rights over material things. He may have rights in respect of his own person, *e.g.*, the right not to be physically injured or assaulted. He has a right of reputation, rights in respect of domestic relations, and even rights in respect of other rights: if I contract to purchase a piece of land from A, I acquire against him a right that he transfer to me certain rights now belonging to himself. One may also have rights over immaterial property; *e.g.*, patent-rights, copyrights, trade-marks and commercial good-will. Finally we have to take account of the rights vested in one person to the services of another: the rights, for example, which are created by a contract between master and servant, physician and patient and so on. In a law which recognises slavery, men themselves may be bought and sold. In our law the only right that can be acquired over a human being is a temporary right to his services.

42. Legal rights in a wider sense of the term

Hitherto we have confined our attention to legal rights in the strictest sense in which they constitute the correlatives of legal duties (*l*). We must now consider the wider use of the term, according to which rights, do not necessarily correspond with duties. In this generic sense a legal right may be defined as any advantage or benefit conferred upon a person by a rule of law. Of rights in this sense there are four distinct kinds. These are (1) *Rights* (in the strict sense), (2) *Liberties*, (3) *Powers*, and (4) *Immunities*. Each of these has its correlative, namely (1) *Duties*, (2) *No-rights*, (3) *Liabilities*, and (4) *Disabilities*. The four pairs of correlatives may be arranged in the following table, the correlatives being obtained by reading downwards.

Right (*stricto sensu*)	Liberty	Power	Immunity
Duty	No-right	Liability	Disability

(*l*) In this narrow sense the word "right" is by some writers replaced by the word "claim", "demand", "claim-right" or "demand-right". This distinguishes it from a right in the generic sense.

As we shall see, the four concepts within each rectangle are intimately related to each other, whereas there is not the same relationship between the concepts in the one rectangle and the concepts in the other rectangle. Having already sufficiently considered rights and their correlative duties, we shall now deal briefly with the others (*m*).

1. *Liberties and no-rights.* Just as my legal rights (in the strict sense) are the benefits which I derive from legal duties imposed upon other persons, so my legal liberties (sometimes called licences or privileges) are the benefits which I derive from the absence of legal duties imposed upon myself. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone. It is clear that the term right is often used in a wide sense to include such liberty. I have a right (that is to say, I am at liberty) to do as I please with my own; but I have no right and am not at liberty to interfere with what is another's. I have a right to express my opinions on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right to defend myself against violence, but I have no right to take revenge upon him who has injured me.

(*m*) The analysis of rights (in the wide sense) into the four pairs of correlatives exhibited in the above table was a matter of slow evolution, and reached its culmination with the work of Hohfeld. See his *Fundamental Legal Conceptions*, published posthumously in 1923, and reprinting (*inter alia*) essays first published in (1913) 23 Yale L.J. 16 and (1917) 26 Yale L.J. 710. The above table is taken from Hohfeld, with the exceptions that his "privilege" is here called "liberty"; also, Hohfeld did not divide off the eight concepts into the two rectangles. Sir John Salmond, upon whose work Hohfeld built, did not assign a separate place in the scheme to the concept of immunity (the absence of power), and he did not have separate terms for the concepts of no-right and liability, but called both of them liabilities. For the work of Salmond and the other predecessors of Hohfeld see Pound, "Fifty Years of Jurisprudence", (1937) 50 H.L.R. 557 at 571–572. Most of the literature that has collected around the work of Hohfeld will be found referred to in Hall, *Readings in Jurisprudence*, Chap. 11; see especially the table showing the terminology of different writers on p. 527. A clear presentation of Hohfeld for the beginner is Corbin, "Legal Analysis and Terminology" (1919) 29 Yale L.J. 163, reprinted in Hall, *op. cit.* 471. See also Campbell, "Some Footnotes to Salmond's Jurisprudence" (1940) 7 C.L.J. 206. An advanced treatment will be found in Kocourek, *Jural Relations* (2nd ed. 1928).

See also Radin, "A Restatement of Hohfeld" (1938) 51 H.L.R. 1141; Maher, "The Kinds of Legal Rights" (1965) 5 *Melbourne University Law Review* 47.

The interests of unrestrained activity thus recognised and allowed by the law constitute a class of legal rights clearly distinguishable from those which we have already considered. Rights of the one class are concerned with those things which other persons *ought* to do for me; rights of the other class are concerned with those things which I *may* do for myself. Both are advantages derived from the law, but they are two distinct species of one genus.

It is often said that all rights whatsoever correspond to duties; and those who are of this opinion contend that a legal liberty is in reality a legal right not to be interfered with by other persons in the exercise of one's activities. It is alleged that the real meaning of the proposition that I have a legal right to express what opinions I please is that other persons are under a legal duty not to prevent me from expressing them. So that even in this case the right is the correlative of a duty. Now there is no doubt that in most cases a legal liberty of acting is accomplished by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. But in such a case there are in reality two rights and not merely one; and there are instances in which liberties are not thus accompanied by protecting rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity. So a trustee has a right to receive from the beneficiaries remuneration for his trouble in administering the estate, in the sense that in doing so he does no wrong. But he has no right to receive remuneration, in the sense that the beneficiaries are under any duty to give it to him. So an alien has a right, in the sense of

liberty, to enter British dominions, but the executive government has an equal right, in the same sense, to keep him out (*n*).

The correlative of A's liberty to do a thing is B's no-right that it shall not be done, and the correlative of A's liberty not to do a thing is B's no-right that it shall be done. "No-right" is a manufactured word indicating the absence of right against another in some particular respect. To say that B has a no-right against A is simply another way of saying that B has not a right against A, just as to say that A has a privilege against B is simply another way of saying that A is not under a duty towards B. Thus a trespasser has a no-right not to be forcibly ejected (*i.e.* has not a right not to be forcibly ejected), corresponding to the occupier's liberty to eject him. Again, the owner of a building generally has a no-right not to have his windows darkened or his foundations weakened by the buildings or excavations of his neighbours. In short, all cases of *damnum sine injuria* (*o*) are cases of no-right.

The term "no-right" which was invented by Hohfeld, has been derided as a purely negative concept: if a no-right is something that is not a right, then the class of no-rights must, it is said, include elephants. The short answer to this is that just because a term is a negative one, this does not justify its application outside its universe of discourse, *i.e.*, in this case the class of legal concepts. To say that an alien has a liberty to enter a country means that he is under *no duty not* to enter; to say that the authorities have a no-right against him is an inelegant way of saying that they have *no right in the strict sense* that he should not enter, though they may have a liberty (*i.e.*, be under no duty not) to prevent him.

We can see, then, that the correlative of B's no-right that an act shall be done is not A's liberty to do the act but A's liberty *not* to do it. Similarly the correlative of B's no-right that an act shall *not* be done is A's liberty *not not* to do it, i.e., A's liberty to do

(*n*) *Musgrove* v. *Toy* [1891] A.C. 272. On the analysis of this case, see the discussion by Cameron (1964) Jurid.Rev. 155.
On the distinction between liberties and rights, see Bentham, *Works*, III. 217; *Starey* v. *Graham* [1899] 1 Q.B. at p. 411, *per* Channel J.; *Allen* v. *Flood* [1898] A.C. at p. 29, *per* Cave J.; Terry, *Leading Principles of Anglo-American Law*, 90; Brown, *Austinian Theory of Law*, 180; Hohfeld, *Fundamental Legal Conceptions*, 38–50.

(*o*) *Infra*, § 86.

it. The correlative to " no-right " then is " no-duty " which is the precise equivalent of " liberty not "; the correlative of " no-right not " is " no-duty not " which is the precise equivalent of " liberty ".

The existence of a liberty—no-right relationship between A and B can be the result of a legal rule conferring the liberty on A. This is so with the law relating to the lawful use of force, where special rules allow for exceptions to the general principles prohibiting assault. The relationship may, however, result simply from the absence of law on the matter. This is so with many liberties in English law, which works from the principle that no act is unlawful unless there is a rule to the contrary, *i.e.*, unless the act constitutes a crime, tort, breach of contract and so on.

But while the categorisation of such rights as liberties helps to a clearer understanding of the law (*p*), it also diverts attention from the dynamic or fluid nature of such rights (*q*). For example, if the right to work is regarded simply as a liberty, this militates against the claim that this right should be protected by laws prohibiting others from preventing a man from doing his work. If on the other hand it is spoken of as a right, this may operate to ground claims that the law should protect this right by prohibiting interference, by guaranteeing employment and so forth. A liberty is in fact not so much a lack of duty as an incipient right.

2. *Powers and liabilities.* Yet another class of legal rights consists of those which are termed powers. Examples of such are the following: the right to make a will, or to alienate property; the power of sale vested in a mortgagee; a landlord's right of re-entry; the right to marry one's deceased wife's sister; the power to sue and to prosecute; the right to rescind a contract for fraud; a power of appointment; the right of issuing execution on a

(*p*) See Dias, *Jurisprudence* (2nd ed.) 233–235. *Chapman* v. *Honig* [1963] 2 Q.B. 502 was a case where Hohfeld's analysis might have been of use. A tenant having given evidence against his landlord, the latter served notice to quit. In a subsequent action by the tenant against the landlord for damages for contempt of court, the majority in the Court of Appeal confessed themselves unable to see how an act could be lawful and unlawful at one and the same time. According to Hohfeld the landlord would have a *power* to terminate the tenancy by notice to quit and he would in general have a *liberty* to serve a notice, but would have no *liberty* to do so in order to revenge himself upon the tenant.

(*q*) See Sawer, *Law in Society*, 43–45.

judgment; the various powers vested in judges and other officials for the due fulfilment of their functions. All these are legal rights —they are legally recognised interests—they are advantages conferred by the law—but they are rights of a different species from the two classes which we have already considered. They resemble liberties, and differ from rights *stricto sensu*, inasmuch as they have no duties corresponding to them. My right to make a will corresponds to no duty in any one else. A mortgagee's power of sale is not the correlative of any duty imposed upon the mortgagor; though it is otherwise with his right to receive payment of the mortgage debt. A debt is not the same thing as a right of action for its recovery. The former is a right in the strict and proper sense, corresponding to the duty of the debtor to pay; the latter is a legal power, corresponding to the liability of the debtor to be sued. That the two are distinct appears from the fact that the right of action may be destroyed (as by prescription) while the debt remains.

It is clear, therefore, that a power is not the same thing as a right of the first class. Neither is it identical with a right of the second class, namely, a liberty. That I have a right to make a will does not mean that in doing so I do no wrong. It does not mean that I *may* make a will innocently; it means that I *can* make a will effectively. That I have a right to marry my cousin does not mean that such a marriage is legally innocent, but that it is legally valid. It is not a liberty that I have, but a power. That a landlord has a right of re-entry on his tenant does not mean that in re-entering he does the tenant no wrong, but that by so doing he effectively terminates the lease (*r*).

A power may be defined as ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. Powers are either public or private. The former are those which are vested in a person as an agent or instrument of the functions of the state; they comprise the

(*r*) A power is usually combined with a liberty to exercise it: that is to say, the exercise of it is not merely effectual but rightful. This, however, is not necessarily the case. It may be effectual and yet wrongful; as when, a thief sells stolen property in market overt. In such a case the sale is a wrongful act, an act which the thief has no right to do. But the sale will nevertheless be effectual and pass a good title to an innocent purchaser. Here there is a power without a co-existing liberty.

various forms of legislative, judicial, and executive authority. Private powers, on the other hand, are those which are vested in persons to be exercised for their own purposes, and not as agents of the state. Power is either ability to determine the legal relations of other persons, or ability to determine one's own. The first of these—power over other persons—is sometimes called *authority*; the second—power over oneself—is usually termed *capacity* (*s*).

The correlative of a power is a liability (*t*). This connotes the presence of power vested in someone else, as against the person with the liability. It is the position of one whose legal rights (in the wide sense) may be altered by the exercise of a power. Examples are the liability of a tenant to have his lease determined by re-entry, that of a mortgagor to have the property sold by the mortgagee, that of a judgment debtor to have execution issued against him, and that of an unfaithful spouse to be divorced. The most important form of liability is that which corresponds to the various powers of action and prosecution. Such liability is independent of the question whether the particular action or prosecution will be successful, and is therefore independent of (say) the duty to pay damages for a civil wrong. A tortfeasor is under a duty to pay damages for his wrong (this is called "tortious liability") and is liable to be sued in tort; but a person who has committed no tort is also liable to be sued in tort, though in this case the action will fail (*u*).

A liability may be co-incident with a no-right: thus when a defaulting tenant has his goods distrained for rent, he has both a no-right against his landlord not to have his goods

(*s*) On the distinction between powers and other kinds of rights, see Windscheid, I. sect. 37; Terry, *op. cit.* 100; Hohfeld, *op. cit.* 50–60.

(*t*) All modern analytical jurists writing in the English language (including Salmond and Hohfeld) have used the term "liability" for the correlative of power, and this usage has been adopted in the American *Restatement*. It is therefore retained here, although the term "liability" already has two other meanings. When we speak of a debt as a liability, and also when we speak of tortious liability and the liability to pay damages for breach of contract, we are referring to an enforceable duty *in personam* to pay money; the words "liability" may also be used for the position of any wrongdoer in respect of the remedy of a wrong. Thus we may say that in its narrower sense a liability is an enforceable duty *in personam* to pay money, and in its wider sense it is the position of one against whom legal proceedings can be taken *with success*.

(*u*) He can be forced to enter an appearance, file a defence and so on, on pain of judgment going by default if he does not.

touched and a liability to have them impounded and sold against his will. In this technical use of the term, a "liability" may be an advantageous position. Thus a person has a power to make a gift of his property (for by exercising the power he alters the legal position both of himself and of the donee); hence other persons, who may be given the property, have a liability to have it given to them. This liability is beneficial, not detrimental.

3. *Immunities and disabilities.* The term "right" is used in a fourth sense to mean an immunity from the legal power of some other person. Just as a power is a legal ability to change legal relations, so an immunity is an exemption from having a given legal relation changed by another. The right of a peer to be tried by his peers, for example, was neither a right in the strict sense, nor a liberty, nor a power. It was an exemption from trial by jury —an immunity from the power of the ordinary criminal courts. Immunity stands in the same relation to power as liberty (not) does to right *stricto sensu*: immunity is exemption from the power of another in the same way as liberty (not) is exemption from the right of another. Immunity, in short, is no-liability.

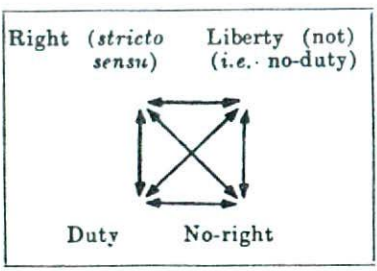
The correlative of immunity is disability (otherwise called inability, or, more clearly though less elegantly, no-power). Disability is simply the absence of power. Thus the rule *Nemo dat quod non habet* can be expressed as a disability on the part of persons in general to transfer property that they do not themselves own.

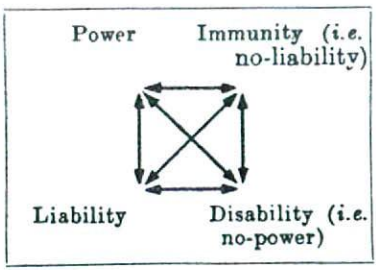
These, then, are the four classes of rights conferred by the law: right in the strict sense, when the law limits the liberty of others in my behalf; liberty, when the law allows to my will a sphere of unrestrained activity; power, when the law actively assists me in making my will effective; immunity, when the law denies to others a particular power over me. A right in the narrow sense is that which other persons *ought* to do on my behalf; a liberty is that which I *may* do innocently; a power is that which I *can* do effectively; an immunity is that which other persons *cannot* do effectively in respect of me. I enjoy my rights through the control exercised by the law over the acts of others on my behalf; I use my liberties with the

acquiescence of the law; I use my powers with its active assistance in making itself the instrument of my will; I use my immunities through its refusal to accord this active assistance to others.

Of the four classes the first, consisting of rights correlative to duties, are by far the most important. So predominant are they, indeed, that we may regard them as constituting the principal subject-matter of the law, while the others are merely accessory. In future, therefore, I shall use the term right in this narrow and specific sense, except when the context indicates a different usage; and I shall commonly speak of the other forms of rights by their specific designations.

Reverting to the table of legal correlatives in section 42, it will be seen that the four terms in the first rectangle are related to each other in precisely the same way as the four terms in the second rectangle. This can be seen more clearly by connecting each set of terms by arrows, and assigning a meaning to each kind of arrow.





In this diagram the vertical arrows connect jural correlatives, and may be read either way as " is the presence of in another " Thus right is the presence of duty in another and liability is the presence of power in another.

The diagonal arrows connect jural contradictories and may be read either way as " is the absence of in oneself ". Thus no-right is the absence of right in oneself, and disability is the absence of power in oneself.

The horizontal arrows connect the contradictories of correlatives and may be read either way as " is the absence of in another ". Thus liberty (not) is the absence of

right in another, and immunity is the absence of power in another.

With the aid of the arrows any of the eight expressions can be mechanically defined in terms of three of the others. The broad distinction between the first set of terms and the second set is that the first relates to static legal relationships while the second relates to the changing of relationships.

43. The kinds of legal rights

Rights and their correlative duties may be distinguished in various ways.

1. *Perfect and imperfect rights.* A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognised by the law, but *enforced*. A duty is enforceable when an action or other legal proceeding, civil or criminal, will lie for the breach of it, and when judgment will be executed against the defendant, if need be, through the physical force of the state. In all ordinary cases, if the law will recognise a right at all, it will enforce it. In all fully developed legal systems, however, there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form (*v*).

Examples of such imperfect legal rights are certain claims barred by lapse of time; claims unenforceable by action owing to the absence of some special form of legally requisite proof (such as a written document); claims against foreign states or sovereigns, as for interest due on foreign bonds. In all those cases the duties and correlative rights are imperfect. No action will lie for their maintenance; yet they are, for all that, legal rights and legal duties, for they receive recognition from the law. The statute of limitations, for example, does not provide that after a certain time a debt shall become extinct, but merely that no

(*v*) In ethics the term "imperfect duty" is sometimes used to describe a duty of such a nature that it is not fit for enforcement, but ought properly to be left to the free will of him whose duty it is. A perfect duty, on the other hand, is one which a man not merely *ought* to perform, but may be *justly compelled* to perform. The duty to give alms to the poor is imperfect; that of paying one's debts is perfect. Perfect duties pertain to the sphere of justice; imperfect to that of benevolence.

action shall thereafter be brought for its recovery (*w*). Lapse of time, therefore, does not destroy the right, but merely reduces it from the rank of one which is perfect to that of one which is imperfect. It remains valid for all purposes save that of enforcement. It may be good as a ground of defence, it may suffice to support any security given for it, and it may possess the capacity of becoming a perfect right. Money paid in satisfaction of a statute-barred debt cannot be recovered; a pledge securing the debt remains valid; and acknowledgment of the debt by the debtor will revive the creditor's right of action (*x*). All these cases of imperfect rights are exceptions to the maxim, *Ubi jus ibi remedium*. The customary union between the right and the right of action has been for some special reason severed, but the right survives.

The rights of the subject against the state are sometimes classified as imperfect rights. Even where a system of law allows the subject to sue the state and obtain a judgment recognising his rights, the judgment cannot be enforced. This being so, some would contend that such rights are not in reality legal rights of any kind. This, however, is to confuse obligatoriness with enforceability. Moreover it is contrary to popular and legal usage. To the lawyer, as to the layman, a contract with the state is as much a source of legal rights as is a contract between two private persons.

Because of unenforceability, then, these rights are sometimes termed imperfect. Yet they differ from the normal type of imperfect right discussed above. The ordinary imperfect right is unenforceable because some rule of law declares it to be so. One's rights against the state are unenforceable, not in this legal sense, but in the sense that the strength of the law is none other than the strength of the state and cannot be turned or used against the state whose strength it is.

2. *Positive and negative rights*. A positive right corresponds to a positive duty, and is a right that he on whom the duty lies shall do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty, and is a right that the person bound shall refrain from some act which would

(*w*) Limitation Act, 1939, s. 2 (1). But lapse of time now extinguishes title to chattels or to land: *ibid.*, ss. 3 (2), 16; but see s. 7 and Land Registration Act, 1925, s. 75.

(*x*) *Cf. Allen* v. *Waters & Co.* [1935] 1 K.B. 200.

operate to the prejudice of the person entitled. The former is a right to be positively benefited; the latter is merely a right not to be harmed.

The distinction is one of practical importance. It is much easier, as well as much more necessary, for the law to prevent the infliction of harm than to enforce positive beneficence. Therefore while liability for hurtful acts of commission is the general rule, liability for acts of omission is the exception. Generally speaking, all men are bound to refrain from all kinds of positive harm, while only some men are bound in some ways actively to confer benefits on others. I have a right against every one not to be pushed into the water; if I have a right at all to be pulled out, it is only on special grounds against determinate individuals.

3. *Rights in rem and rights in personam.* The distinction between rights *in rem* and *in personam* is closely connected but not identical with that between negative and positive rights. It is based on a difference in the incidence of the correlative duties. A right *in rem*, sometimes called a real right, corresponds to a duty imposed upon persons in general; a right *in personam*, sometimes called a personal right, corresponds to a duty imposed upon determinate individuals. A right *in rem* is available against the world at large; a right *in personam* is available only against particular persons. The distinction is one of great prominence in the law, and we may take the following as illustrations of it. My right to the peaceable occupation of my farm is *in rem*, for all the world is under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is *in personam*, for it avails exclusively against the tenant himself. For the same reason my right to the possession and use of the money in my purse is *in rem*; but my right to receive money from some one who owes it to me is *in personam*.

A right *in rem*, then, is an interest protected against the world at large; a right *in personam* is an interest protected solely against determinate individuals. The distinction is clearly one of importance. The law confers upon me a greater advantage in protecting my interests against all persons than in protecting them only against one or two. The right of a patentee, who has a monopoly as against all the world, is much more valuable than

the right of him who purchases the goodwill of a business and is protected only against the competition of his vendor If I buy a chattel, it is an important question whether my interest in it is forthwith protected against every one, or only against him who sells it to me. The main purpose of mortgages and other forms of real security is to supplement the imperfections of a personal right by the superior advantages inherent in a right of the other class. Furthermore, these two kinds of rights are necessarily very different in respect of the modes of their creation and extinction. The indeterminate incidence of the duty which corresponds to a right *in rem*, renders impossible many modes of dealing with it which are of importance in the case of rights *in personam*.

Almost all rights *in rem* are negative, and most rights *in personam* are positive, though in a few exceptional cases they are negative. It is not difficult to see the reason for this general coincidence. A right *in rem*, available against all other persons, can be in general nothing more than a right to be left alone by those persons—a right to their passive non-interference. No person is in general given a legal right to the active assistance of all the world. On the other hand almost all personal rights are positive.

It is sometimes contended that a right *in rem* is in reality a a conglomeration of separate rights *in personam*, since every right can only correlate with a single duty and not with many different duties (y). But the essence of a right *in rem* is that it avails against an open or indefinite class of persons, whereas a right *in personam* avails only against a specific person or persons.

In defining a right *in rem* as one availing against the world at large, it is not meant that the incidence of the correlative duty is absolutely universal, but merely that the duty binds persons in general, and that if any one is not bound his case is exceptional. Similarly a right *in personam* is not one available against a single person only, but one available against one or more *determinate* individuals. The right of the creditor of a firm is *in personam*, though the debt may be due from any number of partners. Even as so explained, however, it can scarcely be denied that, if

(y) Hohfeld, *Fundamental Legal Conceptions* (1921), 91 *et seq. cf.* Campbell in (1940) 7 C.L.J. at 211–212.

intended as an exhaustive classification of all possible cases, the distinction between rights *in rem* and *in personam*—between duties of general and of determinate incidence—is logically defective. It takes no account of the possibility of a third and intermediate class. Why should there not be rights available against particular classes of persons, as opposed both to the whole community and to persons individually determined, for example, a right available only against aliens?

The terms right *in rem* (or *in re*) and right *in personam* are derived from the commentators on the civil and canon law (*z*). Literally interpreted, *jus in rem* means a right against or in respect of a thing, *jus in personam* a right against or in respect of a person. In truth, however, every right is at the same time one in respect of some thing, namely, its object, and against some person, namely the person bound. In other words, every right involves, not only a *real*, but also a *personal* relation. But in real rights it is the real relation that stands in the forefront of the juridical conception; such rights are emphatically and conspicuously *in rem*. In personal rights, on the other hand, it is the personal relation that forms the predominant factor in the conception; such rights are before all things *in personam*.

For this difference there is more than one reason. In the first place, the right *in rem* is a relation between the owner and a vague multitude of persons, no one of whom is distinguished from any other; while a right *in personam* is a definite relation between determinate individuals, and the definiteness of this personal relation raises it into prominence. Secondly, the source or title of a right *in rem* is commonly to be found in the character of the real relation, while a right *in personam* generally derives its origin from the personal relation. In other words, if the law confers upon me a right *in rem*, it is commonly because I stand in some special relation to the thing which is the object of the right, *e.g.*,

(*z*) The terms *jus in rem* and *jus in personam* are derived from the Roman terms *actio in rem* and *actio in personam*. An *actio in rem* was an action for the recovery of *dominium*; one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. An *actio in personam* was one for the enforcement of an *obligatio*; one in which the plaintiff claimed the payment of money, the performance of a contract, or the protection of some other personal rights vested in him as against the defendant (Gaius IV. 2). Naturally enough, the right protected by an *actio in rem* came to be called *jus in rem*, and a right protected by an *actio in personam*, *jus in personam*.

because I made it, found it or first acquired possession of it. If on the contrary, it confers on me a right *in personam*, it is commonly because I stand in some special relation to the person who is the subject of the correlative duty, *e.g.*, because I have made a contract with them.

The commonest and most important kind of *jus in personam* is that which has been termed by the civilians and canonists *jus ad rem*. I have a *jus ad rem* when I have a right that some other right shall be transferred to me or otherwise vested in me. *Jus ad rem* is a right to a right. It is clear that such a right to a right must be in all cases *in personam*. The right which is to be transferred, however—the subject-matter of the *jus ad rem*—may be either *in rem* or *in personam*, though it is more commonly *in rem*. An agreement to assign a chattel creates a *jus ad jus in rem*; an agreement to assign a debt or a contract creates a *jus ad jus in personam*.

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

(4) *Proprietary and personal rights.* Another important distinction is that between proprietary and personal rights. The aggregate of a man's proprietary rights constitutes his *estate*, his *assets*, or his *property* in one of the many senses of that most equivocal or legal terms. The sum total of a man's personal rights, on the other hand, constitutes his *status* or personal condition, as opposed to his estate. If he owns land, or chattels, or patent rights, or the goodwill of a business, or shares in a company, or if debts are owing to him, all these rights pertain to his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law.

The distinction lies in the fact that proprietary rights are *valuable*, and personal rights are not. The former are those which

are worth money; the latter are those that are worth none. The former are the elements of a man's *wealth*; the latter are merely elements in his *well-being*.

It makes no difference in this respect whether a right is *jus in rem* or *jus in personam*. Rights of either sort are proprietary, and make up the estate of the possessor if they are of economic value. Thus my right to the money in my pocket is proprietary; but not less so is my right to the money which I have in the bank. Stock in the funds is part of a man's estate, just as much as land and houses; and a valuable contract, just as much as a valuable chattel. On the other hand, a man's rights of personal liberty, and of reputation, and of freedom from bodily harm, are personal, not proprietary. They concern his welfare, not his wealth; they are juridical merely, not also economic. So, also, with the rights of a husband and father with respect to his wife and children. Rights such as these pertain to his legal status, not his legal estate. If we go outside the sphere of private into that of public law, we find the list of personal rights greatly increased. Citizenship, honours, dignities, and official position (*a*) in all its innumerable forms, pertain to the law of status, not to that of property (*b*).

The distinction between proprietary and personal rights is not confined to rights in the strict sense, but is equally applicable to other classes of rights also. A landlord's right (*i.e.*, power) of re-entry is proprietary, no less than his right to the rent; and a mortgagee's right (*i.e.*, power) of sale, no less than the debt secured.

The distinction also has its counterpart in that between personal and proprietary duties, no-rights, liabilities and disabilities. The latter represent a loss of money, just as a proprietary right represents the acquision of it. All others are personal. The

(*a*) In the past, however, public office was regarded as a form of property, to be bought and sold like other property: see Holdsworth, *H.E.L.*, I. 439 *et seq.*; D. W. Logan, "A Civil Servant and His Pay" (1945) 61 L.Q.R. 240 at 249 *et seq.*

(*b*) For a criticism of the above account see Campbell in (1940) 7 C.L.J. at 214–215, arguing that personal rights also are of economic value. Though this is true, it may perhaps be answered that the economic value of personal rights consist in the fact that they afford an opportunity for the acquisition of proprietary rights; they are not of economic value in themselves.

The words status and estate are in their origin the same. As to the process of their differentiation in legal meaning, see Pollock and Maitland, *History of English Law* (2nd ed.) II. 10 and 78. The other uses of the term property will be considered later, in Chap. 13.

duty of fulfilling a contract for the purchase of goods is proprietary, but the duty of fulfilling a contract to marry is personal.

Although the term estate includes only rights (in the generic sense), the term status includes not only rights, but also duties, no-rights, subjections and disabilities. A minor's contractual disabilities are part of his status, though a man's debts are not part of his estate.

The term status is used in a variety of senses. It is used to refer to a man's legal condition of any kind, whether personal or proprietary. A man's status in this sense includes his whole position in the law—the sum total of his legal rights, duties, liabilities or other legal relations, whether proprietary or personal, or any particular group of them separately considered. Thus we may speak of the status of a landowner, of a trustee, of an executor, of a solicitor and so on.

More commonly it is used to denote his personal legal condition in so far as concerns his personal rights and burdens, to the exclusion of his proprietary relations. A person's status, in this sense, is made up of smaller groups of personal rights and their correlative burdens, and each of these constituent groups is itself also called a status. Thus the same person may have at the same time the status of a free man, of a citizen, of a husband, of a father and so on. So we speak of the status of an alien, a lunatic, or an infant; but not of a landowner or trustee.

The term may be used to refer to personal capacities and incapacities as opposed to other elements of personal status (c). The law of status in this sense would include the rules as to the contractual capacities and incapacities of married women, but not the personal rights and duties existing between her and her husband.

Status is used by some writers to signify a man's personal legal condition, so far only as it is imposed upon him by the law without his own consent, as opposed to the condition which he has acquired for himself by agreement. The position of a slave is a matter of status, the position of a free servant is a matter of contract. Marriage creates a status in this sense, for although it is entered into by way of consent, it cannot be dissolved in that way, and the legal condition created by it is determined by the law, and cannot be modified by the agreement of the parties. A

(c) See Dicey, *Conflict of Laws* (7th ed. 1958), p. 223; Graveson, *Status in the Common Law* (1953), 2. See the interesting discussion of this and other

business partnership, on the other hand, pertains to the law of contract and not to that of status.

(5) *Rights in re propria and rights in re aliena.* Rights may be divided into two kinds, distinguished by the civilians as *jura in re propria* and *jura in re aliena*. The latter may also be conveniently termed *encumbrances*, if we use that term in its widest permissible sense (*d*). A right *in re aliena* or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All others are *jura in re propria*. It frequently happens that a right vested in one person becomes subject or subordinate to an adverse right vested in another. It no longer possesses its full scope or normal compass, part of it being cut off to make room for the limiting and superior right which thus derogates from it. Thus the right of a landowner may be subject to, and limited by, that of a tenant to the temporary use of the property.

A right subject to an encumbrance may be conveniently designated as *servient*, while the encumbrance which derogates from it may be contrasted as *dominant* (*e*).

The terms *jus in re propria* and *jus in re aliena* were devised by the commentators on the civil law, and are not to be found in the original sources. Their significance is clear. The owner of a chattel has *jus in re propria*—a right over his own property; the pledgee or other encumbrancer of it has *jus in re aliena*—a right over the property of someone else.

There is nothing to prevent one encumbrance from being itself subject to another. Thus a tenant may sublet; that is to say, he may grant a lease of his lease, and so confer upon the sub-lessee a *jus in re aliena* of which the immediate subject-matter is itself merely another right of the same quality. The right of the tenant in such a case is dominant with regard to that of the landowner, but servient with regard to that of the sub-lessee.

definitions by J. C. Hicks, "Jargon and Occult Qualities" (1956) 19 M.L.R. 158. See further, Maine, *Ancient Law*, Chap. 5 *ad fin.*, and Pollock's Note L to his edition; Markby, *Elements of Law*, 178; Hunter, *Roman Law* (4th ed.), 138. For a further discussion of status see Allen, "Status and Capacity", in his *Legal Duties* (1931), 28 *et seq.*

(*d*) The Romans termed them *servitutes*, but the English term servitude is used to include one class of *jura in re aliena* only, namely the *servitutes praediorum* of Roman law.

(*e*) The owner of an encumbrance may be termed the encumbrancer of the servient right or property over which it exists.

A right is not to be classed as encumbered or servient merely on account of its *natural* limits and restrictions. Otherwise all rights would fall within this category, since none of them are unlimited in their scope, all being restrained within definite boundaries by the conflicting interests and rights of other persons. All ownership of material things, for example, is limited by the maxim, *sic utere tuo ut alienum non laedas*. Every man must so restrain himself in the use of his property, as not to infringe upon the property and rights of others. But in these and all similar cases we are dealing merely with the normal and natural boundaries of the right, not with those exceptional and artificial restrictions which are due to the existence of *jura in re aliena* vested in other persons. A servient right is not merely a limited right, for all are limited; it is a right so limited that its ordinary boundaries are infringed.

It is essential to an encumbrance that it should, in the technical language of our law, *run with* the right encumbered by it. In other words, the dominant and the servient rights are necessarily *concurrent*. By this it is meant that an encumbrance must follow the encumbered right into the hands of new owners, so that a change of ownership will not free the right from the burden imposed upon it. If this is not so—if the right is transferable free from the burden—there is no true encumbrance. For the burden is then merely personal to him who is subject to it, and does not in truth limit or derogate from the right itself. This right still exists in its full compass, since it can be transferred in its entirety to a new owner. For this reason an agreement to sell land vests an encumbrance or *jus in re aliena* in the purchaser; but an agreement to sell a chattel does not. The former agreement runs with the property, while the latter is non-concurrent.

Concurrence, however, may exist in different degrees; it may be more or less perfect or absolute. The encumbrance may run with the servient right into the hands of some of the successive owners and not into the hands of others. In particular, encumbrances may be concurrent either in law or merely in equity. In the latter case the concurrence is (apart from statute) imperfect or partial, since it does not prevail against the kind of owner known in the language of the law as a purchaser

for value without notice of the dominant right. Examples of encumbrances running with their servient rights at law are easements, leases, and legal mortgages. On the other hand, an agreement for a lease, an equitable mortgage, a restrictive covenant as to the use of land, and a trust, will run with their respective servient rights in equity, but not at law.

The chief classes of encumbrances are four in number, namely, Leases, Servitudes, Securities, and Trusts. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another. A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it; for example, a right of way or a right to the passage of light or water across adjoining land.

A security is an encumbrance vested in a creditor over the property of his debtor, for the purpose of securing the recovery of the debt; a right, for example, to retain possession of a chattel until the debt is paid. A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of someone else. The owner of the encumbered property is the trustee; the owner of the encumbrance is the beneficiary.

(6) *Principal and accessory rights.* The relation between principal and accessory rights is the reverse of that just considered as existing between servient and dominant rights. For every right is capable of being affected to any extent by the existence of other rights; and the influence thus exercised by one upon another is either adverse or beneficial. It is adverse when one right is limited or qualified by another vested in a different owner. It is beneficial, on the other hand, when one right has added to it a supplementary right vested in the same owner. In this case the right so augmented may be termed the *principal*, while the one so appurtenant to it is the *accessory* right. Thus a security is accessory to the right secured; a servitude is accessory to the ownership of the land for whose benefit it exists; the rent and covenants of a lease are accessory to the landlord's ownership of the property.

(7) *Primary and sanctioning rights.* We have discussed in an earlier chapter the distinction between primary and sanctioning rights (*f*). It will be remembered that a sanctioning right

(*f*) § 16.

originates from some wrong, *i.e.*, from the violation of another right. Primary rights have some source other than wrongs.

It should be observed that a primary right can be either a right *in rem*, *e.g.*, my right not to be assaulted, or a right *in personam*, *e.g.*, my right that you perform your contract with me. But the sanctioning right which arises from the violation of a primary right will be in all cases a right *in personam*. If you break your contract, I now have a sanctioning right *in personam* to damages. But equally if you violate my right not to be assaulted, I now have a sanctioning right *in personam* to damages. The reason why sanctioning rights are *in personam* is obvious enough. Rights *in rem* are negative and avail against all the world, *i.e.*, an open or indefinite class of persons. Violations of such rights, therefore, must consist of positive acts, and positive acts can only be performed by specific persons; it makes no sense to talk of a positive act performed by an indefinite class of persons; in other words a violation by all the world is a logical impossibility. Consequently it is only against specific persons that sanctioning rights can be either necessary or operative: they must be, therefore, rights *in personam*.

(8) *Legal and equitable rights.* In England there were formerly two systems of law, administered respectively in the courts of common law and the Court of Chancery. These were to a considerable extent discordant. One of the results of this discordance was the establishment of a distinction between two classes of rights, distinguishable as legal and equitable. Legal rights are those which were recognised by the courts of common law. Equitable rights (otherwise called equities) are those which were recognised solely in the Court of Chancery. Notwithstanding the fusion of law and equity by the Judicature Act, 1873, this distinction still exists, and must be reckoned with as an inherent part of our legal system. That which would have been merely an equitable right before the Judicature Act is merely an equitable right still.

Although all rights, whether legal or equitable, now obtain legal recognition in all courts, the distinction is still of importance.

The methods of their creation and disposition are different A legal mortgage of land must be created by deed, but an equitable mortgage may be created by a written agreement or by a mere deposit of title-deeds.

Equitable rights have a more precarious existence than legal rights. Where there are two inconsistent legal rights claimed adversely by different persons over the same thing, the first in time generally prevails. *Qui prior est tempore potior est jure*. A similar rule applies, in general, to the competition of two inconsistent equitable rights. But when a legal and an equitable right conflict, the legal will (apart from statute) prevail over and destroy the equitable, even though subsequent to it in origin, provided that the owner of the legal right acquired it for value and without notice of the prior equity. As between a prior equitable mortgage, for example, and a subsequent legal mortgage, preference will be given to the latter. The maxim is: Where there are equal equities, the law will prevail (*g*).

(9) *Vested and contingent rights* (*h*). A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right. A right is contingent when some but not all of the vestitive facts, as they are termed, have occurred. A grant of land to A in fee simple will give A a vested right of ownership. A grant to A for life and then to B in fee simple if he survives A, gives B a contigent right. It is contingent because some of the vestitive facts have not yet taken place, and indeed may never do so: B may not survive A. If he does, his formerly contingent right now becomes vested. A contingent right then is a right that is incomplete (*i*).

A contingent right is different, however, from a mere hope or *spes*. If A leaves B a legacy in his will, B has no right to this during A's lifetime. He has no more than a hope that he will obtain the legacy; he certainly does not have an incomplete right, since it is open to A at any time to alter his will (*j*).

(*g*) This rule has been considerably modified in England by the property legislation of 1925, which to a large extent substituted registration for notice. An equitable right validly registered under the Land Charges Act, 1925, becomes, by virtue of the Law of Property Act, 1925 (section 198), binding upon the whole world.

(*h*) See Paton, *Jurisprudence* (3rd ed. 1964), 269–270. This is a different distinction from that made by English law between interests vested in possession and interests vested in ownership. See *infra* § 50.

(*i*) This distinction is particularly important in international law, where the question whether a successor state is bound to respect rights granted by its predecessor may depend on whether the right is vested or contingent. See O'Connell, *The Law of State Succession*, Chaps. 6–13.

(*j*) For an example of a mere *spes* see *Director of Public Works* v. *Ho Po Sang* [1961] A.C. 901. *Cf. Free Lanka Insurance Co. Ltd.* v. *Ranasinghe* [1964] A.C. 541.

CHAPTER 8

OWNERSHIP

44. The idea of ownership

Ownership denotes the relation between a person and an object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights *in rem*, being good against all the world and not merely against specific persons (*a*). Though in certain situations some of these rights may be absent, the normal case of ownership can be expected to exhibit the following incidents (*b*).

First, the owner will have a right to possess the thing which he owns. He may not necessarily have possession (the analysis of which is dealt with in the following chapter), for he may have been wrongfully deprived of it or may have voluntarily divested himself of it. If A's watch is stolen by B, the latter has possession but the former remains the owner with an immediate right to possession. If A lends his watch for hire to C, A now has neither possession nor an immediate right to possess. He is still the owner, however, for he retains a reversionary interest in the watch, *i.e.*, a right to repossess it on the termination of the period of hire; and though he lacks in English law the remedies available to a possessor for wrongful interference, he is protected by a remedy in the form of an action on the case against interference damaging his reversionary interest.

Secondly, the owner normally has the right to use and enjoy the thing owned: the right to manage it, *i.e.*, the right to decide how it shall be used; and the right to the income from it. Whereas the right to possess is a right in the strict sense, these rights are in fact liberties: the owner has a liberty to use the thing, *i.e.*, he is under no duty not to use it, in contrast with others who are under a duty not to use or interfere with it.

(*a*) Although the rights are rights *over the thing*, they are, of course, like all rights, rights *against other persons*.

(*b*) The reader is referred to Honoré "Ownership" in *Oxford Essays in Jurisprudence* (ed. Guest), 107, on which this section is largely based. See also Dias, *Jurisprudence* (2nd ed.), Chap. 13, Paton, *Jurisprudence* (3rd ed. 1964), Chap. 21.

Thirdly, the owner has the right to consume, destroy or alienate the thing. The rights to consume and destroy are straightforward liberties. The right to alienate, *i.e.*, the right to transfer his rights over the object to another, involves the existence of a power. In English law the owner can effectively dispose of the property after his death by will, or convey it during his lifetime, by virtue of rules of property which empower him to achieve these objectives by complying with certain requirements. A non-owner even though he has possession, cannot normally transfer the rights of ownership over a thing to another; for the law acts on the principle *nemo dat quod non habet*. To this principle there are certain exceptions: for example, the Factors Acts enable non-owners in possession to transfer ownership in certain circumstances.

Fourthly, ownership has the characteristic of being indeterminate in duration. The position of an owner differs from that of a non-owner in possession in that the latter's interest is subject to be determined at some future set point, whereas the interest of the owner can endure theoretically for ever. The interest of a bailee or lessee comes to an end when the period of hire or of the lease determines; the owner's interest is perpetual, being determined neither by any set point nor by the owner's death, because the property owned can descend to the owner's heir or next-of-kin, and if he had sold the property prior to his death, then the new owner's interest would continue unaffected by the previous owner's death.

Fifthly, ownership has a residuary character. If, for example, a landowner gives a lease of his property to A, an easement to B and some other right such as a profit to C, his ownership now consists of the residual rights, *i.e.*, the rights remaining when all these lesser rights have been given away. Moreover, in English law the general rule is that the extinction of such lesser rights will revive in the owner all his original rights.

It is sometimes argued that the term "ownership" is not strictly applicable to English law, because in an action concerning title to property the plaintiff need only prove that he has a better title than the defendant, not that he has the best of all possible titles (c). If, for example, A finds a chattel and is then dispossessed of it by B, all A need prove is that he has a better title than B.

(c) See Honoré, *op. cit.* 136–141 for a discussion of this problem.

His ownership will be good against all the world except the true owner but is liable to be defeated if the latter claims the property. Such a system of law under which there can exist several independent titles to property (*d*), can be contrasted with a system such as Roman law, under which, roughly speaking, there can be at any one time only one title from which all other titles must be traced; and under this system no new title independent of the old title can be acquired except by divesting the previous owner of the latter. On the other hand, the fact that in English law the plaintiff need only prove a better title than the defendant implies the existence of someone who has the best possible right to possess and who is therefore the true owner. Moreover, it is not wholly true that English law provides nothing by way of absolute ownership, *i.e.*, ownership which is not open to be defeated by some better claim. The system of land registration adopted in 1925 provides that land may be registered with an absolute title, with the result that, except for certain reasons (*e.g.*, that the registered owner knew of a defect in his title), the owner now has an absolute title against all the world, which cannot be defeated by a prior claim. In such cases proof of a better title grounds a claim for compensation from an insurance fund in the hands of the Registrar instead of upsetting the new owner's title itself (*e*).

The rights of the owner, then, can be contrasted with the lesser rights of the possessor and of the encumbrancer. The owner's rights are indeterminate and residuary in a way in which these other rights are not. As we have seen, the possessor's rights do not extend in time to infinity as do the owner's; and on the extinction of the possessor's rights those of the owner revive. As compared with the rights of an encumbrancer those of the owner are again indeterminate and residuary, but on a different plane. An encumbrancer is one who has a right over the property of another. A may be the owner of Blackacre and B may have an easement of way over it. Here we can see that the interest of B, the encumbrancer, is adverse to the owner's rights and limits them. But while this adverse limiting right is of a specific nature,

(*d*) The difficulties arising in English law from the possibility of independent estates co-existing in the same property are discussed in Rudden, "The Terminology of Title" (1964) 80 L.Q.R. 63.

(*e*) See Megarry & Wade, *The Law of Real Property* (2nd ed.), 1014–1016.

the rights of the owner comprise all those indefinite rights, liberties and powers generally inherent in ownership, except for this one right of the encumbrancer; and should the encumbrancer's right be extinguished, the rights of the owner will stretch once more to their previous unlimited extent.

This does not mean, however, that an owner whose property is unencumbered has completely unlimited rights. To describe someone as an absolute owner of property is to say two things: it is to assert that his title to the property is indisputable, and that he has all the rights of ownership allowed by the legal system in question. We have seen that the rights of ownership may be limited by the adverse dominant rights of an encumbrancer or by the rights of the possessor (who is in fact one very special type of encumbrancer). They may also be limited by special provisions of law such as town and country planning law, which regulates for social purposes the use which an owner may make of his land. But in addition to being restricted by such specific provisions of public law, an owner's rights are restricted by a whole variety of provisions of the ordinary law, according to which various harmful and dangerous types of conduct qualify as criminal or tortious: the fact that I am the owner of a knife will not entitle me to use it to kill Smith. We may say that an owner is free to use and dispose of his property as he pleases, except in so far as he does not infringe his duties to specific encumbrancers, his duties under special regulations concerning the use of property (*f*) and his general duties under the general law of the land (*f*).

45. The subject-matter of ownership

The prime subject-matter of ownership consists of material objects such as land and chattels. But ownership is by no means limited to things of this category. A man's wealth (*g*) may consist not only of his land and goods, but of such things as interests in the land of others, debts due to him, shares in companies, patents, copyrights and his interests in trust funds. Thus he may have a

(*f*) Honoré, *op. cit.* 123, would regard limitations of this kind as one of the incidents of *ownership*. Yet the owner is not the only person whose use of an article is limited by the law: I may not by law use my knife to kill Smith, but neither may you use it for this purpose. The underlying truth is that no one's rights, not even an owner's, are unlimited.

(*g*) A discussion of the various items of wealth is to be found in Lawson, *Introduction to the Law of Property* (1958) Chap. 2.

profit à prendre to catch and take fish from A's land; a debt of £100 owing him from B; shares in C Co. Ltd.; various patents, copyrights and other industrial property; and an interest in various trust funds. Yet none of these is a material or physical thing. They are in fact nothing other than rights: the right to recover the debt from the debtor, the rights of a shareholder under company law, the right of exclusive exploitation of the patent or copyright, and the right to be paid out of the trust fund (*h*).

With such items the term "ownership" is appropriate to mark a distinction between that right and the lesser rights of temporary enjoyment. The owner of a profit à prendre can let this right to another, but this other does not become the owner of it, for ownership still inheres in the original owner. A patent-holder can grant a temporary licence to another person to manufacture and sell the article patented. An owner of a chose in action may mortgage it by assigning it as security for a loan with a proviso for reassignment on repayment of the loan.

Salmond indeed took the view that the true subject-matter of ownership was in all cases a right, on the ground that it would be a logical absurdity if the subject-matter was sometimes a material object and sometimes a right (*i*). This view gains support from the development of English land law, under which the various interests in land, ranging from a mere right over another's land to the fee simple absolute, are all regarded as interests capable of ownership, so that there would seem to be no difference in quality but merely one of degree between the rights of an encumbrancer and those of an owner. Moreover, it has a certain value in emphasising that ownership consists in fact of rights against others, whether those rights relate to material things or not. Nevertheless to speak as if what is owned is always a right runs counter to lay and legal usage. It is natural to talk of owning land and chattels, and this usage serves to mark the special relationship existing in such cases between the owner and the material object owned. Furthermore, since owning a chattel normally means having certain rights in respect of it, to describe

(*h*) Rights of property which can only be claimed or enforced by action and not by taking possession are termed *choses in action*, in contrast with *choses in possession*. The money I have in my pocket is a chose in possession; the debt owed me by my debtor is a chose in action. *Vide infra*, § 122.

(*i*) See Salmond (7th ed.), 279.

this as owning rights in respect of the chattel, would seem to entail that the owner should in fact be said to have rights to rights in respect of it; and this is to say the least, a strange conclusion. Finally, except in the case of certain rights, such as those mentioned above, we do not normally speak of ownership at all. Usually a man is said not to own, but to have, a right. In the first place many rights, such as the right of free speech or of reputation, do not appear to be fit subjects of ownership at all: a man does not *own* a right to his reputation; that is a right which he *has*. Secondly, the contrast between ownership and possession or some lesser interest, though applicable to some rights such as a profit à prendre, has no application whatsoever to others: one cannot lease or sell one's right to one's reputation. Of course there is no compelling logical reason why a legal system should not provide for such transactions, in which case such a right would become a valuable and marketable item of property. But in a society which regards only certain rights as marketable, it is natural that such transactions should be restricted to these; and that the things and rights that can form the subject-matter of such transactions—and these only—should be regarded as capable of ownership (*j*).

In consonance with lay and legal usage it is preferable to speak both of owning things in the sense of material objects and of owning rights. In this chapter we shall use the term " thing " in a wide sense to cover both of these.

Precisely what things in this wide sense can form the subject-matter of ownership will depend on the rules of each system of law.

In English law certain things qualify as capable of being owned but as not in fact being owned; others would seem to be incapable by nature of being owned. The former class includes things not yet reduced into anyone's ownership: *e.g.*, islands outside the territory of any state (*k*), wild animals not reduced into captivity,

(*j*) See Honoré, *op. cit.* 128–134.

(*k*) Since in English law the theory is that all land is held by the king, there cannot be a *res nullius* in land within the realm. In international law a *res nullius* is territory not under the sovereignty of any state. A state's sovereignty over territory is analogous to, but different from, a man's ownership of his property. The latter consists of his rights over it under the legal system of the territory in which the property is situated. Sovereignty over territory consists in the right to make laws for that territory and to govern it to the exclusion of other states

meteorites landing in the sea. The latter class consists of a variety of things. Certain rights, we have seen, such as the right to reputation cannot be owned. In addition there are certain things in a material sense which are by nature not ownable: living persons; corpses other than anatomical specimens; things common to all men, such as the air and the sea; and things beyond our reach, such as the sun, moon and stars.

But while these things are in principle incapable of ownership, there is nothing in law or logic to prevent us from having a different principle. Our law could permit slavery. It could provide that the air and the sea might be owned, sold, bought, rented and so forth, as may be done with the subsoil of the ocean: effective control is no longer impossible with regard to these elements, and it would be perfectly feasible to allow one man to charge another for breathing the air or crossing the sea (*l*). Even such objects as the sun, which, we may guess, will never be subject to human control, are not things to which the notion of ownership is completely inappropriate. A system of law under which the king owned the sun and was entitled to charge a fee from those who benefited from its rays would be perfectly possible.

The reason why it seems natural that such things should be incapable of ownership is that we have accepted certain value judgments in regard to them. Having set our hearts against slavery, we will not allow persons to be the subject of ownership at law. As for such *res communes* as the sea and air, we feel that there is enough of these for all men and that therefore it is only fair that they should be open to all and owned by none. With regard to the heavenly bodies there is the additional fact that possession and control of such things are not altogether practicable.

Where, however, a thing is capable of being owned, the methods of acquiring ownership over it will vary from legal system to legal system. Basically one can acquire ownership in two ways: by operation of law or by reason of some act or event. As to the first, a statute might provide that all A's property should after a certain period of time vest in B (*m*). As to the second, this may

(*l*) The airspace over a man's property in English law in law belongs to him, so that an infringement of it constitutes a trespass; the advent of the airplane necessitated special statutory provisions to overcome this problem.

(*m*) The laws of intestacy and bankruptcy operate to vest one man's property in another in just this way.

consist in the first taking or making a thing, both being cases of original acquisition. Or it may consist in taking the thing from another with or without his consent, both being now cases of derivative acquisition, since the new owner's title is derived from that of his predecessor. Thirdly, the thing may fall into a man's ownership without any human act, as would be the case if a piece of land were to break off from an island in a river and attach itself to my land on the opposite bank.

Whether such modes of acquisition are justified and whether ownership altogether can be justified are questions of ethics rather than of law and jurisprudence. But in so far as law depends on and reflects social attitudes, we can see that ownership no longer has quite that pre-eminence today that it had a hundred years ago (*n*). Whereas earlier generations exalted the rights of the owner almost to absolutism—and this was not without its value at a time when society stood in greater need of the entrepreneur—the tendency today has been to restrict the rights and even the existence of ownership. First, owners have been made to have regard to the general needs of society. Legislation has been passed to prevent landlords from exploiting tenants by charging exorbitant rents; to stop landowners and property developers building without regard to the interests of the general environment; and to force owners of agricultural holdings to farm their land efficiently. But secondly, private ownership has been seen as a menace to society by reason of the fact that great wealth spells great influence and power. High rates of income tax and estate duty have done much to lessen individual fortunes and so individual power, while at the same time much that was formerly in private hands has been transferred to public ownership. But the public ownership of such things as the railways, airlines, coal mines and so on is not necessarily a satisfactory solution to the problem. For in the first place, whether in private or public hands, they must still be managed, and the managers may have all or much of the power formerly possessed by the previous owners. In any case, the development of the trust on the one hand and the limited company on the other, has brought about a division between management and ownership, resulting in power being in reality in the hands of the former rather

(*n*) See the discussion in Friedmann, *Law in a Changing Society*, Chap. 8; *Law and Social Change*, Chap. 2; Dias, *op. cit.* 344–347; Paton, *op. cit.* § 118.

than the latter. Secondly, the existence of large private fortunes is not without value, in that it allows at least some few people the freedom of speaking out against the decisions of the public administrators, of campaigning at their own expense and financing their own legal battles against authority; and this is not altogether undesirable in a democratic and pluralistic society.

46. Sole ownership and co-ownership

As a general rule a thing is owned by one person only at a time, but duplicate ownership is perfectly possible. Two or more persons may at the same time have ownership of the same thing vested in them. This may happen in several distinct ways, but the simplest and most obvious case is that of co-ownership. Partners, for example, are co-owners of the chattels which constitute their stock-in-trade, of the lease of the premises on which their business is conducted, and of the debts owing to them by their customers. It is not correct to say that property owned by co-owners is divided between them, each of them owning a separate part. It is an undivided unity, which is vested at the same time in more than one person. If two partners have at their bank a credit balance of £1,000, there is one debt of £1,000 owing by the bank to both of them at once, not two separate debts of £500 due to each of them individually. Each partner is entitled to the whole sum, just as each would owe to the bank the whole of the firm's overdraft. The several ownership of a part is a different thing from the co-ownership of the whole. So soon as each of two co-owners begins to own a part of the thing instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process known as partition. Co-ownership involves the undivided integrity of what is owned.

Co-ownership, like all other forms of duplicate ownership, is possible only so far as the law makes provision for harmonising in some way the conflicting claims of the different owners *inter se*. In the case of co-owners the title of the one is rendered consistent with that of the other by the existence of reciprocal obligations of restricted use and enjoyment.

Co-ownership may assume different forms by virtue of the different incidents attached to it by law. Its two chief kinds in

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

47. The fragmentation of ownership in respect of time

So far we have discussed how two or more persons can be simultaneously owners of the same property by being co-owners. Much more important is the way in which the rights of ownership can be split between several persons on the temporal plane (*o*).

For example, a landowner wishing to provide for his sons, A and B, may constitute them co-owners of it. Alternatively he might divide the land into two parts, giving one part to each as sole owner. A third method would be to convey the land to A for life and thereafter to B in fee simple. In this case neither son becomes sole owner of the land; nor would they be co-owners. Each is sole owner of a separate estate or interest in the land. A has a life estate, which is vested in possession; B has a fee simple remainder vested, not in possession, but in interest.

The value of this third method is that it enables the owner to make provision for both sons, while ensuring that the land remains intact. Indeed English property law worked out in great detail procedures, by which the owner could at the same time keep his land and fortune intact, make provision for his dependants, and establish control over how the property was to be enjoyed. Detailed discussion of such procedures would take us into the realm of real property. Here it must suffice to observe that basically there have developed two different systems. One of these, the trust for sale, operates by means of a conveyance to trustees as legal owners, their duty being to manage the property and hold the profits or the proceeds of sale on trust for the beneficial (or equitable) owners of the various interests in the property. Under the other, the strict settlement, the owner of the life estate, the life-tenant, is the legal owner and has the right to manage the property

(*o*) See Lawson, *op. cit.* 65–73.

on behalf of himself and the owners of the other interests. The life-tenant in fact owns the land in trust for himself and the other beneficiaries, and the property legislation of 1925 provides that there shall be in addition trustees of the settlement to protect the interests of the other beneficiaries. Both schemes, then, are intimately connected with the distinction between trust and beneficial ownership, which is next considered.

48. Trust and beneficial ownership

A trust is a very important and curious instance of duplicate ownership which allows for the separation of the powers of management and the rights of enjoyment. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust-ownership; the latter is called the beneficiary, and his is beneficial ownership (*p*).

The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of some one else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognises the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as

(*p*) He who owns property for his own use and benefit, without the intervention of any trustee, may be termed the *direct* owner of it, as opposed to a mere trustee on the one hand, and to a beneficial owner or beneficiary on the other. Thus if A owns land, and makes a declaration of trust in favour of B, the direct ownership of A is thereby changed into trust-ownership, and a correlative beneficial ownership is acquired by B. If A then conveys the land to B, the ownership of B ceases to be merely beneficial, and becomes direct.

Professor Campbell suggests the term "bare ownership" in place of "trust ownership". See (1940), 7 C.L.J., at 217–18.

between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large.

The purpose of trusteeship is to protect the rights and interests of persons who for any reason are unable effectively to protect them for themselves. The law vests those rights and interests for safe custody, as it were, in some other person who is capable of guarding them and dealing with them, and who is placed under a legal obligation to use them for the benefit of him to whom they in truth belong. The chief classes of persons in whose behalf the protection of trusteeship is called for are four in number. In the first place, property may belong to persons who are not yet born; and in order that it may be adequately safeguarded and administered, it is commonly vested in the meantime in trustees, who hold and deal with it on account of its unborn owners. In the second place, similar protection is required for the property of those who lie under some incapacity in respect of the administration of it, such as infancy, lunacy, or absence. Thirdly, it is expedient that property in which large numbers of persons are interested in common should be vested in trustees. The complexities and difficulties which arise from co-ownership become so great, so soon as the number of co-owners ceases to be small, that it is essential to avoid them; and one of the most effective devices for this purpose is that scheme of duplicate ownership which we term a trust. Fourthly, when persons have conflicting interests in the same property (for example, an owner and an encumbrancer, or different kinds of encumbrancers) it is often advisable that the property should be vested in trustees, whose power and duty it is to safeguard the interests of each of those persons against the conflicting claims of the others.

A trust is to be distinguished from two other relations which resemble it. It is to be distinguished, in the first place, from a mere contractual obligation to deal with one's property on behalf of some one else. A trust is more than an obligation to use one's property for the benefit of another; it is an obligation to use it for the benefit of another in whom it is already concurrently vested. The beneficiary has more than a mere personal right against his trustee to the performance of the obligations of

the trust. He is himself an owner of the trust property. That which the trustee owns the beneficiary owns also. If the latter owned nothing save the personal obligation between the trustee and himself, there would be no trust at all. Thus if a husband gratuitously covenants with his wife to settle certain property upon her, he remains the sole owner of it, until he has actually transferred it in fulfilment of his contract; and in the meantime the wife owns nothing save the contractual obligation created by the covenant. There is therefore no trust. If, on the other hand, the husband declares himself a trustee of the property for his wife, the effect is very different. Here also he is under a personal obligation to transfer the property to her, but this is not all. The beneficial ownership of the property passes to the wife forthwith, yet the ownership of the husband is not destroyed It is merely transformed into a trust-ownership consistent with the concurrent beneficial title of his wife.

In the second place, a trust is to be distinguished from the relation in which an agent stands towards the property which he administers on behalf of his principal. In substance, indeed, as already indicated, these two relations are identical, but in form and in legal theory they are essentially different. In agency the property is vested solely in the person on whose behalf the agent acts, but in trusteeship it is vested in the trustee himself no less than in the beneficiary. A trustee is an agent for the administration of property, who is at the same time the nominal owner of the property so administered by him. A trustee can give a good title to a *bona fide* purchaser of the legal estate for value without notice of the trust, while an agent cannot do so except under the Factors Act or one of the other exceptions to the principle *Nemo dat quod non habet*. An agent must, in general, carry out the instructions of his principal, while a trustee frequently has considerable discretion so long as he keeps within the terms of the trust instrument. A trust always involves property that is the subject-matter of the trust, while agency need not necessarily do so. An agent can create direct obligations between his principal and a third person, while the acts of a trustee acting as such never do this—he can affect only the property (and therefore the beneficiaries' interests indirectly) and cannot impose new duties upon the beneficiaries towards third persons.

A trust is created by any act or event which separates the trust-ownership of any property from the beneficial ownership of it, and vests them in different persons. Thus the direct owner of property may declare himself a trustee for some one else, who thereupon becomes the beneficial owner; or the direct owner may transfer the property to some one else, to hold it in trust for a third. In many cases trusts arise without any intention to create them, where a person holds property in circumstances that make it inequitable for him to disregard the claims of others to the benefit of it. These are called " constructive trusts ". Conversely, a trust is destroyed by any act or event which reunites in the same hands the two forms of ownership which have become thus separated. The trustee, for example, may transfer the property to the beneficiary, who then becomes the direct owner; or the beneficiary may transfer it to his trustee, with the like result.

Trust-ownership and beneficial ownership are independent of each other in their destination and disposition. Either of them may be transferred, while the other remains unaffected. The trustee may assign to another, who thereupon becomes a trustee in his stead, while the beneficiary remains the same; or the beneficiary may assign to another, while the trust-ownership remains where it was. In like manner, either kind of ownership may be independently encumbered. The trustee may in pursuance of the powers of the trust, lease or mortgage the property without the concurrence of the beneficiary; and the beneficiary may deal in the same way with his beneficial ownership independently of the trustee.

Whenever the beneficial ownership has been encumbered, either by the creator of the trust or by the beneficial owner himself, the trustee holds the property not only on behalf of the beneficial owner but also on behalf of the beneficial encumbrancers. That is to say, the relation of trusteeship exists between the trustee and all persons beneficially interested in the property, either as owners or encumbrancers. Thus if property is transferred to A, in trust for B for life, with remainder to C, A is a trustee not merely for C, the beneficial owner, but also for B, the beneficial encumbrancer. Both are beneficiaries of the trust, and between the trustee and each of them there exists the bond of a trust-obligation.

49. Legal and equitable ownership

Closely connected but not identical with the distinction between trust and beneficial ownership is that between legal and equitable ownership. One person may be the legal and another the equitable owner of the same thing or the same right at the same time. Legal ownership is that which has its origin in the rules of the common law, while equitable ownership is that which proceeds from rules of equity divergent from the common law. The courts of common law refused to recognise equitable ownership, and denied that the equitable owner was an owner at all. The Court of Chancery adopted a very different attitude. Here the legal owner was recognised no less than the equitable, but the former was treated as a trustee for the latter. Chancery vindicated the prior claims of equity, not by denying the existence of the legal owner, but by taking from him by means of a trust the beneficial enjoyment of his property. The fusion of law and equity effected by the Judicature Act, 1873, has not abolished this distinction; it has simply extended the doctrines of the Chancery to the courts of common law, and as equitable ownership did not extinguish or exclude legal ownership in Chancery, it does not do so now.

The distinction between legal and equitable ownership is not identical with that mentioned in a previous chapter as existing between legal and equitable *rights*. These two forms of ownership would still exist even if all rights were legal. The equitable ownership of a legal right is a different thing from the ownership of an equitable right. Law and equity are discordant, not merely as to the *existence* of rights, but also as to the *ownership* of the rights which they both recognise. When a debt is orally assigned by A to B, A remains the legal owner of it none the less, but B becomes the equitable owner of it. But there are not for that reason *two* debts. There is only one as before, though it has now two owners. The thing which he thus equitably owns is a legal right, which is at the same time legally owned by A. Similarly the ownership of an equitable mortgage is a different thing from the equitable ownership of a legal mortgage.

Nor is the distinction between legal and equitable ownership merely equivalent to that between trust and beneficial ownership. It is true that, whenever the legal estate is in one man and the

equitable estate in another, there is a trust. A legal owner is always a trustee for the equitable owner, if there is one. But an equitable owner may himself be merely a trustee for another person. A man may settle upon trust his equitable interest in a trust fund, or his equitable estate in his mortgaged land. In such a case neither trustee nor beneficiary will have anything more than equitable ownership.

Hitherto it has been assumed that the terms "beneficial ownership" and "equitable ownership" are a proper use of language, *i.e.*, that they conform to the usual idea of ownership. Something more must now be said in defence of this position. Originally it was hardly possible to speak of equitable ownership, in the corporeal sense of the word "ownership", because the rights of the beneficiary were enforced only against a restricted class of persons, and, as we have seen, the notion of corporeal ownership presupposes rights, liberties, powers and so on *in rem*, not merely *in personam*. The protection of the beneficiary was, however, greatly extended in the course of time (*q*). At first his rights availed only against the trustee himself; later they were extended against the trustee's heir and personal representatives, his creditors, donees from him, purchasers from him with notice of the equitable interest, and others, until finally it became true to say that equitable rights availed against every one except a *bona fide* purchaser of the legal estate for value without notice, actual or constructive, of the equitable rights (*r*). Because such equitable rights are not good against all the world entirely, some argue that all equitable rights are *in personam* and that equitable ownership, at least in the sense of corporeal ownership, is impossible (*s*). Others content themselves with saying that equitable rights are neither purely *in rem* nor purely *in personam* but are *sui generis* or hybrids (*t*). The latter view, however, does not assist in solving the practical questions to which the distinction gives rise, as for example in the field

(*q*) See on the development Maitland, *Equity* (revised ed. 1936), 112–114.

(*r*) *Re Nisbet and Pott's Contract* [1906] 1 Ch. 386.

(*s*) Among the writers who have taken this view are Coke, Langdell, Ames, Maitland and Holland. For specialised discussions see Hart, "The Place of Trust in Jurisprudence" (1912) 28 L.Q.R. 290; Stone, "The Nature of the Rights of the *Cestui que Trust*" (1917) 17 Col.L.Rev. 467; Williams in (1952) 30 Can. Bar Rev. 1004; Valentine Latham in (1954) 32 *ibid.* 520.

(*t*) So Pollock in (1912) 28 L.Q.R. at 297; Hanbury, *Essays in Equity* (1934), 26–27, 51.

of conflict of laws. Suppose that the beneficiary under a trust of land dies domiciled in a different country from that in which the land is situated. According to which system of law will his interest devolve? The rule of the conflict of laws is that land devolves according to the *lex situs*; hence if the beneficiary is regarded as having an interest in the land itself, his interest will presumably devolve according to the law of the place where the land is situated. If on the other hand the beneficiary is regarded as having a mere right *in personam* against the trustee and other particular persons, his interest will presumably devolve in the same way as other rights that are not regarded as existing in respect of land, namely in accordance with the *lex domicilii*. The law must settle this question one way or the other, and cannot content itself simply with saying that equitable rights are hybrids. On the whole it is submitted that equitable rights are now best regarded as being fully *in rem* (*u*).

50. Vested and contingent ownership

Ownership is either vested or contingent. It is vested when the owner's title is already perfect; it is contingent when his title is as yet imperfect, but is capable of becoming perfect on the fulfilment of some condition. In the former case the ownership is absolute; in the latter it is merely conditional. In the former case the investitive fact from which he derives the right is complete in all its parts; in the latter it is incomplete, by reason of the absence of some necessary element, which is nevertheless capable of being supplied in the future. In the meantime, therefore, his ownership is contingent, and it will not become vested until the necessary condition is fulfilled. A testator, for example, may leave property to his wife for her life, and on her death to A, if he is then alive, but if A is then dead, to B. A and B are both owners of the property in question, but their ownership is merely contingent. That of A is conditional on his surviving the testator's widow; while that of B is conditional on the death of A in the widow's lifetime.

In English law an estate may be vested even though it does not give a right to immediate possession. Thus on a devise to A

(*u*) For a presentation of this view see Scott, "The Nature of the Rights of the *Cestui que Trust*" (1917) 17 Col.L.Rev. 269; *cf.* Hohfeld, *op. cit.* 156–159. A taxation case that bears it out is *Baker* v. *Archer-Shee* [1927] A.C. 844.

for life with remainder to B in fee simple, B's interest is vested because there is nothing but A's prior interest to stand between him and the actual enjoyment of the land. In technical language, B's interest is vested in interest, though not vested in possession; it becomes vested in possession only on the death of A.

An estate may be vested in interest although the facts may be such that it never becomes vested in possession, and so never gives a right to the actual enjoyment of the land. Thus on a devise to A for life with remainder to B for life with remainder to C in fee simple, B's estate is vested in interest notwithstanding that if B dies before A his interest will never vest in possession. For there is still nothing but A's estate between B and the enjoyment of the land.

The contingent *ownership* of a thing does not necessarily involve its contingent *existence*. Shares and other choses in action may have an absolute existence, though the ownership of them may be contingently and alternatively in A and B. Money in a bank may be certainly owing to some one, though it may depend on a condition, whether it is owing to C or D. On the other hand, it may be that the right is contingent in respect of its existence, no less than in respect of its ownership. This is so whenever there is no alternative owner, and when, therefore, the right will belong to no one unless it becomes vested in the contingent owner by the fulfilment of the condition.

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

The conditions on which contingent ownership depends are termed conditions *precedent* to distinguish them from another kind known as conditions *subsequent*. A condition precedent is one by the fulfilment of which an inchoate title is completed; a condition subsequent is one on the fulfilment of which a title already completed is extinguished. In the former case I acquire absolutely what I have already acquired conditionally. In the

latter case I lose absolutely what I have already lost conditionally. A condition precedent involves an inchoate or incomplete investitive fact; a condition subsequent involves an incomplete or inchoate divestitive fact (*v*). He who owns property subject to a power of sale or power of appointment vested in someone else owns it subject to a condition subsequent. His title is complete, but there is already in existence an incomplete divestitive fact, which may one day complete itself and cut short his ownership.

It is to be noticed that ownership subject to a condition subsequent is not contingent but vested. The condition is attached not to the commencement of vested ownership, but to the continuance of it. Contingent ownership is that which is not yet vested, but may become so in the future; while ownership subject to a condition subsequent is already vested, but may be divested and destroyed in the future. It is ownership already vested, but liable to premature determination by the completion of a divestitive fact which is already present in part (*w*).

It is clear that two persons may be contingent owners of the same right at the same time. The ownership of each is alternative to that of the other. The ownership of one is destined to become vested, while that of the other is appointed to destruction. Similarly, the vested ownership of one man may co-exist with the contingent ownership of another. For the event which in the future will vest the right in the one, will at the same time divest it from the other. Thus a testator may leave property to his wife, with a provision that if she marries again, she shall forfeit it in favour of his children. His widow will have the vested ownership of the property, and his children the contingent ownership at the same time. Her marriage is a condition subsequent in respect of her own vested ownership, and a condition precedent in respect of the contingent ownership of the children (*x*).

(*v*) On investitive and divestitive facts, see § 75.

(*w*) English law draws a technical distinction between estates subject to a condition subsequent and determinable estates. The distinction turns merely upon the form of words used to create the respective estates, but when an estate is classified as the one or the other, certain legal consequences follow: see (1945) 61 L.Q.R. 79.

(*x*) On vested and contingent ownership, see Windscheid, I. sects. 86–95; Dernburg, *Pandekten*, I. 82, 105—112; Austin, *Lecture* 53; Kocourek, *Jural Relations* (2nd ed. 1928), Chap. 14.

CHAPTER 9

POSSESSION

51. The idea of possession (a)

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

Nor is it just the acquisition of possession that is essential. A society lacking all respect for individual possession would quite clearly be unviable. If a man could never be sure that the food before him, the coat on his back and the tool in his hand will not be snatched from him by his neighbour, then obviously life in society would be completely impracticable. Simple economics dictates that, as a minimum, some measure of uninterrupted enjoyment is a prerequisite to man's deriving any benefit or value from material objects and that such temporary possession must be respected by, and protected from, his neighbours.

For this reason, law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself (*b*); and the possessor may well be stirred to defend

(a) On possession generally see Pollock and Wright, *Possession in the Common Law*; Holmes, *The Common Law*, Lecture iv; Kocourek, *Jural Relations* (2nd ed.), Chap. XX; Dias, *Jurisprudence* (2nd ed.), Chap. XII; Paton, *Jurisprudence* (3rd ed.), Chap. XXII; Goodhart, *Essays in Jurisprudence and the Common Law*, Chap. 4; Harris, "The Concept of Possession in English Law" in *Oxford Essays in Jurisprudence* (ed. Guest), Chap. 4.

(b) See Holmes, *The Common Law*, 207.

himself with force. The result is violence, chaos and disorder. In so far therefore as a legal system aims to replace self-help and private defence by institutionalised protection of rights and maintenance of order, it must incorporate rules relating to possession.

But the concept of possession is as difficult to define as it is essential to protect. In the first place, possession is an abstract notion and involves the same sort of difficulties, which we have seen to arise with other abstract terms such as "law" and "rule" (*c*). There is nothing which we can point at and identify as possession in the same way as we can do with concrete things such as tables and chairs. Moreover, it is an abstract term to which the traditional type of definition is as inappropriate as we saw it to be for the term "rule". Just as we could not locate the notion of a rule within some wider class of concepts, so too with possession we cannot define it by placing it in a wider class and then distinguishing it from other members of the class; for possession is, it would seem, in a class of its own.

A second cause of difficulty is the fact that possession is not purely a legal concept. Our discussion of ownership showed that possession differs from ownership in that the former is of temporary duration whereas the latter is of a more permanent, ultimate and residuary nature. But possession differs from ownership in another quite different respect. Ownership, as we saw, consists of a combination of legal rights, some or all of which may be present in any particular instance; and such rights imply the existence of legal rules and a system of law. With possession this is not so. A possessor is not so much one who has certain rights as one who actually *has* possession. Whether a person has ownership depends on rules of law; whether he has possession is a question that could be answered as a matter of fact and without reference to law at all. The notion of possession has application in a pre-legal society, and even perhaps outside society altogether. Of course in so far as statements about possession are statements of law, then they imply the existence of that law, but the existence of possession is independent of, and prior to, that of law.

(*c*) Supra, § 6.

Whereas ownership is strictly a legal concept, possession is both a legal and a non-legal or pre-legal concept (*d*).

Now with possession, as with all concepts that are used both inside and outside the law, we must remember that the legal and the ordinary meanings can diverge. There is indeed no logical compulsion for lay and legal usage to coincide. For it is always open to a system of law to adopt a word from ordinary language and to use it in some special restricted or extended sense for its own particular purposes. Some cases of actual possession the law may prefer to regard as something less than possession, since it may wish to refuse to these the protection which it normally affords. The borrower of a thing would usually be considered to be in possession of it. Yet Roman law looked on him as having something less, as having mere custody or *detentio*: he had possession in fact but not in law. Again, a person in possession of an envelope or bureau would ordinarily be taken to have possession of its contents. Yet English law has decided the contrary in certain larceny cases, where such persons have been held not to take possession of contents of which they were unaware until they discovered them and realised what they were (*e*). Equally a system of law may wish to afford the protection usually given to possessors to persons who in fact have sometimes less than possession; such persons are sometimes said by lawyers to have constructive possession.

This divergence between lay and legal usage is not only possible; it is to be expected. Like many words in common use, "possession" is a word of open texture. Though there are cases where we can say "If this is not possession, then nothing is", and others where we can assert that here is nothing remotely like possession, nevertheless there may always arise the marginal situation that leaves us doubtful whether to describe it as a case of possession or not. If X unknown to me leaves a wallet on the floor of my shop, is it now in my possession? To this sort of question common sense and ordinary language provides no clear

(*d*) Sir John Salmond considered that there were not two separate ideas of possession, a legal and a natural, but that there was one idea of possession to which possession in law conforms more or less imperfectly. Salmond, *Jurisprudence* (7th ed.), 295. However, the lack of conformity may be such as to justify our treating possession in law as a separate concept.

(*e*) *Infra*, § 52.

or unqualified answer. Law, however, may have to provide just this, because upon the answer given may depend a determination as to whether the right to the wallet should inhere in me or in the customer who finds it.

To such problems each system of law is free to provide its own solution. No two systems are obliged to arrive at the same conclusion, but the answers given will depend on the policy which each legal system adopts and will affect the meaning of the legal concept of possession in each system. As policies and solutions may differ from system to system, so will the concept of possession. Moreover, even within the same system of law different policies may be seen at work in different areas of law. The English law of larceny, where the courts have been concerned to see that dishonesty should not escape conviction, has frequently found occasion to narrow the meaning of possession, as in the examples given above. By contrast, the law relating to landlord and tenant, where the courts have been anxious to give protection to tenancies, has at times extended the connotation to cover situations that would hardly qualify in ordinary speech as cases of possession.

To look for a definition then that will summarise the meanings of the term " possession " in ordinary language, in all areas of law and in all legal systems, is to ask for the impossible. We may be tempted, therefore, to inquire instead into the sorts of factual criteria according to which each area of a system of law ascribes possessory rights to people and to investigate the nature of these rights. In other words we may prefer to ask " what are the facts on which legal possession is based, and what are the legal consequences?" In short we might feel that the term " possession " itself could just as well be omitted: there are facts and there are rights, but possession itself is merely a useful but unnecessary stepping-stone from one to the other.

However attractive it may seem, this is a misleading approach. In the first place, it is true that the rules in different systems, and in different parts of the same system of law, may not necessarily produce consistency: the concept of possession in larceny may be different from the concept of possession in the law of landlord and tenant. For in any case the normal order of things is that practical rules precede theoretical analysis. Nevertheless, a multitude of

unrelated regulations becomes in due course not only intellectually unsatisfying but for practical purposes unmanageable. Practice itself then stands in need of theory and rationalisation. We must not expect to achieve a definition to which every use of the term "possession" will conform. That could be bought only at the price of distorting the rules of law themselves or lengthening the definition to a point beyond utility. What we can aim at is a definition of the normal or standard legal case of possession and an analysis of the factual notion underlying this concept.

Secondly, to seek only the criteria for the ascription of possessory rights together with a description of such rights, overlooks the importance to the legal concept of the notion of actual possession. Not only is actual possession the prime case where possessory rights are afforded; it is also true that one of these rights may well consist in the right to be restored to actual possession. Consequently we cannot avoid inquiring into the nature of actual possession itself. Further, to concentrate solely on the criteria and the rights, without regard to the underlying factual notion underlying the standard legal case is to miss the unifying force of the term "possession". If facts F_1, F_2 . . . F_n are such that the existence of any one of them enables us to say in law that here is a case of possession; and if a possessor is entitled in law to any or all of the possessory rights R_1, R_2 . . . R_n; nonetheless to restrict the description of the concept of possession to a description of the facts and the rights would be to distort the picture. Some of the facts may be more central than others; equally so may some of the rights. A mere catalogue of both will miss the pattern running through the whole (*f*).

The most fruitful approach is first to examine the ordinary or extra-legal meaning of possession, and then to discuss the ways in which a legal concept of possession may diverge from this on account of the factors which the law may want to take into consideration, remembering that while the factual concept underlies the legal concept, the latter may in turn affect our use of the former. The way that lawyers use "possession" may well have repercussions on its extra-legal use.

(*f*) See Tay, "The Concept of Possession in the Common Law: Foundations for a new Approach" (1964) 4 *Melbourne University Law Review* 476; and the reply by D. R. Harris, *ibid.* 498.

52. Possession in fact

Possession, in fact, is a relationship between a person and a thing. I possess, roughly speaking, those things which I have: the things which I hold in my hand, the clothes which I wear, and the objects which I have by me. To possess them is to have them under my physical control. If I capture a wild animal, I get possession of it; if it escapes from my control, then I lose possession.

Things not in any way amenable to human control cannot form the subject-matter of possession. A man cannot be said to possess for example the sun, the moon or the stars. Indeed the expression "to possess the sun" is without application: if a man claimed to possess the sun, we should be at a loss to understand what he meant. In time, however, it is conceivable that means might be discovered of controlling such distant objects as the sun and in this event it might make sense to talk of possessing it; but this would be a very different world from the one we know and the one our language describes. Yet the fact that our ordinary language has no use for such expressions by no means rules out their employment in a legal system. We have seen that the legal concept of ownership could quite feasibly be applied to such objects as the sun and the same holds true of the legal concept of possession. We could, if we wanted, have laws specifying criteria according to which a man might be said to possess the sun. For legal concepts and ordinary concepts need not coincide.

Now to say that something is under my control is not to assert that I am continuously exercising control over it. I can have a thing in my control without actually holding or using it at every given moment of time. In the ordinary sense of the word, I retain possession of my coat even if I take it off and put it down beside me; and I continue in possession of it even though I fall asleep. All that is necessary is that I should be in such a position as to be able, in the normal course of events, to resume actual control if I want. At this point we may observe the influence of law and of the legal concept of possession on the idea of possession in fact. In a wholly primitive society utterly devoid of law and of legal protection for possession, there might well be little hope of resuming actual control over a thing once you had momentarily relinquished it. In such a society men could only be said to

possess those objects over which they were actually exercising control. By contrast, in a society in which possession is respected generally and is protected by law, we may expect that temporary relinquishment of actual control will not result in complete loss of the ability to resume it at will. So, by providing remedies against dispossession the law enlarges the number of situations in which a person may count on retaining his power of control; in other words it increases the number of cases where a man may be said to have possession.

Now whether in any given case I can be said to have sufficient control (whether actual or potential) to be in possession of an object will depend on a variety of factors (*g*). First there is the extent of my power over the object itself. Obviously complete absence of power entails complete lack of possession, but having possession does not involve having absolute power over the subject-matter; the amount of power that is necessary varies according to the nature of the object. The more amenable it is to control, the less likely am I to qualify as possessing it without being able to exercise a high degree of control. Possession of small objects may involve holding them or else having them near to hand; a fairly ungovernable object such as a wild animal is capable of being possessed by being confined in a cage, without the possessor's being able to lay hold of it himself; a large or immovable object, such as a ship or a house, could be said to remain in my possession even though I am miles away and able to exercise very little control, if any.

Another factor relevant to the assessment of control is the power of excluding other people. Once actual control is abandoned, the possibility of resumption may well depend on the lack of outside interference. This may be due to the possessor's own physical power and influence; to his having kept secret the object's existence or whereabouts; to his neighbour's customary respect for possession, *i.e.*, their unwillingness to interfere if the exercise of control has been interrupted; and finally to the law itself which may penalise any such interruption. Indeed, so

(*g*) Harris, *op. cit.* 72 *et seq.* isolates no less than nine factors which have been held relevant to a conclusion that a plaintiff has acquired possession of a chattel for the purposes of a particular rule of law. It is suggested that the reason for the relevance in law of the first seven of the factors listed by Harris is partly their relevance to a conclusion that a person has possession in fact.

important is the exclusion of others to the notion of possession that it is sometimes regarded as an essential part of the very concept: to possess anything, it is said, entails being able or intending to exclude others from it (*h*). That this is not so, however, can be seen from the fact that " posssession " is a term apt to describe even situations involving only one person. If the sole inhabitant of a desert island catches a fish, he can quite correctly be described as getting possession of it, as keeping it in his possession, or as losing possession of it if it escapes. Here actual possession differs from ownership, which consists of rights and which therefore automatically involves the existence of persons against whom the owner can have those rights. But words are not used idly and " possession " is not just a term used to catalogue everything which a man happens to have at any one time. We should hardly attribute to the man on the island possession of his clothes, for example: there would be no point in our doing so; whereas the point in describing his relationship with the fish in terms of possession was to contrast his position with regard to this particular fish with his position with regard to those which he had not caught. Now the contrast we usually want to make is between those cases where we have exclusive control and those where we do not. The factor of exclusion, therefore, though not logically essential to possession, is, because of its effect on the ability to control and because of the kind of distinctions we wish to draw, a highly important feature; it is central in the sense that cases of possession without such exclusion are odd exceptions: the example of the man on the island is an unusual and marginal situation.

So far no distinction has been made between the mental and physical aspects of possession. Many jurists have distinguished two such elements (*i*). Salmond considered that possession consisted of a *corpus possessionis* and an *animus possidendi* (*j*). The former, he thought, comprised both the power to use the thing

(*h*) The view that possession in some way involves an exclusive element was held by Salmond, *Jurisprudence* (7th ed.), § 97; Pollock, *Jurisprudence and Legal Essays* (ed. Goodhart), 98 *et seq.*; Holmes, *The Common Law*, 220 *et seq.*

(*i*) The distinction between *animus* and *corpus* was made in Roman law: *Dig.* 41.2.3.1., and has been accepted by such jurists as Savigny, Ihering, Pollock, Salmond and Holmes.

(*j*) Salmond, *Jurisprudence* (7th ed.), 297–308.

possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant. Moreover, it is doubtful whether in ordinary usage possession could be ascribed to a person utterly unable to form any intentions whatsoever: it would be odd to describe a day-old baby or a man in a protracted coma as actually (as opposed to legally) possessing anything at all. As against this, however, we may find counter-examples of possession unaccompanied by intention. I should normally be said to possess the coins in my pocket, even if unaware of their existence and so unable to form any intention in respect of them. Can we say then that what the possessor needs is at least a minimum intention, an intent to exclude others from whatever may be in his pocket? To this there are two replies. First, in its widest and loosest sense, the sense in which "possesses" simply means "has", I can be said to possess such things as a fine head of hair, a stout heart or a good sense of humour—without any question of intent arising. Secondly, in the narrower sense, where the subject-matter of possession consists of material objects other than parts of the possessor's own body, it is misleading to assert that the possessor must actually be intending anything at all. If I possess something, then it is true that if my possession is challenged or attacked I shall probably display an intention of excluding such interference. But unless my possession is under attack—and in the normal course of events it is not; furthermore it would be highly unusual to find a man's possession under constant attack—no question of, or need for, intent is involved.

The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it—in which event he clearly has possession—we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others. There will always, of course, be border-line cases. Suppose I become paralysed: am I still in possession of the coat by my side? Such questions need not detain us, for the

ordinary concept of possession is not designed to cope with such marginal cases, while the existence of legal rules relating to legal possession will answer such questions and obviate the need for any decision in terms of possession in fact.

We have seen that the word " possess " is sometimes used in a very wide sense to mean " have ". Thus I can be said to possess a sense of humour. I can also be said to possess certain rights, and here the term can be used to draw a distinction between the ownership and the possession of a proprietary right, as discussed earlier. It may, on the other hand, mean nothing more than to say that I have the rights in question, and this is not restricted to legal rights; I can be said to possess a moral, or natural, right to privacy, whether or not this is accompanied by a legal right. In general, however, the extra-legal notion of possession is concerned with things of a material or physical character.

53. Possession in law

We have seen that in any society some protection of possession is essential. This being so, the law must needs provide such protection, and this it can do in two different ways. First, the possessor can be given certain legal rights, such as a right to continue in possession free from interference by others. This primary right *in rem* can then be supported by various sanctioning rights *in personam* against those who violate the possessor's primary right: he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him. Secondly, the law can protect possession by prescribing criminal penalties for wrongful interference and for wrongful dispossession. By such civil and criminal remedies the law can safeguard a man's *de facto* possession.

Now obviously whenever such remedies are invoked, it will be important to ascertain whether a person invoking them actually has any possession to be protected. It will be relevant to inquire whether a plaintiff complaining of interference actually possesses the object interfered with, or whether a plaintiff alleging wrongful dispossession was himself formerly in possession in fact. Consequently there will be a need for legal criteria to determine whether a person is in possession of an object.

A legal system could of course content itself with providing

that in law the existence of possession should depend solely on the criteria of common sense. In this case possession in law would be identical with possession in fact; a man would in law possess only those things which in ordinary language he would be said to possess. Such a system of law, then, would concern itself only with actual possession. Even so, the concept of possession would not be free of difficulty. For possession in fact, as we saw, is not a wholly simple notion; the question whether I am in fact in possession of an article depends on such factors as the nature of the article itself and the attitudes and activities of other people. But the general outline of the concept of possession in fact, as given in the preceding section, would suffice for the purposes of a legal system that adopted this approach.

Even with such a legal system, however, there would no doubt arise borderline questions to which lay usage gave no answer but which the law would have to resolve: if A loses his golf-ball on B's golf-links and the ball is found by C, we cannot proceed with the matter of safeguarding possession until we know who in such a case actually has possession. Yet, at the moment when C has found the ball but has not yet picked it up, it is by no means clear which of these three parties would ordinarily, and outside the law, be held to be in possession. A legal system's solutions to such marginal problems would inevitably refine the notion of possession and produce divergences between the factual and the legal concepts.

Apart from this type of development however, the two concepts could quite easily coincide. Nor need such coincidence restrict legal protection to cases of actual possession. If A wrongfully takes possession of B's watch, the law can still afford all its possessory remedies to B, on the ground that B *did* originally have, and therefore *ought* to have, possession. The fact that the law regards as possessors only those who are actually in possession need not prevent it from protecting those who are not in possession but who in the general view of society ought to be. Indeed the protection of possession would be of little point if legal protection ceased the moment possession was lost: the protection of possession entails supporting the dispossessed against the dispossessor.

But when a system of law allows possessory rights and remedies to persons not in actual possession, it may do so, not by

considering them simply as entitled to possession and its attendant rights, but by regarding them as being for legal purposes *in possession*. Thus we may find that one who is not actually a possessor is nevertheless considered as such in the eyes of the law; and conversely one who actually has possession may be looked on by law as a non-possessor. Accordingly the concept of legal possession parts company still further from the ordinary notion of possession, as law tends to invent instances of constructive possession, *i.e.*, cases where something less than possession in one person is deemed possession in law, and where conversely the actual possession of some other party is reduced to something less than legal possession.

The common law relating to the crime of larceny provides numerous examples of this tendency. This offence penalises the wrongful taking of possession, and in order to qualify as wrongful such taking must be (a) without the possessor's consent and (b) accompanied by an intent to deprive him permanently of the object stolen. But there are many cases where an unsuspecting owner allows the wrongdoer to get possession with his consent and where accordingly dishonesty would go scot-free but for the special provisions regarding possession in such cases. Where a man asks his companion to hold his luggage, or a shopkeeper allows a customer to examine his goods, or a master instructs his servants to use his tools, or a host lets his guests use his table-ware—in all these cases actual possession might well be said to have been given by the first party to the second. Consequently if the companion, the customer, the servant or the guest absconded with the goods, they would not in ordinary language take possession against the rightful possessor's consent, since they would have already obtained it earlier with consent. The law, however, provides that in such cases possession remains in the first party, while the second is said to obtain mere custody of the article (*k*). Accordingly he does not acquire legal possession until he makes off with the article, but at this point he is acting without the rightful possessor's consent and so is guilty of a wrongful taking of possession.

(*k*) On the distinction in larceny between possession and custody see Smith and Hogan, *Criminal Law*, 348.

It should be noted that there was nothing logically inevitable in this sort of development: in order to catch dishonesty which is outside the strict meaning of the definition of larceny, the law has extended the meaning of certain terms in the definition; it could equally well have extended the definition itself.

This indeed has been done to cope with the case of the dishonest bailee. In common law a bailee is one who is given possession of goods on the understanding that he is to deliver them *in specie* to the bailor or at the bailor's directions. Such a person acquires possession of the goods in law as well as in fact. Suppose then that he misappropriates them? Having already got possession, he cannot, it would seem, be guilty of larceny. First, the courts created a peculiar rule that the bailee only got possession of the container and not of its contents; if he subsequently " broke bulk " by opening the container and misappropriating the contents, he was now deemed to take possession of the contents for the first time, and because such taking was against the original possessor's consent, he became guilty of larceny (*l*). Later, however, legislation provided that if a bailee fraudulently misappropriated the goods bailed to him he would be guilty of stealing, thus providing that a bailee who has lawful possession can nevertheless commit larceny of the goods he possesses. Here then the definition of larceny was extended by extending the terms in the definition.

Similar to the problem of the bailee is that posed by the delivery by one person to another of an object which, unknown to either of them, contains inside it certain valuable items of property. A sells B a bureau, which, unknown to both, contains jewels in a secret drawer. Who has possession, A or B? Ordinarily perhaps we should consider that a person with possession of a container gets possession also of the contents, and that the buyer in the above example would simultaneously take possession of the bureau and the valuables. Common law, however, holds that in such a case, unless the deliverer intends the deliveree to obtain possession of the contents, the latter does not acquire legal possession of them until he discovers them and that if at this stage he

(*l*) This curious rule of law originated from the *Carrier's Case* (1473) Y.B. 13 Edw. IV fo. 9 pasch. pl. 5. For a discussion of the policy behind the rule see Hall, *Theft, Law and Society*, Appendix.

decides dishonestly to misappropriate them, he accordingly becomes guilty of larceny (*m*).

In the above cases the physical possession of the accused is regarded as less than legal possession, because the accused is unaware that he has the object. Yet in common law possession does not always involve knowledge of the presence or existence of the subject-matter. If A unknowingly takes something which is in B's possession, he nevertheless takes possession and commits a trespass against B. So in the famous case of *R.* v. *Riley* (*n*) the accused was held to have taken possession of a sheep which belonged to the prosecutor and which he unknowingly drove with his own flock to market.

An occupier of land is held to be in possession of objects under or attached to the land whether he knows of them or not (*o*). So if X takes valuable rings embedded in the soil of Y's pool, he commits a trespass to goods which in law are in the possession of Y, despite Y's ignorance (*p*). For the purposes of larceny an occupier of land has been held to be in possession also of articles lying on the land though not attached to it. In *Hibbert* v. *McKiernan* (*q*) balls lost on a golf-links and abandoned by the owner were held to have fallen into the possession of the secretary and members of the club. Whether things lying on but not attached to land are for civil purposes in the possession of the occupier is not settled (*r*).

Normally, lost articles are deemed in law to remain in possession of the loser. So, if I lose my wallet, in law I retain possession of it, even though in fact I might well be said to have lost possession. To lose not only the object but also legal possession of it, the law requires that I should terminate my intention to retain my rights over it, *e.g.*, by throwing it away deliberately. In most

(*m*) *Merry* v. *Green* (1847) M. & W. 623. We may contrast with this the case of *Moynes* v. *Coopper* [1956] 1 Q.B. 439, where the deliveror intended the deliveree to take possession of the money in the wage packet, so that the deliveree acquired possession with consent and could not, therefore, commit larceny of the money later on.

(*n*) (1853) Dears.C.C. 149.

(*o*) *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch.D. 562; *South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q.B. 44.

(*p*) *South Staffordshire Water Co.* v. *Sharman*, supra.

(*q*) [1948] 2 K.B. 142.

(*r*) The uncertainty is largely due to the case of *Bridges* v. *Hawkesworth*, *q.v. infra*.

cases it is a question of inference from the circumstances whether the loser has abandoned his legal possession, and this is a conclusion which the law is slow to draw (*s*).

We can see then that sometimes possession is possible without knowledge of the subject-matter and that sometimes such knowledge is a necessary requirement. We can also see, however, that in common law possession is a relative matter (*t*). The common law is not normally concerned with the question who has the *best* right to possess; it is concerned with the question which of the parties before the court has the *better* right to possess. If A momentarily hands his wallet to B, from whom it is stolen by C, who then loses it on D's property, where it is then found by E, the question who has the right to possess—which is often considered the same as the question who *has* legal possession—will depend on who brings action against whom.

Against all subsequent parties E's title would prevail, for finding confers a good title. In an action between D and E, however, it would seem that D would have the better right if he could show that the article was found on property from which he had a general intention to exclude others. *Bridges* v. *Hawkesworth* (*u*) decided that notes found on the floor of a shop passed into the possession of the finder rather than of the shopkeeper. This case, which has been much criticised (*v*), was distinguished in *South Staffordshire Water Co.* v. *Sharman* (*w*) on the ground that the notes were found in the public part of the shop, but would seem to have been followed in *Hannah* v. *Peel* (*x*) where a soldier, who found a brooch in a requisitioned house, was held entitled to the brooch as against the owner of the house. Here, however, the owner had never been in possession of the house.

(*s*) It is not unusual for the law to consider that a person has not relinquished all right to possess an object, although outside the law he might well be thought to have abandoned all right to possess. A person who had buried a diseased pig on his land has been deemed not to have abandoned such right: *R.* v. *Edwards* (1877) 13 Cox C.C. 384; a householder who puts refuse in his dustbin has been held to retain possession of it until it is collected: *Williams* v. *Phillips* (1957) 41 Cr.App.R. 5. In these cases, however, the objects were on land in occupation of these persons, whose possession could, therefore, be also based on their right as occupiers.

(*t*) Harris, *op. cit.* at 71.

(*u*) (1851) 21 L.J.Q.B. 75.

(*v*) Goodhart, *Essays in Jurisprudence and Common Law*, 83, considers the case to be wrongly decided.

(*w*) [1896] 2 Q.B. 44.

(*x*) [1945] K.B. 509.

In the recent case of *London Corporation* v. *Appleyard and Another* (*y*) money found on land was held to be in the possession of the occupier and not of the finder.

The occupier of land has possession in common law of articles under and attached to his land (*z*) and also, perhaps of articles lying on his land, unless they are on a part of this land to which the public is admitted. Where the public is admitted, the rule in *Bridges* v. *Hawkesworth* may still hold good, *i.e.*, that the finder's right prevails. It is arguable that the occupier's right should always prevail, since the true owner will have more hope of recovering the article from the occupier of the place where it was lost than from a finder whose whereabouts may be unknown (*a*). On the other hand, if there is no likelihood of the true owner's appearance to claim the property, perhaps the fairest course would be to treat the object as a windfall and to divide the proceeds of sale between finder and occupier equally.

To return to our example, neither D nor E would be said by law to have possession as against C. The latter, since he had possession, has a right good against all the world except the true owner. In an action by C against D and E, the latter would not be able to plead *jus tertii*, *i.e.*, to argue that the object belongs to someone other than C and that therefore C should not succeed against D or E. To allow this would be to allow anyone who could prove a defect in a possessor's title to dispossess him of the goods. This, however, is a right which common law allows only to the true owner and his agents.

As against A or B, however, C would have no defence. B could recover the wallet because he had actual possession of it. A could recover it from C because, although it was in B's hands, he had an immediate right to possess. So either A or B, whichever brought action against C, would be deemed to have possession as against C.

(*y*) [1963] 1 W.L.R. 982. *Cf. Bird* v. *Fort Francis* (1949) 2 D.L.R. 791, where the finder of money lost in a building was held to have obtained a good title to it, there being no claim on the part of the owner of the money or the occupier of the premises. *Cf.* also *Grafstein* v. *Holme & Freeman* (1958) 12 D.L.R. (2d) 727.

(*z*) *Supra*, p. 278.

(*a*) See Harris, *op. cit.* 97–98. Certain American jurisdictions draw a distinction between articles that are mislaid and articles that are lost. Where they are mislaid, *i.e.*, deliberately left somewhere but the owner has forgotten where, possession passes to the occupier.

As between A and B, however, there is no doubt that in law A, the true owner, would succeed. In a civil action for conversion or detinue the question which party actually has possession need not arise, because A, having an immediate right to possession, is entitled to bring these actions; but if B were to be prosecuted for larceny there is no doubt that he would be said to have had, not possession, but only custody of the wallet. This is so notwithstanding that he has possession as against C, who is guilty of stealing the wallet from B's possession. In *R.* v. *Harding* (*b*), for example, the accused was convicted of stealing a raincoat from a servant, who, as against the master, had mere custody of the coat and could herself have been convicted of larceny had she dishonestly made off with it.

Of all the divergencies between legal and actual possession this is the most notable, *viz.*, that outside the law possession is used in an absolute sense whereas within the law it is employed in a relative sense. Outside the law we do not speak of a person having possession as against someone else; we say that he either has or has not got possession. In law we talk rather of possession as something which one person has against another. If we overlook this, then decisions like *R.* v. *Harding* and *London Corporation* v. *Appleyard* are unnecessarily difficult. How could the servant in the first case have possession of the coat and yet at the same time not have possession of it? If the law used possession in an absolute sense, then of course she could not. As it is, she had possession as against the thief but not as against her employer. Likewise the occupier of the land in the second case had possession of the notes as against the workmen who found them; he would not of course have had possession as against the true owner, had the latter advanced his claim.

It is said that English law has never worked out a consistent theory of possession (*c*). But although there are many other parts

(*b*) (1929) 142 L.T. 583.

(*c*) The complexities of the English law are increased by the curious circumstance that two distinct kinds of legal possession are recognised in that system. These are distinguished as seisin and possession. To a considerable extent they are governed by different rules and have different effects. I may have seisin of a piece of land but not possession of it, or possession but not seisin, or both at once; and in all those cases I may or may not at the same time have possession in fact. The doctrine of seisin is limited to land; it is one of the curiosities of that most curious of the products of the human intellect, the English law of real property. The doctrine of possession, on the other

of English law which give rise to difficult problems concerning possession and which cannot be further discussed here, it would seem that underlying the concept of possession in English law is to be found the ordinary notion of factual possession; that this has been refined by extensions and restrictions in order to base the right to possess on actual possession; and that the equating of the right with the possession has resulted in an unnecessary and yet useful concept of relative possession. To provide a terse definition to apply to all instances of legal possession would, therefore, be impossible, but the basic strands in the concept are reasonably discernible.

54. Immediate and mediate possession

In law one person may possess a thing for and on account of some one else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed *mediate*, while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct*. If I go myself to purchase a book, I acquire direct possession of it; but if I send my servant to buy it for me, I acquire mediate possession of it through him, until he has brought it to me, when my possession becomes immediate.

Of mediate possession there are three kinds (*d*). The first is

hand, is common, with certain variations, to land and chattels. The divergence between these two forms of possession in law is a matter of legal history, not of legal theory.

Extraordinary importance was until a comparatively recent period attributed by our law to the acquisition and retention of seisin by the owner of land. Without seisin his right was a mere shadow of ownership, rather than the full reality of it. For many purposes a man *had* only what he possessed—and the form of his possession must be that which amounted to seisin. A dispossessed owner was deprived of his most effective remedies; he could neither alienate his estate nor leave it by his will; neither did his heirs inherit after him. The tendency of modern law is to eliminate the whole doctrine of seisin, as an archaic survival of an earlier process of thought, and to recognise a single form of legal possession.

See, as to the idea of seisin and the consequences attributed to its presence or absence, a series of interesting articles by Maitland, "The Seisin of Chattels", "The Mystery of Seisin", and "The Beatitude of Seisin", *Collected Papers*, I. 329, 358, 407. See also Lightwood, *Possession of Land*, 4–8.

(*d*) The explicit recognition of mediate possession (mittelbarer Besitz) in its fullest extent is a characteristic feature of the German Civil Code (sects. 868–871): "If anyone possesses a thing as usufructuary, pledgee, tenant, borrower, or depositee, or in any similar capacity by virtue of which

that which I acquire through an agent or servant; that is to say, through someone who holds solely on my account and claims no interest of his own. In such a case I undoubtedly acquire or retain possession; as, for example, when I allow my servant to use my tools in his work, or when I send him to buy or borrow a chattel for me, or when I deposit goods with a warehouseman who holds them on my account, or when I send my boots to a shoemaker to be repaired. In all such cases, though the immediate possession is in the servant, warehouseman, or artisan, the mediate possession is in me; for the immediate possession is held on my account.

The second kind of mediate possession is that in which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to obtain from him the direct possession whenever I choose to demand it. That is to say, it is the case of a borrower or tenant at will. I do not lose possession of a thing because I have lent it to someone who acknowledges my title to it and is prepared to return it to me on demand, and who in the meantime holds it and looks after it on my behalf. There is no difference in this respect between entrusting a thing to a servant or agent and entrusting it to a borrower. Through the one, as well as through the other, I retain as regards all other persons a due security for the use and enjoyment of my property. I myself possess whatever is possessed for me on those terms by another (*c*).

There is yet a third form of mediate possession, respecting which more doubt may exist, but which must be recognised by sound theory as true possession. It is the case in which the immediate possession is in a person who claims it for himself until

be is entitled or bound with respect to some other person to keep possession of the thing for a limited time, then that other person has possession of it also (mediate possession)." See Dernburg, *Das bürgerliche Recht*, III. sect. 13. Windscheid, I. pp. 697—701.

(*c*) In *Ancona* v. *Rogers* (1876) 1 Ex.D. at p. 292, it is said in the judgment of the Exchequer Chamber: "There is no doubt that a bailor who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods. . . . We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would in a popular sense as well as in a legal sense be said to be still in his possession."

some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end: as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned.

The extent to which the above ideas are recognised in English law may be briefly noticed. An instance of mediate legal possession is to be found in the law of prescription. Title by prescription is based on long and continuous possession. But he who desires to acquire ownership in this way need not retain the *immediate* possession of the thing. He may let his land to a tenant for a term of years, and his possession will remain unaffected, and prescription will continue to run in his favour. If he desires to acquire a right of way by prescription, his tenant's use of it is equivalent to his own. For all the purposes of the law of prescription mediate possession in all its forms is as good as immediate. In *Haig* v. *West* (*f*) it is said by Lindley, L.J.: "The vestry by their tenants occupied and enjoyed the lanes as land belonging to the parish . . . The parish have in our opinion gained a title to those parish lanes by the Statute of Limitations. The vestry have by their tenants occupied and enjoyed the lanes for more than a century."

In the case of chattels a further test of the legal recognition of mediate possession in all its forms is to be found in the law as to delivery by attornment. In *Elmore* v. *Stone* (*g*) A bought a horse from B, a livery stable keeper, and at the same time agreed that that it should remain at livery with B. It was held that by this agreement the horse had been effectually delivered by B to A though it had remained continuously in the physical custody of B. That is to say, A had acquired mediate possession, through the direct possession which B held on his behalf. The case of *Marvin* v. *Wallace* (*h*) goes still further. A bought a horse from B, and, without any change in the immediate possession, lent it to the

(*f*) [1893] 2 Q.B. 80, 81.
(*g*) (1809) 1 Taunt. 458; 10 R.R. 578.
(*h*) (1856) 6 El. & B. 726. See further Chalmers, *Sale of Goods Act, 1893* (14th ed.), 179.

seller to keep and use as a bailee for a month. It was held that the horse had been effectually delivered by B to A. This was mediate possession of the third kind, being acquired and retained through a bailee for a fixed term. Crompton, J., referring to *Elmore* v. *Stone*, says (*i*): "In the one case we have a bailment of a description different from the original possession; here we have a loan; but in each case the possession of the bailee is the possession of the bailor; it would be dangerous to distinguish between such cases."

In larceny, where a chattel is stolen from a bailee, the "property", *i.e.*, the possession that has been violated, may be laid either in the bailor or in the bailee, at any rate where the bailment is revocable by the bailor at his pleasure either unconditionally or upon a condition that he may satisfy at will (*j*). A bailor at will can also bring a civil action of trespass where a chattel is taken from his bailee (*k*); but a bailor for a term cannot do so (*l*). Thus the third form of mediate possession is not recognised for the purpose of the action of trespass. Also, where land is let, whether for a term of years or at will, the landlord cannot bring trespass so long as he is out of immediate possession; but after re-entry he can recover damages in respect of acts done even while he was out of possession (*m*).

In all cases of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. If I deposit goods with an agent, he is in possession of them as well as I. He possesses for me, and I possess through him. A similar duplicate possession exists in the case of master and servant, landlord and tenant, bailor and bailee, pledgor and pledgee. There is, however, an important distinction to be noticed. For some purposes mediate possession exists as against third persons only, and not as against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate possessor himself. Thus if I

(*i*) At p. 735.
(*j*) Pollock and Wright, *Possession in the Common Law*, 145, 166; Archbold, *Criminal Pleading, Evidence and Practice* (35th ed.), § 107.
(*k*) Salmond, *Torts* (14th ed.), 158. For the history see Holdsworth, *H.E.L.*, III. 348, VII. 430.
(*l*) *Gordon* v. *Harper* (1796) 7 T.R. 9.
(*m*) Salmond, *Torts* (14th ed.), 79.

deposit goods with a warehouseman, I retain possession as against all other persons; because as against them I have the benefit of the warehouseman's custody. But as between the warehouseman and myself, he is in possession and not I. So in the case of a pledge, the debtor continues to possess *quoad* the world at large; but as between debtor and creditor, possession is in the latter. The debtor's possession is mediate and relative; the creditor's is immediate and absolute. So also with landlord and tenant, bailor and bailee, master and servant, principal and agent, and all other cases of mediate possession.

Here also we may find a test in the operation of prescription. As between landlord and tenant, prescription, if it runs at all, will run in favour of the tenant; but at the same time it may run in favour of the landlord as against the true owner of the property. Let us suppose, for example, that possession for twelve years will in all cases give a good title to land, and that A takes wrongful possession of land from X, holds it for six years, and then allows B to have the gratuitous use of it as tenant at will. In six years more A will have a good title as against X, for, as against him, A has been continuously in possession. But in yet another six years B, the tenant, will have a good title as against his landlord, A, for as between these two the possession has been for twelve years in B (*n*).

To put the matter in a general form, prescription runs in favour of the immediate against the mediate possessor, but in favour of the mediate possessor as against third persons.

On the other hand, the transfer of the mediate possession of goods is regarded as a "delivery" of the goods even as between the two parties to the transfer.

55. Concurrent possession

It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. *Plures eandem rem in solidum possidere non possunt* (*o*). As a general

(*n*) Actually the law is not quite so simple as this, for by the Limitation Act, 1939, s. 9 (1), the rule is in effect that time does not begin to run in favour of a tenant at will until the end of the first year of his tenancy. Therefore, in the above illustration, B would not obtain title until the lapse of thirteen years from the beginning of his tenancy. This complication does not affect the point explained in the text.

(*o*) D. 41. 2. 3. 5; *cf.* for English law Holdsworth, *H.E.L.*, III, p. 96.

proposition this is true; for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realisation. Hence there are several possible cases of duplicate possession.

1. Mediate and immediate possession coexist in respect of the same thing as already explained.

2. Two or more persons may possess the same thing in common, just as they may own it in common. This is called *compossessio* by the civilians.

56. The acquisition of possession

The modes of acquisition are two in number, namely Taking and Delivery. Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of some one else, and in either case the taking of it may be either rightful or wrongful. Delivery, on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor. It is of two kinds, distinguished by English lawyers as actual and constructive (*p*). Actual delivery is the transfer of *immediate* possession; it is such a physical dealing with the thing as transfers it from the hands of one person to those of another. It is of two kinds, according as the *mediate* possession is or is not retained by the transferor. The delivery of a chattel by way of sale is an example of delivery without any reservation of mediate possession; the delivery of a chattel by way of loan or deposit is an instance of the reservation of mediate possession on the transfer of immediate. Actual delivery may be either to the deliveree himself or to a servant or agent for him (*q*), and the delivery of the key of a warehouse is regarded in law as an actual delivery of the goods in the warehouse, because it gives access to the goods (*r*).

(*p*) These terms, however, are not strictly accurate, inasmuch as the so-called constructive delivery is a perfectly real transfer of possession, and involves no element of fiction whatever.

(*q*) Thus by the Sale of Goods Act, 1893, s. 32 (1), delivery to a carrier is prima facie deemed to be delivery to the buyer.

(*r*) "The key is not a symbol, which would not do": *per* Lord Hardwicke in *Ward* v. *Turner* (1751) 2 Ves.Sen. 443. *Cf.* Pollock and Wright, *Possession in the Common Law*, 61 *et seq.*; Barlow in (1956) 19 M.L.R. 394. It

Constructive delivery, on the other hand, is all which is not actual, and it is of three kinds. The first is that which the Roman lawyers termed *traditio brevi manu*, but which has no recognised name in the language of English law. It consists in the surrender of the mediate possession of a thing to him who is already in immediate possession of it. If, for example, I lend a book to someone, and afterwards, while he still retains it, I agree with him to sell it to him, or to make him a present of it, I can effectually deliver it to him in fulfilment of this sale or gift, by telling him that he may keep it. It is not necessary for him to go through the form of handing it back to me and receiving it a second time from my hands. For he has already the immediate possession of it, and all that is needed for delivery under the sale or gift is the destruction of the *animus* through which mediate possession is still retained by me (*s*).

The second form of constructive delivery is that which the commentators on the civil law have termed *constitutum possessorium* (that is to say, an agreement touching possession). This is the converse of *traditio brevi manu*. It is the transfer of mediate possession, while the immediate possession remains in the transferor. Any thing may be effectually delivered by means of an agreement that the possessor of it shall for the future hold it no longer on his own account but on account of some one else. No physical dealing with the thing is requisite, because by the mere agreement mediate possession is acquired by the transferee, through the immediate possession retained by the transferor and held on the other's behalf. Therefore, if I buy goods from a warehouseman, they are delivered to me so soon as he has agreed with me that he will hold them as warehouseman on my account. The position is then exactly the same as if I had first taken actual delivery of them, and then brought them back to the warehouse, and deposited them there for safe custody.

The third form of constructive delivery is that which is

seems that the only circumstance in which the English lawyer admits that symbolic delivery is sufficient is the indorsement and delivery of a bill of lading, which is regarded as a delivery of the cargo represented by it: *per* Bowen L.J. in *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327 at 341.

(*s*) For examples of *traditio brevi manu*, see *Winter* v. *Winter* (1861) 4 L.T.(N.S.) 639; *Cain* v. *Moon* [1896] 2 Q.B. 283; *Richer* v. *Voyer* (1874) L.R. 5 P.C. 461.

known to English lawyers as attornment (*t*). This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person. The mediate possessor of a thing may deliver it by procuring the immediate possessor to agree with the transferee to hold it for the future on his account, instead of on account of the transferor. Thus if I have goods in the warehouse of A and sell them to B, I have effectually delivered them to B so soon as A has agreed with B to hold them for him, and no longer for me. Neither in this nor in any other case of constructive delivery is any physical dealing with the thing required, the change in the *animus* of the persons concerned being adequate in itself (*u*).

57. The continuance of possession

We have seen that the acquisition of legal possession normally involves the occurrence of some event whereby the subject-matter falls under the control of the possessor. This can consist in the possessor's taking the thing or having it delivered to him; or it may consist in the object's coming on to the possessor's land. Such acquisition will also normally involve some intention on the part of the possessor to exercise control over the subject-matter and to exclude others from it.

The continuance of legal possession, however, does not necessitate the continuance of either of these factors (*v*). For example the furniture in my house remains in my legal possession even during my absence from the house, even though such absence may prevent me from exercising control over the furniture. Or again, if I lose my wallet in the street, I have now lost control over it together with any actual likelihood that others will not interfere with the wallet. Nevertheless, unless I have actually

(*t*) *Constitutum possessorium*, also, may be termed attornment in a wide sense.

(*u*) Delivery by attornment is provided for by the Sale of Goods Act, 1893, s. 29 (3): "Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf."

(*v*) The jurist Paul stated that possession could be retained solely by intention: D. 41. 2. 3. 7. (*cf.* Bracton, ff. 38b—39a), and also that it could be retained by a person who fell asleep: D. 41. 3. 31. 3. He did not expressly combine these two propositions. *Cf.* Buckland, *Text Book of Roman Law* (2nd ed.), 202.

abandoned possession, the legal possession of the wallet remains in me (*w*). On the other hand if the subject-matter is particularly difficult to control, such as a wild animal, then escape from my control may well terminate my legal possession.

Nor does continuance of legal possession depend on continuance of intention on the part of the possessor. For even if I forget that I have the object, and so have no specific intention of still possessing it, I may still retain possession of it. I may have forgotten that I ever had the wallet, which I lost in the street, but in law this need not prevent me from still being in possession. But if I lose control of the subject-matter and give up all intention of resuming control, then I shall lose possession of it in law. If I go away from my house with no intention of ever returning or exercising any rights over it, I may be taken to have abandoned possession to anyone wishing to take it (*x*).

58. Incorporeal possession

Hitherto we have limited our attention, in the main, to the case of corporeal possession. We have now to consider incorporeal possession and to seek the generic conception which includes both these forms. For I may possess not the land itself, but a way over it, or the access of light from it, or the support afforded by it to my land which adjoins it. So also I may possess powers, privileges, immunities, liberties, offices, dignities, services, monopolies. All these things may be possessed as well as owned. They may be possessed by one man, and owned by another. They may be owned and not possessed, or possessed and not owned.

Corporeal possession involves, as we have seen, the continuing exercise of exclusive control over a material object. Incorporeal possession is the continuing exercise of a claim to anything else. The thing so claimed may be either the non-exclusive use of a material object (for example, a way or other servitude over a piece of land) or some interest or advantage unconnected with the use

(*w*) *R.* v. *Thurborn* (1849) 1 Den. 387.

(*x*) For example, in *Tickner* v. *Hearn* [1961] 1 All E.R. 65 a statutory tenant of a protected dwelling under the Rent Acts left the premises on a temporary visit, became insane and remained continuously in hospital. In order to retain possession within the Acts, the court found it necessary that she should be able to show the existence of an intention to return. On the evidence the court held that the existence of this intention had just about been proved.

of material objects (for example, a trade-mark, a patent, or an office of profit).

Corporeal possession, as we have seen, consists less in the actual exercise of exclusive control than in the existence of a legal right to exercise such control. If I lose my watch, I retain possession, not because I have control over it or because I exercise a claim to exclusive control, but because in law I retain a right to exclusive control. Actual use of the subject-matter, therefore, is not essential. In the case of incorporeal possession, on the contrary, it may be thought that I must actually enjoy and exercise the right in order to possess it. Yet if I have an easement of way over another man's land, mere non-use will not extinguish it; at most this will only constitute evidence of abandonment, which consists of non-use together with an intention to give up the right. Moreover, my possession of various rights *in rem* such as the right to my reputation, my liberty to leave the country and so on is quite consistent with my never actually exercising them or seeking to enforce them.

Incorporeal possession is commonly called the possession of a *right*, and corporeal possession is distinguished from it as the possession of a *thing*. The Roman lawyers distinguish between *possessio juris* and *possessio corporis*, and the Germans between *Rechtsbesitz* and *Sachenbesitz*. But there is a sense in which possession of a right necessarily involves the exercise of the right in question (*y*). In this sense I can be said to possess a right where

(*y*) Thus in the Civil Code of France it is said (sect. 2228): La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous-mêmes ou par un autre qui la tient ou qui l'exerce en notre nom.

The definition of the Italian Civil Code is similar (sect. 685): "Possession is the detention of a thing or the enjoyment of a right by any person either personally or through another who detains the thing or exercises the right in his name."

A good analysis of the generic conception of possession, and of the relation between its two varieties, is to be found in Baudry-Lacantinerie's *Traité de Droit Civil* (De la Prescription, sect. 199): "Possession is nothing else than the exercise or enjoyment, whether by ourselves or through the agency of another, of a real right which we have or claim to have over a thing. It makes no difference whether this right is one of ownership or one of some other description, such as *ususfructus*, *usus*, *habitatio*, or *servitus*. The old distinction between possession and quasi-possession, which was recognised by Roman law and is still to be found in the doctrine of Pothier, has been rejected, and rightly so. It was in our opinion nothing more than a result of that confusion between the right of ownership and the object of that right, which has been at all times prevalent. Possession is merely the exercise of a right, in reality it is not the thing which we possess, but the right which

I exercise a claim *as if it were a right*. There may be no right in reality; and when there *is* a right, it may be vested in some other person, and not in the possessor. If I possess a way over another's land, it may or may not be a *right* of way; and even if it is a right of way, it may be owned by someone else, though possessed by me. Similarly a trade-mark or a patent which is possessed and exercised by me may or may not be legally valid; it may exist *de facto* and not also *de jure*; and even if legally valid, it may be legally vested not in me, but in another (*z*).

The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership. Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right.

59. Possession and ownership

We have already adverted to the chief differences between possession and ownership. Possession consists basically in a relationship between a person and an object within the context of the society in which he lives. It is therefore primarily a matter of fact; and the differences between legal and non-legal or actual possession result from the need to advance the policy of the law by regarding this relationship as existing where in fact it does not obtain; and this in turn may lead to the development of the notion that in law I may have possession of an object as against

we have or claim to have over the thing. This is as true of the right of ownership as of the right of servitude and usufruct; and consequently the distinction between the possession of a thing and the quasi-possession of a right is destitute of foundation."

See to the same effect Ihering, *Grund des Besitz.* 159: "Both forms of possession consist in the exercise of a right (die Ausübung eines Rechts)." Bruns, also, recognises the figure of speech on which the distinction between corporeal and incorporeal possession is based. *Recht des Besitzes*, 477.

(*z*) Bruns rejects the definition of possession as consisting in the continuing exercise of a right, and defines it as the continuous possibility of exercising a right at will. "Just as corporeal possession," he says (*Recht des Besitzes*, 475), 'consists not in actual dealing with the thing, but only in the power of dealing with it at will, so incorporeal possession consists not in the actual exercise of a right, but in the power of exercising it at will; and it is only because the existence of this power does not become visible as an objective fact until actual exercise of the right has taken place, that such actual exercise is recognised as an essential condition of the commencement of possession." This, however, seems incorrect. Possession consists not in the power of exercising a claim in the future, but in the power of *continuing to exercise* it from now onwards.

one person while not having possession of it as against another. Ownership, on the other hand, consists not of a factual relationship but of certain legal rights, and is a matter not of fact but of law. These two concepts of ownership and possession, therefore, may be used to distinguish between the *de facto* possessor of an object and its *de jure* owner, between the man who actually has it and the man who ought to have it. They serve also to contrast the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature.

Speaking generally, ownership and possession have the same subject-matter. Whatever may be owned may be possessed, and whatever may be possessed may be owned. This statement, however, is subject to important qualifications. There are claims which may be realised and exercised in fact without receiving any recognition or protection from the law, there being no right vested either in the claimant or in anyone else. In such cases there is possession without ownership. For example, men might possess copyrights, trade-marks, and other forms of monopoly, even though the law refused to defend those interests as legal rights. Claims to them might be realised *de facto*, and attain some measure of security and value from the facts, without any possibility of support from the law.

Conversely there are many rights which can be owned, but which are not capable of being possessed. They are those which may be termed *transitory*. Rights which do not admit of continuing exercise do not admit of possession either. They cannot be exercised without being thereby wholly fulfilled and destroyed; therefore they cannot be possessed. A creditor, for example, does not possess the debt that is due to him; for this is a transitory right which in its very nature cannot survive its exercise (*a*). But a man may possess an easement over land, because its exercise and its continued existence are consistent with each other. It is for this reason that obligations generally (that is to say, rights *in personam* as opposed to rights *in rem*) do not admit of possession.

(*a*) But in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379, the House of Lords considered that, where funds deposited in a bank were transferred to an account in the name of the appellant as agent for the Government of Pakistan, that Government could be said to be in "possession and control" of the chose in action consisting of the debt due from the bank.

It is to be remembered, however, that *repeated* exercise is equivalent in this respect to *continuing* exercise. I may possess a right of way through repeated acts of use, just as I may possess a right of light or support through continuous enjoyment. Therefore even obligations admit of possession, provided that they are of such a nature as to involve a series of repeated acts of performance. We may say that a landlord is in possession of his rents, an annuitant of his annuity, a bondholder of his interest, or a master of the services of his servant (*b*).

We may note finally that, although incorporeal possession is possible in fact of all continuing rights, it by no means follows that the recognition of such possession or the attribution of legal consequences to it, is necessary or profitable in law. To what extent incorporeal possession exists in law, and what consequences flow from it, are questions which are not here relevant, but touch merely the details of the legal system.

60. Possessory remedies

In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself (*c*). Many other legal systems (*d*), however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to

(*b*) Windscheid, II. sect. 464: "If we ask what other rights, in addition to real rights, admit of possession, the answer is that in principle no right is incapable of possession, which is capable of continuing exercise (dauernde Ausübung)."

So Ihering, *Grund des Besitz*. 158: "The conception of possession is applicable to all rights which admit of realisation (Thatsächlichkeit), that is to say, which admit of a continuing visible exercise." Ihering defines possession generally (p. 160) as "Thatsächlichkeit der mit dauernder Ausübung verbundenen Rechte." See also Brune, *Recht des Besitzes*. 479, 481

(*c*) *Armory* v. *Delamirie* (1722) 1 Strange 505; 1 Smith L.C. (13th ed.), 393; *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1; Holdsworth, *H.E.L.*, VII. 449 *et seq.*

(*d*) See, for example, the German Civil Code, sects. 858, 861, 864, and the Italian Civil Code, sects. 694–697.

it (c). He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.

Legal remedies thus appointed for the protection of possession even against ownership are called *possessory*, while those available for the protection of ownership itself may be distinguished as *proprietary*. In the modern and medieval civil law the distinction is expressed by the contrasted terms *petitorium* (a proprietary suit) and *possessorium* (a possessory suit).

This duplication of remedies, with the resulting provisional protection of possession, has its beginnings in Roman law. It was taken up into the canon law, where it received considerable extensions, and through the canon law it became a prominent feature of medieval jurisprudence. It is still received in modern Continental systems; but although well known to the earlier law of England, it has been long since rejected by us as cumbrous and unnecessary.

There has been much discussion as to the reasons on which this provisional protection of possession is based. It would seem probable that the considerations of greatest weight are the three following.

1. The evils of violent self-help are deemed so serious that it must be discouraged by taking away all advantages which anyone derives from it. He who helps himself by force even to that which is his own must restore it even to a thief. The law gives him a remedy, and with it he must be content. This reason, however, can be allowed as valid only in a condition of society in which the evils and dangers of forcible self-redress are much more formidable than they are at the present day. It has been found abundantly sufficient to punish violence in the ordinary way as a criminal offence, without compelling a rightful owner to deliver up to a trespasser property to which he has no manner of right, and which can be forthwith recovered from him by due course of law. In the case of chattels, indeed, our law has not found it needful to protect possession even to this extent. It seems that an owner who retakes a chattel by force acts within

(c) He may, however, set up the fact that he was previously dispossessed of the property.

his legal rights. Forcible entry upon land, however, is a criminal offence.

2. A second reason for the institution of possessory remedies is to be found in the serious imperfections of the early proprietary remedies. The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient. The path of the claimant was strewn with pitfalls, and he was lucky if he reached his destination without disaster. The part of plaintiff in such an action was one of grave disadvantage, and possession was nine points of the law. No man, therefore, could be suffered to procure for himself by violence the advantageous position of defendant, and to force his adversary by such means to assume the dangerous and difficult post of plaintiff. The original position of affairs must first be restored; possession must first be given to him who had it first; then, and not till then, would the law consent to discuss the titles of the disputants to the property in question. Yet however cogent such considerations may have been in earlier law, they are now of little weight. With a rational system of procedure the task of the plaintiff is as easy as that of the defendant. The law shows no favour to one rather than to the other.

3. A third reason for possessory remedies, closely connected with the second, is the difficulty of the proof of ownership. It is easy to prove that one has been in possession of a thing, but difficult (in the absence of any system of registration of title) to prove that one is the owner of it. Therefore it was considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulders to those of his opponent. Every man should bear his own burden. He who takes a thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner of it; and the law will then give to him what it will not suffer him to take for himself. But English law has long since discovered that it is possible to attain this end in a much more satisfactory and reasonable way. It adjusts the burden of proof of ownership with perfect equity, without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules:

1. Prior possession is *prima facie* proof of title. Even in the ordinary proprietary action a claimant need do nothing more

than prove that he had an older possession than that of the defendant; for the law will presume from this prior possession a better title. *Qui prior est tempore potior est jure.*

2. A defendant is always at liberty to rebut this presumption by proving that the better title is in himself.

3. A defendant who has violated the possession of the plaintiff is not allowed to set up the defence of *jus tertii*, as it is called; that is to say, he will not be heard to allege, as against the plaintiff's claim, that neither the plaintiff nor he himself, but some third person, is the true owner. Let every man come and defend his own title. As between A and B the right of C is irrelevant. The only exceptions are (i) when the defendant defends the action on behalf and by the authority of the true owner; (ii) when he committed the act complained of by the authority of the true owner; and (iii) when he has already made satisfaction to the true owner by returning the property to him (*f*).

By the joint operation of these three rules the same purpose is effected as was sought in more cumbrous fashion by the early duplication of proprietary and possessory remedies.

(*f*) Salmond, *Torts* (14th ed.), 161.

CHAPTER 10

PERSONS

61. The nature of personality

The purpose of this chapter is to investigate the legal conception of personality. In popular or non-legal use this is not an exact term, but the underlying notion can be readily discerned. The prime case of a person is a human being, and personality would seem to entail the possession of those characteristics belonging particularly to mankind, *i.e.*, the power of thought, speech and choice. To personify an object is to imagine it as endowed with such attributes; and it is on account of the possession of such qualities that we ascribe personality to such non-human beings as gods, angels, devils and so forth. Conversely people deprived of the power of reason and choice, *e.g.*, idiots, are often described as being less than persons.

But law is concerned with rights and duties, both of which involve the notion of choice. If A has a right in the strict sense against B, then part of what is meant by this is that A can choose whether or not to call for performance of a duty by B. But to state that B owes a duty, *i.e.*, ought to perform some act, implies that he *can* do it and at the same time that he *can refrain* from doing it; otherwise it would make little sense to speak of "ought", since generally "ought" implies "can". Since rights and duties involve choice, therefore, they will naturally under any system of law be held to inhere primarily in those beings which enjoy the ability to choose, *viz.*, human beings.

Yet the legal notion of personality need not coincide with the ordinary concept on which it is based. In the law there may be men who are not persons; slaves, for example, are destitute of legal personality in any system which regards them as incapable of either rights or liabilities. Like cattle, they are things and the objects of rights; not persons and the subjects of them. Conversely there are, in the law, persons who are not men. A joint-stock company or a municipal corporation is a person in legal contemplation. So also, in Hindu law, idols are legal

persons, and this has been recognised by the Privy Council (*a*). What, then, is the legal meaning of a "person"?

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

Persons as so defined are of two kinds, distinguishable as natural and legal. A natural person is a human being. Legal persons are beings, real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings (*c*).

62. The legal status of the lower animals

The only natural persons are human beings. Beasts are not persons, either natural or legal (*cc*). They are merely things—often the objects of legal rights and duties, but never the subjects of them. Beasts, like men, are capable of acts and possess interests. Yet their acts are neither lawful nor unlawful; they are not recognised by the law as the appropriate subject-matter either of permission or of prohibition. Archaic codes did not scruple, it is true, to punish with death in due course of law the beast that was guilty of homicide. "If an ox gore a man or a woman that they die: then the ox shall be surely stoned and his flesh shall not be eaten" (*d*). A conception such as this pertains to a stage that is long since past; but modern law shows us a relic of it in the rule that a trespassing beast may be distrained damage feasant, and kept until its owner or some one else interested in the beast pays compensation (*e*). Distress damage feasant does

(*a*) *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1925) L.R. 52 Ind.App. 245. See Duff, "The Personality of an Idol" (1927) 3 C.L.J. 42; Vesey-Fitzgerald, "*Idolon Fori*" (1925) 41 L.Q.R. 419.

(*b*) For a full discussion see Alexander Nékám, *The Personality Conception of the Legal Entity* (1938).

(*c*) Legal persons are also termed fictitious, juristic, artificial, or moral.

(*cc*) It would of course be possible for a legal system to regard an animal as a person and endow it with rights and duties.

(*d*) Exodus xxi. 28. To the same effect see Plato's *Laws*, 873.

(*e*) Williams, *Liability for Animals*, Chaps. 1, 7.

not, however, in modern law involve any legal recognition of the personality of the animal.

A beast is as incapable of legal rights as of legal duties, for its interests receive no recognition from the law. *Hominum causa omne jus constitutum* (*f*). The law is made for men, and allows no fellowship or bonds of obligation between them and the lower animals. If these last possess moral rights—as utilitarian ethics at least need not scruple to admit—those rights are not recognised by any legal system. That which is done to the hurt of a beast may be a wrong to its owner or to the society of mankind, but it is no wrong to the beast. No animal can be the owner of any property, even through the medium of a human trustee. If a testator vests property in trustees for the maintenance of his favourite horses or dogs, he will thereby create no valid trust enforceable in any way by or on behalf of these non-human beneficiaries. The only effect of such provisions is to authorise the trustees, if they think fit, to expend the property or any part of it in the way so indicated; and whatever part of it is not so spent will go to the testator's representatives as undisposed of (*g*).

There are, however, two cases in which beasts may be thought to possess legal rights. In the first place, cruelty to animals is a criminal offence, and in the second place, a trust for the benefit of particular classes of animals, as opposed to one for individual animals, is valid and enforceable as a public and charitable trust; for example, a provision for the establishment and maintenance of a home for stray dogs or broken-down horses (*h*). Are we driven by the existence of these cases to recognise the legal rights and therefore the legal personality of beasts? There is no occasion for any such conflict with accustomed modes of thought and speech. These duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries, but to public rights vested in the community at large—for the community has a rightful interest, legally recognised to this extent, in the well-being even of the dumb animals which belong to it. Where,

(*f*) D. 1. 5. 2.
(*g*) *Re Dean* (1889) 41 Ch.D. 552.
(*h*) *Ibid.*, p. 557.

however, the interests of animals conflict with those of human beings, the latter are preferred (*i*).

63. The legal status of dead men

Ordinarily speaking, the personality of a human being may be said to commence existence on birth and cease to exist at death, and in general the law takes the same view. Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives, and are now as destitute of rights as of liabilities. They have no rights because they have no interests. They do not even remain the owners of their property until their successors enter upon their inheritance. For instance, the goods of an intestate, before the grant of letters of administration, were formerly vested in the bishop of the diocese, and are now vested in the judge of the Court of Probate, rather than left to the dead until they are in truth acquired by the living (*j*).

Yet although all a man's rights and interests perish with him, he does when alive concern himself much with that which shall become of him and his after he is dead. And the law, without conferring rights upon the dead, does in some degree recognise and take account after a man's death of his desires and interests when alive. There are three things, more especially, in respect of which the anxieties of living men extend beyond the period of their deaths, in such sort that the law will take notice of them. These are a man's body, his reputation, and his estate. By a natural illusion a living man deems himself interested in the treatment to be awarded to his own dead body. To what extent does the law secure his desires in this matter? A corpse is the property of no one. It cannot be disposed of by will or any other instrument (*k*), and no wrongful dealing with it can amount to theft (*l*). The criminal law, however, secures decent burial

(*i*) See, *e.g.*, *National Anti-Vivisection Society* v. *I.R.* [1928] A.C. 81.

(*j*) The concept of *hereditas iacens* in Roman law made some approach to the idea of continuing the deceased's personality. It was said that the inheritance, in the interval between the death and the entry of the *heres*, represented a *persona* (*personae vice fungitur*: D. 46. 1. 22). After some disagreement it became settled that the *persona* represented was that of the deceased: but it was so only for some purposes, not for all. See Buckland, *Text-Book of Roman Law* (2nd ed. 1932), 306 *et seq.*; Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 154–155; Duff, *Personality in Roman Private Law* (1938), Chap. VII.

(*k*) *Williams* v. *Williams* (1882) 20 Ch.D. 659.

(*l*) 2 East P.C. 652.

Just as our law refuses to personify and incorporate the Commonwealth as a whole, so it refuses to personify and incorporate the various constituent self-governing states of which it is made up. There is no such person known to the law of England as the state or government of Canada or of New Zealand (*s*). The King or the Crown represents not merely the empire as a whole, but each of its parts; and the result is a failure of the law to give adequate recognition and expression to the distinct existence of these parts (*t*). The property and liabilities of the government of New Zealand are in law those of the British Crown. The national debts of the colonies are at present owing by no person known to the law save the Queen of England. A contract between the governments of two colonies is in law a nullity, unless the Queen can make contracts with herself. All this would be otherwise, did the law recognise that the dependencies within the Commonwealth were bodies politic and corporate, each possessing a distinct personality of its own, and capable in its own name and person of rights, liabilities, and activities. Some of the older colonies were actually in this position, being created corporations aggregate by the royal charters to which they owed their origin: for example, Massachusetts, Rhode Island, and Connecticut. Even an unincorporated colony of the ordinary type may become incorporate and so possessed of separate personality, by virtue of its own legislation (*u*). In the absence of any such separate incorporation of the different portions of the empire, their separate existence can be recognised in law only by way of a doctrine of plural personality. Although the Queen represents the whole Commonwealth (with the exception of the "Republics within the

(*s*) *Sloman* v. *Government of New Zealand* (1876) 1 C.P.D. 563. This was an action brought in England against the "Governor and Government of the Colony of New Zealand". It failed because there was no such person or body corporate known to the law. The rule seems to have been overlooked in *Government of Gibraltar* v. *Kenney* [1956] 3 W.L.R. 466.

(*t*) See *Williams* v. *Howarth* [1905] A.C. 551.

(*u*) The Commonwealth of Australia, for example, and also the constituent Australian states are now to be deemed for certain purposes bodies politic and corporate. For by virtue of Australian legislation they can now sue and be sued in their own names, and possess other attributes of personality; thus an action will now lie at the suit of the State of Victoria against the State of New South Wales. The corporate character thus bestowed upon these states, however, is concurrent with, and not exclusive of the old common law principle which identifies the state with the King. Public lands in Australia, for example, are still the lands of the Crown, except so far as they may be expressly vested in the corporate state by statute.

64. The legal status of unborn persons

Though the dead possess no legal personality, it is otherwise with the unborn. There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is none the less a real and present ownership. A man may settle property upon his wife and the children to be born of her. Or he may die intestate, and his unborn child will inherit his estate. Yet the law is careful lest property should be too long withdrawn in this way from the uses of living men in favour of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for a hundred years and then distributed among his descendants.

A child in its mother's womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, *Nasciturus pro jam nato habetur*. In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth" (*t*). Thus, in the law of property, there is a fiction that a child *en ventre sa mère* is a person in being for the purposes of (1) the acquisition of property by the child itself, or (2) being a life chosen to form part of the period in the rule against perpetuities (*u*).

To what extent an unborn person can possess personal as well as proprietary rights is a somewhat unsettled question. It has been held that a posthumous child is entitled to compensation under Lord Campbell's Act for the death of his father (*v*). Wilful or negligent injury inflicted on a child in the womb, by reason of which it dies after having been born alive, amounts to murder or manslaughter (*a*). A pregnant woman condemned to death is respited as of right, until she has been delivered of her child. On the other hand, in a case in which a claim was made by a female infant against a railway company for injuries inflicted upon her while in her mother's womb through a collision due to

(*t*) 7 Co.Rep. 8 b. Compare D. 1. 5. 26: Qui in utero sunt in toto paene jure civili intelleguntur in rerum natura esse.

(*u*) See Winfield, "The Unborn Child" (1942) 4 *Univ. of Toronto Law Journal* 278 at 279, reprinted in (1942) 8 *Cambridge Law Journal* 76 at p. 77.

(*v*) *The George and Richard* (1871) L.R. 3 Ad. & Ecc. 466.

(*a*) *R. v. Senior* (1832) 1 Moody C.C. 344; *R. v. West* (1848) 2 Car. & Kir. 784.

the defendant's negligence, it was held by an Irish court that no cause of action was disclosed (*b*). The decision of two of the four judges, however, proceeded upon the ground that the company owed no duty of care towards a person whose existence was unknown to them, and not upon the ground that an unborn child has in no case any right of immunity from personal harm.

The rights of an unborn person, whether proprietary or personal, are all contingent on his birth as a living human being. The legal personality attributed to him by way of anticipation falls away *ab initio* if he never takes his place among the living Abortion and child destruction are crimes; but such acts do not amount to murder or manslaughter unless the child is born alive before he dies. A posthumous child may inherit; but if he dies in the womb, or is stillborn, his inheritance fails to take effect, and no one can claim through him, though it would be otherwise if he lived for an hour after his birth. Finally, though the law imputes no rights to persons not yet even conceived, it may protect their interests. If some of the beneficiaries of a trust are unborn persons, the trust cannot be varied without obtaining the court's consent on their behalf (*c*).

65. Double capacity and double personality

English law recognises many different capacities in which a man may act. Often he has power to do an act in an official or representative capacity when he would have no power to do the act in his private capacity or on his own account. All sorts of difficult questions arise out of these distinctions: for instance, whether a person on a particular occasion was acting as trustee for fund A or as trustee for fund B; whether a director has the powers and duties of a trustee; whether an executor has turned into a trustee, and so on. These troubles need not concern us here; the only point to be noticed is that the mere fact that a man has two or more capacities does not give him the power to enter into a legal transaction with himself. Double capacity does

(*b*) *Walker* v. *Great Northern Ry. of Ireland* (1890) 28 L.R.Ir. 69. See generally Winfield, *op. cit.* Recovery has been allowed, however, in certain other common law jurisdictions: *e.g.*, in Canada in *Montreal Tramways* v. *Leveille* [1933] 4 D.L.R. 337 and in South Africa in *Pinchin, N.O.* v. *Santam Insurance Co. Ltd.*, 1963 (2) S.A. 254 (W.L.D.). See also "Compensation for the Harmful Effects of Illegitimacy" (1966) 66 Col.L.R. 127.

(*c*) Variation of Trusts Act, 1958, s. 1 (*c*).

not connote double personality. For instance, at common law a man could not sue himself (*d*), or contract with himself (*e*), or convey property to himself; and it made no difference that he was acting on each side in a different capacity. So rigorous was the rule that, if the same party appeared on both sides of a contract, even though accompanied by different parties in each case, the whole contract was void (*f*). In many cases the rule worked hardship, and its consequences had to be mitigated. For instance, where a creditor became his debtor's executor, the rule that he could not sue himself for the debt was mitigated by giving him a right of retainer. By statute, where a person purports to contract with himself and others, the contract is enforceable as if it had been entered into with the other persons alone (*g*). Also, by a historical accident, namely, the effect given to the Statute of Uses, it became possible for a man to convey to himself; and this power, which was found to be useful however theoretically anomalous, is preserved in the modern legislation that repeals the Statute of Uses (*h*). With these and other small exceptions, the rule that a person cannot enter into a legal transaction with himself remains unimpaired.

66. Legal persons

A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination, and the true nature and uses of it will form the subject of our consideration during the remainder of this chapter.

The law, in creating legal persons, always does so by personifying some real thing. There is, indeed, no theoretical necessity for this, since the law might, if it so pleased, attribute the quality of personality to a purely imaginary being, and yet attain the ends for which this fictitious extension of personality

(*d*) "There is no principle by which a man can be at the same time plaintiff and defendant": *per* Best C.J. in *Neale* v. *Turton* (1827) 4 Bing. 149 at 151. See R. L. Mosse, "Can a Person Sue Himself?" (1944) 94 L.J. Newsp. 262.
(*e*) *Ellis* v. *Kerr* [1910] 1 Ch. 529; *Napier* v. *Williams* [1911] 1 Ch. 361.
(*f*) Last note.
(*g*) Law of Property Act, 1925, s. 82 (1).
(*h*) Law of Property Act, 1925, s. 72.

is devised. Personification, however, conduces so greatly to simplicity of thought and speech, that its aid is invariably accepted. The thing personified may be termed the *corpus* of the legal person so created (i), it is the body into which the law infuses the *animus* of a fictitious personality.

Although all legal personality involves personification, the converse is not true. Legal personality is a definite legal conception; personification, as such, is a mere artifice of speech devised for compendious expression. In popular language, and in legal language also, when strictness of speech is not called for, the device of personification is extensively used. We speak of the estate of a deceased person as if it were itself a person. We say that it owes debts, or has debts owing to it, or is insolvent. The law, however, recognises no legal personality in such a case. The rights and liabilities of a dead man devolve upon his heirs, executors, and administrators, not upon any fictitious person known as his estate. Similarly we speak of a piece of land as entitled to a servitude, such as a right of way over another piece. So, also, in the case of common interests and actions, we personify as a single person the group of individuals concerned, even though the law recognises no body corporate. We speak of a firm as a person distinct from the individual partners. We speak of a jury, a bench of judges, a public meeting, the community itself, as being itself a person instead of merely a group or society of persons. But legal personality is not reached until the law recognises, over and above the associated individuals, a single entity which in a manner represents them, but is not identical with them.

Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. A

(i) German writers term it the *substratum* or *Unterlage* of the fictitious person. Windscheid, I. sect. 57. Vangerow, I. sect. 53. Puchta, II. 193. According to a different usage, the term "legal person" is applied also to natural persons, the argument being that all legal personality is the creation of law, so that it does not matter whether the *substratum* of the lawyer's "person" is a human being or something else. This is merely a question of terminology.

corporation is a group or series of persons which by a legal fiction is regarded and treated as itself a person. A trade union is an association of workmen or employers for the purpose, among other things, of collective bargaining. A friendly society is a voluntary association formed for the purpose of raising, by the subscription of the members, funds out of which advances may be made for the mutual relief and the maintenance of the members and their families in sickness, infancy, old age, or infirmity. There are special statutory provisions by which registered trade unions and friendly societies can sue or be sued in the registered name, and their effect seems to be to make these groups legal entities distinct from their members (*j*). No other legal persons are at present recognised by English law. If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention. They are distinguished by reference to the different kinds of things which the law selects for personification.

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the *corpus* of the legal person are termed its *members*. We shall consider this form of legal personality more particularly in the sequel.

2. The second class is that in which the *corpus*, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself. Our own law does not, indeed, so deal with the matter. The person known to the law of England as the University of London is not the institution that goes by that name, but a personified and incorporated aggregate of human beings, namely, the chancellor, vice-chancellor, fellows, and graduates. It is well to remember,

(*j*) This was the prevailing opinion before *Bonsor* v. *Musicians' Union* [1956] A.C. 104, and it is submitted that the majority opinions in that case bear it out. See the critical analysis by Prof. Dennis Lloyd in (1956) 19 M.L.R. 121.

however, that notwithstanding this tradition and practice of English law, legal personality is not limited by any logical necessity, or, indeed, by any obvious requirement of expediency, to the incorporation of bodies of individual persons (*k*).

3. The third kind of legal person is that in which the *corpus* is some fund or estate devoted to special uses—a charitable fund, for example, or a trust estate, or the property of a dead man or of a bankrupt. Here, also, English law prefers the process of incorporation. If it chooses to personify at all, it personifies, not the fund or the estate, but the body of persons who administer it. Yet the other way is equally possible, and may be equally expedient. The choice of the *corpus* into which the law shall breathe the breath of a legal personality is a matter of form rather than of substance, of lucid and compendious expression rather than of legal principle.

67. Corporations

Corporations are of two kinds, distinguished in English law as corporations aggregate and corporations sole. "Persons", says Coke (*l*), "are of two sorts, persons natural created of God, . . . and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, viz., either sole, or aggregate of many". A corporation aggregate is an incorporated *group* of co-existing persons, and a corporation sole is an incorporated *series* of successive persons. The former is that which has several members at a time, while the latter is that which has only one member at a time. Corporations aggregate are by far the more numerous and important. Examples are a registered company, consisting of all the shareholders, and a municipal corporation, consisting of the inhabitants of the borough. Corporations sole are found only when the successive holders of some public office are incorporated

(*k*) Occasionally in the statute book we find so-called corporations which are in truth not corporations at all—having no incorporated members—but are merely personified institutions. The Commonwealth Bank of Australia, constituted by an Act of the Federal Parliament of Australia, is an example. See the Commonwealth Bank Act, 1911, s. 5: "A Commonwealth Bank, to be called the Commonwealth Bank of Australia, is hereby established." Sect. 6: "The Bank shall be a body corporate with perpetual succession and a common seal, and may hold land, and may sue and be sued in its corporate name."

(*l*) Co. Litt. 2 a.

so as to constitute a single, permanent, and legal person. The Sovereign, for example, is said to be a corporation of this kind at common law (*m*), while the Postmaster-General (*n*), the Solicitor to the Treasury (*o*), the Secretary of State for War (*p*), the Minister of Town and Country Planning (*q*), and the Minister of Education (*r*), have been endowed by statute with the same nature (*s*).

It is essential to recognise clearly that in neither of these forms of incorporation is the legal person identical with any single human being. A company is in law something different from its shareholders or members (*t*). The property of the company is not in law the property of the shareholders. The debts and liabilities of the company are not attributed in law to its members. The company may become insolvent, while its members remain rich. Contracts may be made between the company and a shareholder, as if between two persons entirely distinct from each other. The shareholders may become so reduced in number that there is only one of them left; but he and the company will be distinct persons for all that (*u*).

May we not go further still, and say that a company is capable of surviving the last of its members? At common law indeed, a corporation is dissolved by the death of all its members (*v*). There is, however, no logical necessity for any such rule, and it does not apply to corporations sole, for beings of this sort lead a

(*m*) See § 72.
(*n*) 8 Edw. 7, c. 48, s. 33.
(*o*) 39 & 40 Vict. c. 18, s. 1
(*p*) 18 & 19 Vict. c. 117, s. 2.
(*q*) 6 & 7 Geo. 6, c. 5, s. 5.
(*r*) 7 & 8 Geo. 6, c. 31, s. 1.

(*s*) Corporations sole are not a peculiarity of English law. The distinction between the two forms of incorporation is well known to foreign jurists. See Windscheid, I. sect. 57. Vangerow, I. sect. 53. The English law as to corporations sole is extremely imperfect and undeveloped, but the conception itself is perfectly logical, and is capable of serious and profitable uses. Maitland has traced the history of this branch of the law in two articles in his *Selected Essays*, 73, 105; see also Holdsworth, *H.E.L.*, III. 481–482.

(*t*) Savigny, *System*, sect. 90: "The aggregate of the members who compose a corporation differs essentially from the corporation itself." *Great Eastern Ry.* v. *Turner* (1872) L.R. 8 Ch. at p. 152: "The Company is a mere abstraction of law." *Flitcroft's Case* (1882) 21 Ch.D. at p. 536: "The corporation is not a mere aggregate of shareholders." *Salomon* v. *Salomon & Co.* [1897] A.C. at p. 51: "The company is at law a different person altogether from the subscribers to the memorandum."

(*u*) D. 3. 4. 7. 2. Cum jus omnium in unum reciderit, et stet nomen universitatis. *Universitatis* is the generic title of a corporation in Roman law, a title retained to this day in the case of that particular form of corporation which we know as a university.

(*v*) Blackstone, I. 485; Holdsworth, *H.E.L.*, III. 489, IX. 62.

continuous life, notwithstanding the intervals between the death or retirement of each occupant of the office and the appointment of his successor. Nor is there any reason to suppose that such a ground of dissolution is known to the trading corporations which are incorporated under the Companies Acts. Being established by statute, they can be dissolved only in manner provided by the statute to which they owe their origin (*a*). The representatives of a deceased shareholder are not themselves members of the company, unless they become registered as such with their own consent. If, therefore, on the death of the last surviving members of a private company, their executors refuse or neglect to be registered in their stead, the company will no longer have any members. Is it, for that reason, *ipso jure* dissolved? If not, it is clear that since a company can survive its members and exist without them, it must be something entirely distinct from them (*b*).

In all those respects a corporation is essentially different from an unincorporated partnership. A firm is not a person in the eye of the law; it is nothing else than the sum of its individual members. There is no legal entity, standing over against the partners, as a company stands over against its shareholders. The property and debts of the firm are nothing else than those of the partners. A change in the list of partners is the substitution of a new firm for the old one, and there is no permanent legal unity, as in the case of the company (*c*). There can be no firm which consists of one partner only, as a company may consist of one member. The incorporation of a firm—that process by which an ordinary partnership is transmuted into a company—effects a fundamental change in the legal relations of its members. It is nothing less than the birth of a new being, to whom the whole business and property of the partnership is transferred—a being without soul or body, not visible save to the eye of the law, but of a kind whose power and importance, wealth and activity, are already great, and grow greater every day.

(*a*) Lindley, *Companies* (6th ed.) II. 822 "A company which is incorporated by act of parliament can be dissolved only as therein provided, or by another act of parliament."

(*b*) That a corporation may survive the last of its members is admitted by Savigny, *System*, sect. 89, and Windscheid, I. sect. 61.

(*c*) Yet a partnership is an accounting unit and there are special rules with regard to the position of partners which give it the superficial appearance of a legal entity. See, *e.g.*, *Green* v. *Hertzog* [1954] 1 W.L.R 1309 (C.A.).

In the case of corporations sole, the purely legal nature of their personality is equally apparent. The chief difficulty in apprehending the true nature of a corporation of this description is that it bears the same name as the natural person who is its sole member for the time being, and who represents it and acts for it. Each of them is the Sovereign, or the Solicitor to the Treasury, or the Secretary of State for War. Nevertheless under each of these names two persons live. One is a human being, administering for the time being the duties and affairs of the office. He alone is visible to the eyes of laymen. The other is a mythical being whom only lawyers know of, and whom only the eye of the law can perceive. He is the true occupant of the office: he never dies or retires; the other, the person of flesh and blood, is merely his agent and representative, through whom he performs his functions. The living official comes and goes, but this offspring of the law remains the same for ever.

Property owned by a person as a corporation sole is distinct from that which he owns in his private capacity, and will pass on his death, not to his estate but to his successors in office. One important result of this is that it enables gifts to be made to the successive holders of an office which has been incorporated. Without such incorporation such a gift would fail for remoteness. A gift to "the Prime Minister and his successors", if it is not an outright gift to the man now holding that office, will infringe the rule against perpetuities, and a gift on trust for successive Prime Ministers, unless it could qualify as a charitable gift, will likewise fail. Where, however, there is a corporation sole, no such problem arises, because in law the gift is not to a succession of persons but rather to one continuing entity.

68. The agents, beneficiaries, and members of a corporation

A corporation, having neither soul nor body, cannot act save through the agency of some representative in the world of real men. For the same reason it can have no interests, save those which are attributed to it as a trustee for or otherwise on behalf of actual human beings (*e*). Whatever a company is reputed to

(*e*) The relation between a corporation and its beneficiaries may or may not amount to a *trust* in the proper sense of the term. A share in a company is not the beneficial ownership of a certain proportion of the company's property, but the benefit of a contract made by the shareholder with the

do in law is done in fact by the directors or the shareholders as its agents and representatives. Whatever interests, rights, or property it possesses in law are in fact those of its shareholders, and are held by it for their benefit. Every legal person, therefore, has corresponding to it in the world of natural persons certain agents or representatives by whom it acts, and certain beneficiaries on whose behalf it exists and fulfils its functions. Its representatives may or may not be different persons from its beneficiaries, for these two capacities may or may not be united in the same individuals. The shareholders of a company are not merely the persons for whose benefit it exists; they are also those by whom it acts. In the case of a corporation established for charitable purposes it is otherwise, for the beneficiaries may have no share whatever in the management of its affairs.

The representatives and beneficiaries of a corporation must not be confounded with its members. These last are, as we have seen, the individuals who form the group or series personified by the law, and who so constitute the *corpus* or body of the legal person thus created. Membership of a corporation does not in itself affect in any way the rights or liabilities of the members, for it is nothing more than a matter of form. A man's privileges and responsibilities in respect of a corporation depend on whether he is one of its representatives or beneficiaries, not on whether he is formally accounted by the law as one of its members. Municipal corporations are constituted by the incorporation of the inhabitants of boroughs; but if by statute it were declared that they should consist for the future of the mayor, aldermen, and councillors, the change would not affect the rights, powers, or liabilities of any human being.

It is worth notice that some or all of the members of a corporation may be corporations themselves. There is nothing to prevent the shares of a company from being held by other companies. In this case the idea of incorporation is duplicated, and the law creates a legal person by the personification of a group of persons who themselves possess a merely legal personality.

company, under which he is entitled to be paid a share of the profits made by the company, and of the surplus assets on its dissolution. A share is a chose in action—an *obligation* between the company and the shareholder: *Colonial Bank* v. *Whinney* (1886) 11 App.Cas. 426.

69. The acts and liabilities of a corporation

When a natural person acts by an agent, the authority of the agent is conferred, and its limits are determined, by the will and consent of the principal. In general only those acts of the agent are imputed by the law to the principal, which are within the limits of the agent's authority as thus created and circumscribed. But in the case of a corporation it is necessarily otherwise. A legal person is as incapable of conferring authority upon an agent to act on its behalf as of doing the act *in propria persona*. The authority of the agents and representatives of a corporation is therefore conferred, limited, and determined, not by the will of the principal, but either by (1) the wills of some human beings who are for this purpose identified in law with the corporation, or by (2) the law itself. A good illustration of (1) is afforded by companies incorporated under the Companies Acts. The first directors may be appointed by or in accordance with the articles of association, which may be drawn up by the promoters of the company; or they may be appointed at a meeting of the shareholders. The volition of the promoters, or of the persons empowered to appoint directors by the articles, or of the shareholders, is therefore the volition of the company for this purpose. When the directors are appointed they are themselves regarded for many purposes as the *alter ego* of the company, and their wills are, within the limits of the rules of law, regarded as the will of the company.

An important rule in connection with companies incorporated by special statute and companies incorporated under the general provisions of the Companies Acts is that their powers are restricted by law in a way that the powers of a human being are not. Any act which lies beyond these legally appointed limits will not be imputed to the corporation, even though done in its name and on its behalf. It is said to be *ultra vires* of the corporation, and as a corporate act it is null and void.

Speaking generally, we may say that such corporations can do those things only which are incidental to the fulfilment of the purposes for which the law created it. All its acts must be directed to its legally appointed end. Thus a company incorporated by special statute is limited to the powers conferred by the statute and those reasonably incidental thereto. The

memorandum of association of a company registered under the Companies Acts must set forth the purposes for which it is established; and even the unanimous consent of the whole body of shareholders cannot effectively enable the company to act beyond the limits so marked out for its activity.

It is sometimes thought that the *ultra vires* rule is a necessary consequence of the fact that a corporation itself has no will (*f*). This, however, is not so, for, as we have seen, although the corporation has no will, the law can and does regard certain human beings as the equivalent of the corporation for certain purposes. There is nothing in logic to prevent the law from regarding the will of such human beings as the will of the corporation for *all* purposes, thus dispensing with an *ultra vires* rule. In fact, English law seems to do this in the case of ancient corporations where no charter can be traced (*g*).

It is well settled in the law of England that a corporation may be held liable for wrongful acts, and that this liability extends even to those cases in which malice, fraud, or other wrongful motive or intent is a necessary element. A company may be sued for libel, malicious prosecution, or deceit (*h*). Nor is this responsibility civil only. Corporations, no less than men, are within reach of the arm of the criminal law. They may be indicted or otherwise prosecuted for a breach of their statutory or common law duties, and punished by way of fine and forfeiture (*i*).

Although this is now established law, the theoretical basis of the liability of corporations is a matter of some difficulty and debate. For in the first place it may be made a question whether such liability is consistent with natural justice. To punish a body

(*f*) This view was taken by Salmond.

(*g*) It is frequently said that no chartered company is subject to the *ultra vires* rule, but this is doubtful. See Street, *Ultra Vires* (1930), 18–22.

The Company Law Amendment Committee, 1945, recommended that registered companies should be given as regards third parties the powers of an individual, but this was not acted upon by Parliament. See, upon it, Horrwitz, "Company Law Reform and the *Ultra Vires* Doctrine" (1946) 62 L.Q.R. 66.

(*h*) *Cornford* v. *Carlton Bank* [1899] 1 Q.B. 392; [1900] 1 Q.B. 22. See also Salmond, *Torts* (11th ed.), § 17; Dernburg, *Pandekten*, I. sect. 66; Windscheid, I. sect. 59; Savigny, *System*, sects. 94, 95; D. 4. 3. 15. 1.

(*i*) *R.* v. *Birmingham and Gloucester Ry.* (1842) 3 Q.B. 223; *R.* v. *Great North of England Ry.* (1846) 9 Q.B. 315; *R.* v. *I.C.R. Haulage Ltd.* [1944] K.B. 551. It seems from this last case that *R.* v. *Cory Bros.* [1927] 1 K.B. 810, will not now be followed. See also Williams, *Criminal Law: The General Part* (2nd ed.), Chap. 22.

corporate, either criminally or by the enforcement of penal redress, is in reality to punish the beneficiaries on whose behalf its property is held, for the acts of the agents by whom it fulfils its functions. So far, therefore, as the beneficiaries and the agents are different persons, the liability of bodies corporate is an instance of vicarious responsibility, and it is to be justified on the same principles as are applicable to the vicarious liability of a principal for the unauthorised acts of his agent—principles which will be considered by us at a later stage of our inquiry. For although the representatives of a corporation are in form and legal theory the agents of the legal person, yet in substance and fact they are the agents of the beneficiaries. A company is justly held liable for the acts of its directors, because in truth the directors are the servants of the shareholders.

A more serious difficulty in imposing liability upon bodies corporate arises from the following consideration. The wrongful acts so attributed by the law to legal persons are in reality the acts of their agents. Now we have already seen that, except possibly in the case of chartered corporations, the limits of the authority of those agents are determined by the law itself, and that acts beyond those limits will not be deemed in law to be the acts of the corporation. How, then, can an illegal act be imputed to a corporation? If illegal, it cannot be within the limits of lawful authority; and if not within these limits, it cannot be the act of the corporation (*k*). The solution of this difficulty is as follows. In the first place, it may be said that the argument does not extend to wrongful acts of *omission*, for these are done by the body politic in person, and not merely by its representatives. No legal person can do in person what by law it ought not to do, but it can in person fail to do what in law it ought. And in the second place, the liability of a corporation for the acts of its representatives is a perfectly logical application of the law as to an employer's liability for his servants. The responsibility of a master does not depend on any authority given to his servant to commit the wrongful act. It is the outcome of an absolute rule of law that the employer is himself

(*k*) For a development of this thesis see Goodhart, "Corporate Liability in Tort and the Doctrine of *Ultra Vires*" (1926) 2 *Cambridge Law Journal* 350, reprinted in his *Essays in Jurisprudence and the Common Law* 90, and note thereon in Salmond, *Torts* (10th ed.) 57, n. (*x*) (not repeated in the same form in later editions).

answerable for all wrongs committed by his servant in the course and process of doing that which he is employed to do. I am liable for the negligence of my servant in driving my carriage, not because I authorised him to be negligent, but because I authorised him to drive the carriage. So in the case of the agents of a corporation: the law imputes to the corporation not only all acts which its agents are lawfully authorised to do, but all unlawful acts which they do in or about the business so authorised. The corporation is responsible not only for what its agents do, being thereunto lawfully authorised, but also for the manner in which they do it. If its agents do negligently or fraudulently that which they might have done lawfully and with authority, the law will hold the corporation answerable. This justification, however, applies only in the law of tort. In general the criminal law knows no such doctrine as *respondeat superior*, and the criminal liability of corporations must therefore be looked upon as exceptional (*l*).

But thirdly, the difficulty arises from a misunderstanding. When the law creates legal persons by bestowing upon them rights and duties, it can perfectly reasonably provide that where those persons' agents overstep the powers allowed by law, their acts should count as *ultra vires* and fail to achieve their objective. As a result of such a provision the corporation and its beneficiaries will derive no benefit or advantage from such acts. But, as we saw, the law could provide otherwise; and no rule of logic prevents it from dispensing with the *ultra vires* doctrine in the case of a corporation's liabilities. If in consequence the law lacks symmetry and consistency, we should remember that symmetry is not a necessary feature of law nor yet its sole objective. And in any case the reasons behind the rules are different in the two cases: it is only reasonable that the beneficiaries of a corporation should derive no gain if the corporation does something not allowed by the law, yet equally reasonable that a corporation should be liable, like any other employer, for the injurious act of its servants or agents.

70. The uses and purposes of incorporation

There is probably nothing which the law can do by the aid of the conception of incorporation, which it could not do without

(*l*) For a further discussion of vicarious liability see below, § 105.

it. But there are many things which it can by such aid do better and more easily than would otherwise be possible. Among the various reasons for admitting this extension of personality, we may distinguish one as of general and fundamental importance, namely, the difficulty which the law finds in dealing with common interests vested in large numbers of individuals and with common action in the management and protection of such interests. The normal state of things—that with which the law is familiar, and to which its principles are conformed—is individual ownership. With a single individual the law knows well how to deal, but common ownership is a source of serious and manifold difficulties. If two persons carry on a partnership, or own and manage property in common, complications arise, with which nevertheless the law can deal without calling in the aid of fresh conceptions. But what if there are fifty or a hundred joint-owners? With such a state of facts legal principles and conceptions based on the type of individual ownership are scarcely competent to deal. How shall this multitude manage its common interests and affairs? How shall it dispose of property or enter into contracts? What if some be infants, or insane, or absent? What shall be the effect of the bankruptcy or death of an individual member? How shall one of them sell or otherwise alienate his share? How shall the joint and separate debts and liabilities of the partners be satisfied out of their property? How shall legal proceedings be taken by or against so great a number? These questions and such as these are full of difficulty even in the case of a private partnership, if the members are sufficiently numerous. The difficulty is still greater in the case of interests, rights, or property vested not in individuals or in definite associations of individuals, but in the public at large or in indeterminate classes of the public.

In view of these difficulties the aim of the law has been to reduce, so far as may be, the complex form of collective ownership and action to the simple and typical form of individual ownership and action. The law seeks some instrument for the effective expression and recognition of the elements of unity and permanence involved in the shifting multitude with whose common interests and activities it has to deal. There are two chief devices for this purpose, namely trusteeship and incorporation.

The objects of trusteeship are various, and many of its applications have a source and significance that are merely historical. In general, however, it is used as a mode of overcoming the difficulties created by the incapacity, uncertainty, or multiplicity of the persons to whom property belongs. The property is deemed by the law to be vested, not in its true owners, but in one or more determinate individuals of full capacity, who hold it for safe custody on behalf of those uncertain, incapable, or multitudinous persons to whom it in truth belongs. In this manner the law is enabled to assimilate collective ownership to the simpler form of individual ownership. If the property and rights of a charitable institution or an unincorporated trading association of many members are held in trust by one or two individuals, the difficulties of the problem are greatly reduced.

It is possible, however, for the law to take one step further in the same direction. This step it has taken, and has so attained to the conception of incorporation. This may be regarded from one point of view as merely a development of the conception of trusteeship. For it is plain that so long as a trustee is not required to *act*, but has merely to serve as a depositary of the rights of beneficiaries, there is no necessity that he should be a natural person at all. He may be a mere legal concept. And as between the real and the fictitious trustee there are, in large classes of cases, important advantages on the side of the latter. He is *one* person, and so renders possible a complete reduction of common to individual ownership; whereas the objections to a single trustee in the case of natural persons are serious and obvious. The fictitious trustee, moreover, though not incapable of dissolution, is yet exempt from the inevitable mortality that afflicts mankind. He embodies and expresses, therefore, to a degree impossible in the case of natural trustees, the two elements of unity and of permanence which call for recognition in the case of collective interests. An incorporated company is a permanent unity, standing over against the multitudinous and variable body of shareholders whose rights and property it holds in trust.

It is true, indeed, that a fictitious trustee is incapable of acting in the matter of his trust in his proper person. This difficulty, however, is easily avoided by means of agency, and the agents may be several in number, so as to secure that safety

which lies in a multitude of counsellors, while the unity of the trusteeship itself remains unaffected (*m*).

We have considered the general use and purpose of incorporation. Among its various special purposes there is one which has assumed very great importance in modern times, and which is not without theoretical interest. Incorporation is used to enable traders to trade with limited liability. As the law stands, he who ventures to trade *in propria persona* must put his whole fortune into the business. He must stake all that he has upon the success of his undertaking, and must answer for all losses to the last farthing of his possessions. The risk is a serious one even for him whose business is all his own, but it is far more serious for those who enter into partnership with others. In such a case a man may be called upon to answer with his whole fortune for the acts or defaults of those with whom he is disastrously associated.

It is not surprising, therefore, that modern commerce has seized eagerly upon a plan for eliminating this risk of ruin. Incorporation has proved admirably adapted to this end. They who wish to trade with safety need no longer be so rash as to act *in propria persona*, for they may act merely as the irresponsible agents of a legal entity, created by them for this purpose with the aid and sanction of the Companies Act. If the business is successful, the gains made by the company will be held on behalf of the shareholders; if unsuccessful, the losses must be borne by the company itself. For the debts of a corporation are not the debts of its members. *Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent* (*n*). The only risk run by its members is that of the loss of the capital with which they have supplied or undertaken to supply the company for the purpose of enabling it to carry on its business. To the capital so paid or promised, the creditors of the insolvent

(*m*) The purposes of the corporation sole are analogous to those of the corporation aggregate. A corporation sole consists of the successive holders of an office, regarded by the law as a single person. The object of this device is to avoid the difficulties which are involved in the transmission from each officer to his successor of the property, liabilities, and contracts held, incurred or made by him in his official capacity. Such property, liabilities, and contracts are imputed by the law to the permanent corporation which never dies or retires from office, instead of the individual holders of the office for the time being.

(*n*) D. 3. 4. 7. 1.

corporation have the first claim, but the liability of the shareholders extends no further.

The advantages which traders derive from such a scheme of limited liability are obvious. Nor does it involve any necessary injustice to creditors, for those who deal with companies know, or have the means of knowing, the nature of their security. The terms of the bargain are fully disclosed and freely consented to. There is no reason in the nature of things why a man should answer for his contracts with all his estate, rather than with a definite portion of it only, for this is wholly a matter of agreement between the parties.

In recent years an important motive for incorporation has been tax-avoidance. Under a system of taxation where not only the amount, but also the proportion, of tax payable increases with income, it becomes more useful to have a regular income each year than an income which may be very large one year and non-existent the next. It is also advantageous for several members of a family each to have a separate income instead of one total income in the hands of the head of the family. By means of a limited company a tax-payer can contrive to spread a fluctuating income over the years and to divide a large income into smaller parts to be distributed within his family. Further advantages can be derived from the tax provisions relating to the commencement and termination of businesses. How far such benefits will remain and continue to serve as a reason for incorporation is uncertain; what is clear is that over the last few years the tax position has been one of the most important aspects of incorporation.

71. The creation and extinction of corporations

The birth and death of legal persons are determined not by nature, but by the law. They come into existence at the will of the law, and they endure during its good pleasure. Corporations may be established by royal charter, by statute, by immemorial custom, and in recent years by agreement of their members expressed in statutory forms and subject to statutory provisions and limitations. They are in their own nature capable of indefinite duration, this being indeed one of their chief virtues as compared with humanity, but they are not incapable of destruction. The extinction of a body corporate is called its

dissolution—the severing of that legal bond by which its members are knit together into a unity. We have already noticed that a legal person does not of necessity lose its life with the destruction or disappearance of its *corpus* or bodily substance. There is no reason why a corporation should not continue to live, although the last of its members is dead; and a corporation sole is merely dormant, not extinct, during the interval between two successive occupants of the office (*o*).

72. The state as a corporation

Of all forms of human society the greatest is the state. It owns immense wealth and performs functions which in number and importance are beyond those of all other associations. Is it, then, recognised by the law as a person? Is the commonwealth a body politic and corporate, endowed with legal personality, and having as its members all those who owe allegiance to it and are entitled to its protection? This is the conclusion to which a developed system of law might be expected to attain. But the law of England has chosen another way. The community of the realm is an organised society, but it is no person or body corporate. It owns no property, is capable of no acts, and has no rights nor any liabilities imputed to it by the law. Whatever is said to the contrary is figure of speech, and not the literal language of our law.

How, then, are we to account for this failure of the law to make so obvious and useful an application of the conception of incorporation and legal personality? Why has it failed to recognise and express in this way the unity and permanence of the state? The explanation is to be found in the existence of monarchical government. The real personality of the monarch, who is the head of the state, has rendered superfluous, at any rate within Great Britain, any attribution of legal personality to the state itself. Most public property is in the eye of the law the property of the King—which word, since we are speaking of the sovereign generally, it is convenient to take as

(*o*) It is a somewhat curious circumstance that the legal persons created by one system of law received full recognition from other systems. A French corporation can sue and be sued in an English Court of justice as if it were a human being. *Dutch West India Co.* v. *Van Moses* (1724) 1 Str. 611; *Newby* v. *Van Oppen* (1872) L.R. 7 Q.B. 293.

including the Queen. Public liabilities are those of the King; it is he, and he alone, who owes the principal and interest of the national debt. Whatsoever is done by the state is in law done by the King. The public justice administered in the law courts is royal justice administered by the King through his servants, the judges. The laws are the King's laws, which he enacts with the advice and consent of his Parliament. The executive government of the state is the King's government, which he carries on by the hands of his ministers. The state has no army save the King's army, no navy save the King's navy, no revenues save the royal revenues, no territory save the dominions of the King. Treason and other offences against the state and the public interest are in law offences against the King, and the public peace is the King's peace. The citizens of the state are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord.

It is true that modern times have seen the growth of many exceptions to these principles. Local authorities are public bodies, but in legal theory they do not represent the King. Many other public and semi-public bodies, such as the Mersey Docks and Harbour Board (*p*) and the British Broadcasting Corporation, are legally distinct from the King, and are not considered as acting under his authority. Nevertheless a lawyer would not regard any of these bodies as identical with the state. In so far as the English lawyer thinks of the state as a whole, he expresses his thought by speaking of the King. This legal attitude reduces the need for recognising an incorporate commonwealth, *respublica*, or *universitas regni*. The King holds in his own hands most of the rights, powers and activities of the state. By his agency the State acts, and through his trusteeship it possesses property and exercises rights.

The King himself, however, is in law no mere mortal man. He has a double capacity, being not only a natural person, but a body politic, that is to say, a corporation sole. The visible wearer of the crown is merely the living representative and agent for the time being of this invisible and underlying *persona ficta*, in whom by our law the powers and prerogatives of the government of this realm are vested. When the King in his natural person

(*p*) *Mersey Docks and Harbour Board* v. *Gibbs* (1866) L.R. 1 H.L. 93.

however, the interests of animals conflict with those of human beings, the latter are preferred (*i*).

63. The legal status of dead men

Ordinarily speaking, the personality of a human being may be said to commence existence on birth and cease to exist at death, and in general the law takes the same view. Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives, and are now as destitute of rights as of liabilities. They have no rights because they have no interests. They do not even remain the owners of their property until their successors enter upon their inheritance. For instance, the goods of an intestate, before the grant of letters of administration, were formerly vested in the bishop of the diocese, and are now vested in the judge of the Court of Probate, rather than left to the dead until they are in truth acquired by the living (*j*).

Yet although all a man's rights and interests perish with him, he does when alive concern himself much with that which shall become of him and his after he is dead. And the law, without conferring rights upon the dead, does in some degree recognise and take account after a man's death of his desires and interests when alive. There are three things, more especially, in respect of which the anxieties of living men extend beyond the period of their deaths, in such sort that the law will take notice of them. These are a man's body, his reputation, and his estate. By a natural illusion a living man deems himself interested in the treatment to be awarded to his own dead body. To what extent does the law secure his desires in this matter? A corpse is the property of no one. It cannot be disposed of by will or any other instrument (*k*), and no wrongful dealing with it can amount to theft (*l*). The criminal law, however, secures decent burial

(*i*) See, *e.g.*, *National Anti-Vivisection Society* v. *I.R.* [1928] A.C. 31.

(*j*) The concept of *hereditas iacens* in Roman law made some approach to the idea of continuing the deceased's personality. It was said that the inheritance, in the interval between the death and the entry of the *heres*, represented a *persona* (*personae vice fungitur*: D. 46. 1. 22). After some disagreement it became settled that the *persona* represented was that of the deceased: but it was so only for some purposes, not for all. See Buckland, *Text-Book of Roman Law* (2nd ed. 1932), 306 *et seq.*; Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 154–155; Duff, *Personality in Roman Private Law* (1938), Chap. VII.

(*k*) *Williams* v. *Williams* (1882) 20 Ch.D. 659.

(*l*) 2 East P.C. 652.

Just as our law refuses to personify and incorporate the Commonwealth as a whole, so it refuses to personify and incorporate the various constituent self-governing states of which it is made up. There is no such person known to the law of England as the state or government of Canada or of New Zealand (*s*). The King or the Crown represents not merely the empire as a whole, but each of its parts; and the result is a failure of the law to give adequate recognition and expression to the distinct existence of these parts (*t*). The property and liabilities of the government of New Zealand are in law those of the British Crown. The national debts of the colonies are at present owing by no person known to the law save the Queen of England. A contract between the governments of two colonies is in law a nullity, unless the Queen can make contracts with herself. All this would be otherwise, did the law recognise that the dependencies within the Commonwealth were bodies politic and corporate, each possessing a distinct personality of its own, and capable in its own name and person of rights, liabilities, and activities. Some of the older colonies were actually in this position, being created corporations aggregate by the royal charters to which they owed their origin: for example, Massachusetts, Rhode Island, and Connecticut. Even an unincorporated colony of the ordinary type may become incorporate and so possessed of separate personality, by virtue of its own legislation (*u*). In the absence of any such separate incorporation of the different portions of the empire, their separate existence can be recognised in law only by way of a doctrine of plural personality. Although the Queen represents the whole Commonwealth (with the exception of the "Republics within the

(*s*) *Sloman* v. *Government of New Zealand* (1876) 1 C.P.D. 563. This was an action brought in England against the "Governor and Government of the Colony of New Zealand". It failed because there was no such person or body corporate known to the law. The rule seems to have been overlooked in *Government of Gibraltar* v. *Kenney* [1956] 3 W.L.R. 466.

(*t*) See *Williams* v. *Howarth* [1905] A.C. 551.

(*u*) The Commonwealth of Australia, for example, and also the constituent Australian states are now to be deemed for certain purposes bodies politic and corporate. For by virtue of Australian legislation they can now sue and be sued in their own names, and possess other attributes of personality; thus an action will now lie at the suit of the State of Victoria against the State of New South Wales. The corporate character thus bestowed upon these states, however, is concurrent with, and not exclusive of the old common law principle which identifies the state with the King. Public lands in Australia, for example, are still the lands of the Crown, except so far as they may be expressly vested in the corporate state by statute.

Commonwealth "), it is possible for the law to recognise a different personality in her in respect of each of its component parts. The Queen who owns the public lands in New Zealand is not necessarily in the eye of the law the same person who owns the public lands in England. The Queen, when she borrows money in her capacity as the executive government of Australia, may be deemed in law a different person from the Queen who owes the English national debt. How far this plural personality of the Crown is actually recognised by the common law of England is a difficult question which it is not necessary for us here to answer (*v*). It is sufficient to point out that, in the absence of any separate incorporation, this is the only effective way of recognising in law the separate rights, liabilities and activities of the different dependencies of the Crown.

73. Unincorporated associations (*w*)

With corporations, which are in law distinct persons from members, we may contrast unincorporated associations, which are in law nothing other than the sum of their members. They vary in size and importance from small social clubs to all-powerful professional bodies and trade unions holding the power of life and death over the professional and industrial activities of their members. But though we commonly personify such associations, describing clubs or societies as owning property, owing money and so on, the law knows of no such person as an unincorporated association. The rights and duties of a club are nothing more than the rights and duties of its members. The legal position is that the members are all contractually related with one another; and when a new

(*v*) It has been expressly recognised by the High Court of Australia, so far as regards the Commonwealth of Australia and the constituent states: *Municipal Council of Sydney* v. *The Commonwealth* (1904), 1 Commonwealth L.R. at p. 231, *per* Griffith C.J.: "It is manifest from the whole scope of the Constitution that just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, . . . so the Crown as representing those several bodies is to be regarded not as one, but as several juristic persons." See also *Att.-Gen* v. *Great Southern and Western Railway of Ireland* [1925] A.C. 754; Pitt Cobbett, "'The Crown' as Representing 'The State'" (1904) 1 Commonwealth Law Review 23, 145; W. H. Moore, "The Crown as a Corporation" (1904) 20 L.Q.R. 351; G. L. Haggen, "The Function of the Crown" (1925) 41 L.Q.R. 182; Borchard, "Governmental Responsibility in Tort" (1927) 36 Yale L.J. at 774–780.

(*w*) On this topic see Lloyd, *Law of Unincorporated Associations*. See also Lloyd, *The Idea of Law*, 300–309.

member joins he automatically enters into a contract with the other members. The rules of the club or society constitute the basic contract to which all the members are parties. The club property is the joint property of the members, though in fact it is often held by trustees on behalf of the members, to simplify transactions and to restrict its use to the purposes of the club, these being specified in the trust deed.

In its present state, the law relating to unincorporated associations is far from satisfactory. It can work hardship both to non-members and to members themselves.

A non-member who has supplied goods to the club and is anxious for the money owing him finds that in law there is no such entity as the club and that the only persons liable for the debt are those who personally made the contract and those who, having authorised the contract, are bound as principals; this latter category will, usually, extend to the secretary and committee but not to all the members but only to such as can be shown to have expressly or impliedly authorised or ratified the contract. Or again, a non-member who suffers injuries by reason of the club's negligence, *e.g.*, is injured by a defect in the club premises, will find that only those members who actually committed or authorised the tort will be liable; and it will be only rarely that he can fix all the members with liability.

But members themselves of unincorporated associations are prejudiced by the unsatisfactory state of the law. A member who is expelled from his professional society faces professional and financial ruin. Protection against wrongful expulsion therefore is imperative. Such a person may be fortunate and find that the powers of expulsion are regulated by law. In many cases, however, the member's contract of membership may allow the controlling body, the committee, to make such rules as it thinks fit; and in so far as the courts will interfere, they will do so only to see that the committee has acted according to its own rules, and in accordance with the rules of natural justice; they will not for example, consider appeals against findings of fact.

Midway between corporations and unincorporated associations stand various entities which enjoy some measure of personality. A partnership is not a legal person but yet resembles one in

certain ways. It can sue and be sued in its own name, and its property is separate from the property of its members. But the rights of partnership are in fact the rights of the partners, as are its liabilities; for the partners are in general fully liable personally for the debts of the firm. Moreover, because a partnership is not a separate legal person, one partner cannot himself contract with the partnership; for, as we saw, a man cannot make a contact with himself.

Into this intermediate category, as we saw earlier, come registered friendly societies and registered trade unions. The former consist of voluntary associations which raise funds from their members' subscriptions and lend money to the members in time of need. Both registered friendly societies and registered trade unions can sue and be sued in their own names and can own property in the names of their trustees. Trade unions, however, by virtue of the Trades Dispute Act, 1906, cannot be sued in tort. They can, however, be sued in contract, and the case of *Bonsor* v. *Musicians' Union* (*x*), in which a member sued his union for breach of contract on account of wrongful expulsion, raised in a crucial way the question of a trade union's personality. For if a union is not in law a separate entity from its members, an action for breach of contract by a member against his union is in reality an action against all the members including himself, and since a man cannot sue himself, he cannot therefore sue his union. Without precisely stating the nature of a trade union's legal personality, the House of Lords decided that a member could sue for breach of contract, implying at least that a union has some legal existence independent of its members. In view of the power enjoyed by unincorporated associations it is clear that our present law, based on contract, is inadequate for the problems involved. Whether or not members or non-members should have legal rights against associations should not be made to depend on the conceptual nature of such entities, but rather on the social needs of the time, and legal development to meet such needs should not be hampered by the strait-jacket of conceptualism.

(*x*) [1956] A.C. 104. See comment on this case by Lloyd (1956) 19 M.L.R. 121.

74. Corporate personality (y)

Entities which enjoy legal rights and duties are, as we have seen, either natural or legal persons. But what, in fact is a legal person? If Smith has legal rights, then it is a human being that has the rights in question. But if Smith and Co. Ltd. has legal rights, what is it really that possesses these rights? — if I make a contract with Smith and Co. Ltd., what have I really contracted with?

Some writers, including Salmond, argue that corporations are mere fictions (a). To speak of Smith & Co. Ltd. as having rights and duties is to treat as real an entity which has no real existence. Just as the scientist finds it convenient to regard an electric current as being like a current of water, so the lawyer finds it convenient to look upon a corporation as a sort of person; and just as in reality the electric current is not a current at all, as the scientist well knows, so equally a corporation, as the lawyer knows full well, is in reality not a person at all.

The misleading feature in this theory is the suggestion that the lawyer is indulging in make-belief. The fact that Smith & Co. Ltd. is not the same sort of entity as Smith need not compel us to conclude that it is the same sort of entity as Robinson Crusoe. In a work of fiction the characters do indeed lack existence, although the conventions of the art of fiction require us to imagine that they really lived. Indeed without stepping outside the law, we can observe that John Doe and Richard Roe were fictitious characters, who, as everyone was well aware, did not exist, but whose fictitious existence enabled the courts to provide a convenient remedy for dispossession of land. But Smith & Co. Ltd. is in quite a different case from Robinson Crusoe, John Doe and Richard Roe; for in referring to Smith & Co. Ltd. we are not suspending judgment, pretending or in any way imagining something to be which is not the case. But the rejection of the

(y) See Gower, *Principles of Modern Company Law*; Hallis, *Corporate Personality*; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Chaps. 6–7; Pollock, "Has the Common Law received the Fiction Theory of Corporations?" reprinted in Pollock, *Jurisprudence and Legal Essays* (ed. Goodhart), 212. Wolff, "On the Nature of Legal Persons" (1938) 54 L.Q.R. 494. Hart, "Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 37 at 49–59. Dias, *Jurisprudence* (2nd ed.), Chap. 11. Paton, *A Textbook of Jurisprudence* (3rd ed.) Chap. 16.

(a) Salmond, *Jurisprudence* (7th ed.) § 114.

fiction theory must not drive us to the opposite extreme of asserting that a corporation is a real but mysterious entity with a special type of existence (*b*). For this kind of realist theory, despite the appeal which it has had, is even more unsatisfactory than the fiction theory. The merit of the latter was that it at least attempted to provide some sort of explanation of the nature of a corporation. To say that a corporation is a fiction devoid of real existence does at any rate stress what actually happens in situations involving corporations; to say that the Smith & Co. Ltd., with whom I contracted, is a mere fiction does at least lead on to a description of the circumstances in which I may be said to have contracted with this limited company. But to state that the company is a real but mysterious entity explains nothing at all. Anyone who is puzzled by what it means to contract with Smith & Co. Ltd. will be equally confused at the notion of contracting with an entity such as the realist theory describes.

Common sense suggests that in truth a corporation is nothing other than its members, and that statements about corporations are disguised abbreviations for statements about all the members (*c*). But this too is not entirely satisfactory; for to say that Smith & Co. Ltd. owes me £100 is not an abbreviated way of saying that every member of the company owes me a debt. A limited company is not just the same thing as its members, and statements about the former are not just abbreviations for statements about the latter. On the other hand we could translate statements like " Smith & Co. Ltd. owes me £100 " into other statements which do not contain the words " Smith & Co. Ltd." We could for example specify the circumstances under which the statement would be true; and this would involve a description of the legal rules about incorporation, management and extinction of limited companies together with an account of the law relating to their contractual liability. It would also involve a description of some events which would count by law as incorporation of Smith & Co. Ltd. and as the incurring by Smith & Co. Ltd. of this debt to me. To complete the translation we should need to describe what follows in law from the fact that the company owes

(*b*) This theory is advanced in Gierke, *Political Theories of the Middle Ages*; see also Maitland's Introduction.

(*c*) This theory, sometimes referred to as the " bracket theory," was that of Ihering, *Geist des Römischen Rechts*, i, 202.

me this debt; in other words, we should need to list the legal consequences of the statement, showing who in fact would be liable to pay, what effect this would have on the members of the company and so on. To do all this would be to show the criteria for the truth of statements about limited companies, but it would not be the same thing as an actual statement about the company. For the proposition that Smith & Co. Ltd. owes me £100 states neither the relevant rules nor the relevant events which justify the proposition, nor yet again the consequences of it: all these are implied but not expressed. Statements about corporations are simple, unified methods of stating what would otherwise be inordinately complicated (*d*).

In treating an incorporated group of persons as a separate person, the law is taking the rules about ordinary persons and extending them by analogy to apply to groups of persons who have complied with certain legal formalities. In so far as the rules are extended to apply to the company as a separate person the law allows members to contract and have other legal relations with the company. But not all the rules that apply to natural persons need be extended to corporations. How far they can be held criminally and civilly liable and how far they are capable of enjoying certain rights and privileges will depend on how far the analogy is taken; and this in turn should depend on how far we think it desirable in the public interest for them to have such rights and liabilities. And while there is no logical compulsion to make the analogy complete, there is no particular point at which by any rule of logic the analogy must cease to hold.

(*d*) See Hart, *op. cit.*, for an exposition of this kind of analysis.

CHAPTER 11

TITLES

75. Vestitive facts

We have seen in a former chapter that every right (using the word in a wide sense to include privileges, powers and immunities), involves a title or source from which it is derived. The title is the *de facto* antecedent, of which the right is the *de jure* consequent. If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and these facts are the title of the right. Whether a right is inborn or acquired, a title is equally requisite. The title to a debt consists in a contract, or a judgment, or other such transaction; but the title to life, liberty, or reputation consists in nothing more than in being born with the nature of a human being. Some rights the law gives to a man on his first appearance in the world; the others he must acquire for himself, for the most part not without labour and difficulty. But neither in the one case nor in the other can there be any right without a basis of fact in which it has its root and from which it proceeds.

Titles are of two kinds, being either *original* or *derivative*. The former are those which create a right *de novo*; the latter are those which transfer an already existing right to a new owner. The catching of fish is an original title of the right of ownership, whereas the purchase of them is a derivative title. The right acquired by the fisherman is newly created; it did not formerly exist in any one. But that which is acquired by the purchaser is in legal theory identical with that which is lost by the vendor. It is an old right transferred, not a new one created. Yet in each case the fact which vests the right is equally a title, in the sense already explained. For the essence of a title is not that it determines the creation of rights *de novo*, but that it determines the acquisition of rights new or old.

As the facts confer rights, so they take them away. All rights are perishable and transient. Some are of feeble vitality,

and easily killed by any adverse influence, the bond between them and their owners being fragile and easily severed. Others are vigorous and hardy, capable of enduring and surviving much. But there is not one of them that is exempt from possible extinction and loss. The first and greatest of all is that which a man has in his own life; yet even this the law may deny to him who has himself denied it to others.

The facts which thus cause the loss of rights may be called, after Bentham, *divestitive facts*. This term, indeed, has never been received into the accepted nomenclature of the law, but there seems no better substitute available. The facts which confer rights received from Bentham the corresponding name of *investitive facts*. The term already used by us, namely, title, is commonly more convenient, however, and has the merit of being well established in the law (*a*). As a generic term to include both investitive and divestitive facts the expression *vestitive fact* may be permissible (*b*). Such a fact is one which determines, positively or negatively, the *vesting* of a right in its owner.

We have seen that titles are of two kinds, being either original or derivative. In like manner divestitive facts are either *extinctive* or *alienative*. The former are those which divest a right by destroying it. The latter divest a right by transferring it to some other owner. The receipt of payment is divestitive of the right of the creditor to receive payment; so, also, is the act of the creditor in selling the debt to a third person; but in the former case the divestitive fact is extinctive, while in the latter it is alienative.

It is plain that derivative titles and alienative facts are not two different classes of fact, but are merely the same facts looked at from two different points of view (*c*). The transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee, and the loss of it by the transferor. The vestitive fact, if considered with reference to the transferee, is a

(*a*) Title meant originally a mark, sign, or inscription; *e.g.*, the title of a book; *titulus sepulchri*, an epitaph. "Pilate wrote a title and put it on the cross": John xix. 19. Thence more specifically it came to mean signs or evidence of right or ownership; *e.g.*, *titulus*, a boundary-stone; *titulus*, a title-deed (Du Cange). Thence the *ground* of right or ownership, viz., an investitive fact.

(*b*) Bentham calls such facts *dispositive*.

(*c*) We may term them, with Bentham, *translative* facts.

derivative title, while from the point of view of the transferor it is an alienative fact. Purchase is a derivative title, but sale is an alienative fact; yet they are merely two different sides of the same event.

These distinctions and divisions are exhibited in the following Table:—

Vestitive Facts.	Investitive Facts or Titles.	Original Titles.	Creation of Rights.
		Derivative Titles.	Transfer of Rights.
	Divestitive Facts.	Alienative Facts.	Transfer of Rights.
		Extinctive Facts.	Destruction of Rights.

These different classes of vestitive facts correspond to the three chief events in the life history of a right, namely, its creation, its extinction, and its transfer. By an original title a right comes first into existence, being created *ex nihilo*; by an extinctive fact it is wholly destroyed; by derivative titles and alienative facts, on the other hand—these being, as we have seen, the same facts viewed from different sides—the existence of the right is in no way affected. The transfer of a right does not in legal theory affect its personal identity; it is the same right as before, though it has now a different owner (*d*).

76. Acts in the law

Vestitive facts—whether they create, transfer, or extinguish rights—are divisible into two fundamentally distinct classes, according as they operate in pursuance of the will of the persons concerned, or independently of it. That is to say, the creation, transfer, and extinction of rights are either voluntary or involuntary. In innumerable cases the law allows a man to acquire or lose his rights by a manifestation or declaration of his will and intent directed to that end. In other cases it confers rights upon him, or takes them away without regard to any purpose or consent of his at all. If he dies intestate, the law itself will dispose of his estate as it thinks fit; but if he leaves a duly

(*d*) We here use the term transfer in its generic sense, as including both voluntary and involuntary changes of ownership. It has also a specific sense in which it includes only the former. Succession *ab intestato*, for example, is a transfer of rights in the wide sense, but not in the narrow.

executed will, in which he expresses his desires in the matter, the law will act accordingly (*e*). So if he sells his property, it passes from him in accordance with his declared intent, which the law adopts as its own; but if his goods are taken in execution by a creditor, or vested in a trustee on his bankruptcy, the transfer is an involuntary one, effected in pursuance of the law's purposes, and not of his at all.

The distinction between these two classes of vestitive facts may be variously expressed. We may make use, for example, of the contrasted expressions *act of the party* and *act of the law*. An act of the party is any expression of the will or intention of the person concerned, directed to the creation, transfer, or extinction of a right, and effective in law for that purpose; such as a contract or a deed of conveyance. An act of the law, on the other hand, is the creation, extinction, or transfer of a right by the operation of the law itself, independent of any consent thereto on the part of him concerned. The expression *act of the party* is one of some awkwardness, however, and it is more convenient in general to substitute for it the technical term *act in the law*, as contrasted with those acts *of* the law which we have already defined (*f*). There is a close connection between an act in the law and a legal power (*g*). Every act in the law is the exercise of a legal power, and the exercise of any legal power is an act in the law.

Acts in the law are of two kinds, which may be distinguished as *unilateral* and *bilateral*. A unilateral act is one in which there is only one party whose will is operative; as in the case of testamentary disposition, the exercise of a power of appointment, the revocation of a settlement, the avoidance of a voidable contract, or the forfeiture of a lease for breach of covenant. A bilateral act, on the other hand, is one which involves the consenting wills of two or more distinct parties; as, for example, a contract, a conveyance, a mortgage, or a lease. Bilateral

(*e*) Subject, now, to the power of the court to make provision out of the estate for the maintenance of a surviving spouse or child: Inheritance (Family Provision) Act, 1938. For a general discussion of this type of legislation see the valuable symposium in (1935) 20 Iowa Law Review 232, 241, 317, 326.

(*f*) This nomenclature has been suggested and adopted by Sir Frederick Pollock, *Jurisprudence* (6th ed.) 144, reprinted in Pollock, *Jurisprudence and Legal Essays* (ed. Goodhart), 78–79. Other writers prefer to indicate acts in the law by the term juristic acts. The Germans call them Rechtsgeschäfte.

(*g*) For powers see *supra*, § 42.

acts in the law are called *agreements* in the wide and generic sense of that term. There is, indeed, a narrow and specific use, in which agreement is synonymous with contract, that is to say, the creation of rights *in personam* by way of consent. The poverty of our legal nomenclature is such, however, that we cannot afford thus to use these two terms as synonymous. We shall therefore habitually use agreement in the wide sense, to include all bilateral acts in the law, whether they are directed to the creation, or to the transfer, or to the extinction of rights. In this sense conveyances (*h*), mortgages, leases, or releases are agreements no less than contracts are.

Unilateral acts in the law are divisible into two kinds in respect of their relation to the other party concerned. For in some instances they are adverse to him; that is to say, they take effect not only without his *consent*, but notwithstanding his *dissent*. His will is wholly inoperative and powerless in the matter. This is so, for example, in the case of a re-entry by a landlord upon a tenant for breach of covenant, or the exercise of a power of appointment, as against the persons entitled in default of appointment; or the avoidance of a voidable contract; or the exercise by a mortgagee of his power of sale. In other cases it is not so; the operation of the unilateral act is subject to the dissent of the other party affected by it, though it does not require his consent. In the meantime, pending the expression of his will, the act has merely a provisional and contingent operation. A will, for example, involves nothing save the unilateral intent and assent of the testator. The beneficiaries need know nothing of it; they need not yet be in existence. But if they subsequently dissent, and reject the rights so transferred to them, the testament will fail of its effect (*k*). If, on the other hand, they accept the provisions made on their behalf, the operation of the will forthwith ceases to be provisional and becomes absolute. Similarly, a settlement of property upon trust need not be known or consented to *ab initio* by the beneficiaries. It may be a purely unilateral act, subject, however,

(*h*) The term "conveyance" is here used to signify any voluntary transfer of a right. It has, however, a narrower and a wider meaning. More narrowly it means the transfer of a right of property that does not pass by delivery of a thing or mere agreement. More widely it means any alienative fact, *e.g.*, bankruptcy, which transfers the bankrupt's rights without his consent.

(*k*) But see *Mallott* v. *Wilson* [1903] 2 Ch. 494.

to repudiation and avoidance by the persons intended to be benefited by it. So I may effectually grant a mortgage or other security to a creditor who knows nothing of it (*l*).

Where there are more than two parties concerned in any act in the law, it may be bilateral in respect of some of them and unilateral in respect of others. Thus a conveyance of property by A to B in trust for C may be bilateral as to A and B *inter se*—operating by the mutual consent of these two—while it may at the same time be unilateral as between A and B on the one side and C on the other—C having no knowledge of the transaction. So the exercise of a mortgagee's power of sale is bilateral as between mortgagee and purchaser, but unilateral so far as regards the mortgagor (*m*).

77. Agreements

Of all vestitive facts, acts in the law are the most important; and among acts in the law, agreements are entitled to the chief place. Unilateral acts are comparatively infrequent and unimportant. The residue of this chapter will therefore be devoted to the consideration of the grounds, modes, and conditions of the operation of agreement as an instrument of the creation, transfer, and extinction of rights. A considerable portion of what is to be said in this connection will, however, be applicable *mutatis mutandis* to unilateral acts also.

The importance of agreement as a vestitive fact lies in the universality of its operation. There are few rights which cannot be acquired through the assent of the persons upon whom the correlative duties are to be imposed. There are few rights which cannot be transferred to another by the will of him in whom they are presently vested. There are few which are not extinguished when their owner no longer desires to retain them. Of that great multitude of rights and duties of which the adult

(*l*) *Middleton* v. *Pollock* (1876) 2 Ch.D. 104; *Sharp* v. *Jackson* [1899] A.C. 419.

(*m*) The terms unilateral and bilateral possess another signification distinct from that which is attributed to them in the text. In the sense there adopted all agreements are bilateral, but there is another sense in which some of them are bilateral and others unilateral. An agreement is bilateral, in this latter signification, if there is something *to be done* by each party to it, while it is unilateral if one party is purely passive and free from legal obligation, all the activity and obligation being on the other side. An agreement to lend money is bilateral, while an agreement to give money is unilateral.

member of a civilised community stands possessed, the great majority have their origin in agreements made by him with other men. By agreements of contrary intent he may strip himself almost as destitute of rights and duties, as when in the scantiest of juridical vesture he made his first appearance before the law. *Invito beneficium non datur* (*n*), said the Romans.

By what reasons, then, is the law induced to allow this far-reaching operation to the fact of agreement? Why should the mere consent of the parties be permitted in this manner to stand for a title of right? Are not rights the subject-matter of justice, and is justice a mere matter of convention varying with the wills of men?

The reasons are two in number. Agreement is, in the first place, evidential of right, and, in the second place, constitutive of it. There is in general no better evidence of the justice of an arrangement than the fact that all persons whose interests are affected by it have freely and with full knowledge consented to it. Men are commonly good judges of their own interests, and in the words of Hobbes "there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contented with his share". When, therefore, all interests are satisfied, and every man is content, the law may safely presume that justice has been done, and that each has received his own. This, however, assumes that the parties are in equal economic positions. If, as is too often the case, the economically strong are able to impose their will upon the economically weak, the resulting agreements may seem to the ordinary fair-minded observer to be unjust. For reasons good or bad, the law does not allow this question to be judicially investigated, and the plea that the contract was entered into through economic necessity is no defence to an action on the contract. In the second place, consent is in many cases truly constitutive of right, instead of merely evidential of it. It is one of the leading principles of justice to guarantee to men the fulfilment of their reasonable expectations. In all matters that are otherwise indifferent, expectation is of predominant influence in the determination of the rule of right, and of all the grounds of rational

(*n*) D. 50. 17. 69

expectation there is none of such general importance as mutual consent. "The human will", says Aquinas, "is able by way of consent to make a thing just; provided that the thing is not in itself repugnant to natural justice" (*o*).

There is an obvious analogy between agreement and legislation—the former being the private and the latter the public declaration and establishment of rights and duties. By way of legislation the state does for its subjects that which in other cases it allows them to do for themselves by way of agreement. As to the respective spheres of these two operations, the leading maxim is *Modus et conventio vincunt legem*. Save when the interests of the public at large demand a different rule, the autonomy of consenting parties prevails over what would otherwise be the legislative will of the state. So far as may be, the state leaves the rule of right to be declared and constituted by the agreement of those concerned with it. So far as possible, it contents itself with executing the rules which its subjects have made for themselves. And in doing so it acts wisely. For, in the first place, the administration of justice is enabled in this manner to escape in a degree not otherwise attainable the disadvantages inherent in the recognition of rigid principles of law. Such principles we must have; but if they are established *pro re nata* by the parties themselves, they will possess a measure of adaptability to individual cases which is unattainable by the more general legislation of the state itself. And in the second place, men are commonly better content to bear the burdens which they themselves have taken up, than those placed upon them by the will of a superior.

78. The classes of agreements

Agreements are divisible into three classes, for they either create rights, or transfer them, or extinguish them. Those which create rights are themselves divisible into two sub-classes, distinguishable as *contracts* and *grants*. A contract is an agreement which creates an obligation or right *in personam* between the parties to it. A grant is an agreement which creates a right of any other description; examples being grants of leases, easements, charges, patents, franchises, powers, licences, and so

(*o*) *Summa*, 2. 2. q. 57, art. 2.

forth. An agreement which transfers a right may be termed generically an *assignment*. One which extinguishes a right is a *release*, *discharge*, or *surrender*.

As already indicated, a contract is an agreement intended to create and actually creating a right *in personam* between the contracting parties. No agreement is a contract unless its effect is to bind the parties to each other by the *vinculum juris* of a newly created personal right. It commonly takes the form of a promise or set of promises. That is to say, a declaration of the consenting wills of two persons that one of them shall henceforth be under an obligation to the other naturally assumes the form of an undertaking by the one with the other to fulfil the obligation so created. Not every promise, however, amounts to a contract. To constitute a contract there must be not merely a promise to do a certain act, but a promise, express or implied, to do this act as a legal duty. When I accept an invitation to dine at another man's house, I make him a promise, but enter into no contract with him. The reason is that our wills, though consenting, are not directed to the creation of any legal right or to any alteration of our legal relations towards each other. The essential form of a contract is not: I promise this to you; but: I agree with you that henceforth you shall have a legal right to demand and receive this from me. Promises that are not reducible to this form are not contracts. Therefore the consent that is requisite for the creation of rights by way of contract is essentially the same as that required for their transfer or extinction. The essential element in each case is the express or tacit reference to the legal relations of the consenting parties.

Taking into account the two divisions of the consensual creation of rights, there are, therefore, four distinct kinds of agreements:—

1. Contracts—creating rights *in personam*.
2. Grants—creating rights of any other kind.
3. Assignments—transferring rights.
4. Releases—extinguishing rights.

It often happens that an agreement is of a mixed nature, and so falls within two or more of these classes at the same time. Thus the sale of a specific chattel is both a contract and an assignment,

for it transfers the ownership of the chattel and at the same time creates an obligation to pay the price. So a lease is both a grant and a contract, for it creates real and personal rights at the same time.

A frequent result of the difference between law and equity, and between legal and equitable rights and ownership, is that the same agreement has one effect in law and another in equity. In law it may be a mere contract, and in equity an assignment or a grant. Thus a written agreement for the sale of land is in law nothing more than a contract imposing upon the seller a personal obligation to execute a conveyance under seal, but not in itself amounting to a transfer of the ownership of the land. In equity, on the other hand, such an agreement amounts to an assignment. The equitable ownership of the land passes under it to the purchaser forthwith, and the vendor holds the legal ownership in trust for him. Similarly, a contract to grant a *legal* lease or mortgage or servitude is itself the actual grant of an *equitable lease*, mortgage, or servitude. For it is a maxim of Chancery that equity regards that as already done which ought to be done.

There are some cases in law in which, although in fact there is no agreement, the law regards an agreement as existing. These cases are particularly prominent in contract. Thus if A makes an offer to B, and then writes a letter to B purporting to revoke the offer, and B accepts A's offer before A's revocation has come to his notice, there is a valid contract, notwithstanding that there has never been a *consensus ad idem* at a single point of time. Again, if A leads B to suppose that he is agreeing, when in fact he does not agree, he is estopped from setting up his real intention. These cases have led to the formulation of an " objective " theory of contract, in opposition to the traditional " subjective " one. According to the objective theory, a contract is not an agreement, a subjective meeting of the minds, but is a series of external acts giving the objective semblance of agreement (*p*). It is submitted that this theory goes too far one way, just as a purely subjective theory would go too far

(*p*) See Williston, " Mutual Assent in the Formation of Contracts " (1919) 14 *Illinois Law Review* 85, reprinted in *Selected Readings on the Law of Contracts* (1931) 119.

the other way. The truth is that there are some cases in which the law takes a subjective view, and some cases in which it takes an objective view, according to the policy of the particular case. In the present work the word " agreement " will be used, where the context so admits, to cover not only genuine agreement, but also conduct which in law is regarded as the equivalent of agreement.

79. Void and voidable agreements

In respect of their legal efficacy agreements are of three kinds, being either *valid*, *void*, or *voidable*. A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy (*q*). A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the parties to it. On the exercise of this power the agreement not only ceases to have any efficacy, but is deemed to have been void *ab initio*. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been attributed to it wholly disappears, as if it had never existed. In other words, a voidable agreement is one which is void or valid at the election of one of the parties to it. A lease determinable on notice or on re-entry for breach of covenant is not for that reason voidable; because, when determined, it is destroyed not *ab initio*, but merely from then onwards (*r*).

Void and voidable agreements may be classed together as *invalid*. The most important causes of invalidity are six in

(*q*) In some cases, however, an agreement, though said to be void, is given a limited legal efficacy. Thus, if A bets his watch against B's watch on the result of a horse race, the agreement does not operate to create a contract. The apparent contract is void as a wager, and no legal *obligatio* comes into existence. Nevertheless if A loses and hands over his watch, his delivery of the watch, made in pursuance of the previous agreement to deliver it in the event of losing the bet, will pass the property in the watch. Thus the agreement is void as a contract but, coupled with the delivery, is valid as a conveyance. Again, a void contract may operate as a licence to enter land.

(*r*) In respect of the efficacy of contracts, there is a special case which requires a word of notice. A contract may be neither void nor voidable, but yet *unenforceable*. That is to say, no action will lie for the enforcement of it. The obligation created by it is imperfect. See *ante*, § 48.

number, namely, (1) incapacity, (2) informality, (3) illegality, (4) error, (5) coercion, and (6) want of consideration.

1. *Incapacity*. Certain classes of persons are wholly or partially destitute of the power of determining their rights and liabilities by way of consent. They cannot, at least to the same extent as other persons, supersede or supplement the common law by subjecting themselves to conventional law of their own making. In the case of minors, lunatics, and convicts, for example, the common law is peremptory, and not to be derogated from or added to by their agreement. So the agreements of an incorporated company may be invalid because *ultra vires*, or beyond the capacity conferred upon it by law.

2. *Informality*. Agreements are of two kinds, which may be distinguished as *simple* and *formal*. A simple agreement is one in which nothing is required for its effective operation beyond the manifestation, in whatever fashion, of the consenting wills of the parties. A formal agreement, on the other hand, is one in which the law requires not merely that consent shall exist, but that it shall be manifested in some particular form, in default of which it is held of no account. Thus the intent of the parties may be held effective only if expressed in writing signed by them, or in writing authenticated by the more solemn form of sealing; or it must be embodied in some appointed form of words; or it must be acknowledged in the presence of witnesses, or recorded by some form of public registration; or it must be accompanied by some formal act, such as the delivery of the subject-matter of the agreement.

The leading purpose of all such forms is twofold. They are, in the first place, designed as pre-appointed evidence of the fact of consent and of its terms, to the intent that this method of determinating rights and liabilities may be provided with the safeguards of permanence, certainty, and publicity. In the second place their purpose is that all agreements may by their help be the outcome of adequate reflection. Any necessary formality has the effect of drawing a sharp line between the preliminary negotiations and the actual agreement, and so prevents the parties from drifting by inadvertence into unconsidered consent.

3. *Illegality*. In the third place an agreement may be invalid by reason of the purposes with which it is made. To a very

large extent men are free to agree together upon any matter as they please; but this autonomous liberty is not absolute. Limitations are imposed upon it, partly in the interests of the parties themselves, and partly on behalf of the public. There are many matters in which the common law will admit of no abatement, and many in which it will admit of no addition, by way of conventional law. It is true in great part that *Modus et conventio vincunt legem*; but over against this principle we must set the qualification, *Privatorum conventio juri publico non derogat*. By *jus publicum* is here meant that part of the law which concerns the public interest, and which for this reason the agreements of private persons cannot be allowed to infringe upon (*s*). Agreements which in this way overpass the limits allowed by the law are said in a wide sense to be illegal, or to be void for illegality. They may or may not be illegal in a narrower sense, as amounting in their making or in their performance to a criminal or civil wrong.

4. *Error or mistake.* Error or mistake, as a ground of invalidity, is of two kinds, which are distinguishable as *essential* and *unessential*. Essential error is that which is of such a nature as to prevent the existence of any real consent, and therefore of any real agreement. The parties have not in reality meant the *same* thing, and therefore have not in reality agreed to *any* thing. Their agreement exists in appearance only, and not in reality. This is the case if A makes an offer to B which is accepted in mistake by C; or if A agrees to sell land to B, but A is thinking of one piece of land, and B is thinking of another. The effect of error of this kind is to make the agreement wholly void, inasmuch as there is in truth no agreement at all, but only the external semblance and form of one (*t*).

There is, however, an exception to this rule when the error is due to the negligence of one of the parties and is unknown to the other. For in such a case he who is in fault will be estopped by his own carelessness from raising the defence of essential error, and will be held bound by the agreement in the sense in which the other party understood it (*u*).

(*s*) D. 50. 17. 45. 1.
(*t*) *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459; *Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906; *Phillips* v. *Brooks, Ltd.* [1919] 2 K.B. 243.
(*u*) *King* v. *Smith* [1900] 2 Ch. 425; *ante*, § 78.

Unessential error, on the other hand, is that which does not relate to the nature or contents of the agreement, but only to some external circumstance, serving as one of the inducements which led to the making of it; as when A agrees to buy B's horse because he believes it to be sound, whereas it is in reality unsound. This is not essential error, for there is a true *consensus ad idem*. The parties have agreed to the same thing in the same sense, though one of them would not have made the agreement had he not been under a mistake. The general rule is that unessential error has no effect on the validity of an agreement. Neither party is in any way concerned in law with the reasons which induced the other to give his consent. That which men consent to they must abide by, whether their reasons are good or bad. And this is so even though one party is well aware of the error of the other (*v*).

This rule, however, is subject to an important exception, for even unessential error will in general make an agreement voidable at the option of the mistaken party, if it has been caused by the misrepresentation of the other party. He who is merely mistaken is none the less bound by his agreement; but he who is misled has a right to rescind the agreement so procured (*a*).

5. *Coercion*. In order that consent may be justly allowed as a title of right, it must be free. It must not be the product of any form of compulsion or undue influence; otherwise the basis of its legal operation fails. Freedom, however, is a matter of degree, and it is no easy task to define the boundary line that must be recognised by a rational system of law. We can only say generally, that there must be such liberty of choice as to create a reasonable presumption that the party exercising it has chosen that which he desires, and not merely submitted to that which he cannot avoid. We cannot usefully enter here into any examination of the actual results that have been worked out in this matter by English law.

6. *Want of consideration*. A further condition very commonly required by English law for the existence of fully efficacious

(*v*) *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597.

(*a*) In addition to the case of misrepresentation, unessential error affects any agreement which has been expressly or impliedly made conditional on the existence of the fact erroneously supposed to exist. A contract of sale, for example, is conditional on the present existence of the thing sold; if it is already destroyed, the contract for the purchase of it is void.

consent is that which is known by the technical name of *consideration*. This requirement is, however, almost wholly confined to the law of contract, other forms of agreement being generally exempt from it.

A consideration in its widest sense is the reason, motive, or inducement, by which a man is moved to bind himself by an agreement. It is not for nothing that he consents to impose an obligation upon himself, or to abandon or transfer a right. It is in *consideration* of such and such a fact that he agrees to bear new burdens or to forgo the benefits which the law already allows him. If he sells his house, the consideration of his agreement is the receipt or promise of the purchase money. If he makes a settlement upon his wife and children, it is in consideration of the natural love and affection which he has for them. If he promises to pay a debt incurred by him before his bankruptcy, the consideration of his promise is the moral obligation which survives his legal indebtedness to his creditors. Using the term in this wide sense, it is plain that no agreement made with knowledge and freedom by a rational man can be destitute of some species of consideration. All consent must proceed from some efficient cause. What, then, is meant by saying that the law requires a consideration as a condition of the validity of an agreement? The answer is that the consideration required by the law is a consideration of a kind which the law itself regards as sufficient. It is not enough that it should be deemed sufficient by the parties, for the law has itself authoritatively declared what facts amount to a valid and sufficient consideration for consent, and what facts do not. If men are moved to agreement by considerations which the law refuses to recognise as good, so much the worse for the agreement. *Ex nudo pacto non oritur actio.* To bare consent, proceeding from no lawfully sanctioned source, the law allows no operation.

What considerations, then, does the law select and approve as sufficient to support a contract? Speaking generally, we may say that none are good for this purpose save those which are *valuable*. By a valuable consideration is meant something of value given or promised by one party in exchange for the promise of the other. By English law no promise (unless under seal or of record) is binding unless the promisor receives a

quid pro quo from the promisee. Contracts which are purely unilateral, all the obligation being on one side, and nothing either given or promised on the other, are destitute of legal operation. Every valid contract (*b*) is reducible to the form of a bargain that if I do something for you, you will do something for me.

The thing thus given by way of consideration must be of some *value*. That is to say, it must be material to the interests of one or other or both of the parties. It must either involve some gain or benefit to the promisor by way of recompense for the burden of his promise, or it must involve some loss or disadvantage to the promisee for which the benefit of the promise is a recompense. Commonly it possesses both of these qualities at once, but either of them is sufficient by itself. Thus if I promise gratuitously to take care of property which the owner deposits with me, I am bound by that promise, although I receive no benefit in recompense for it, because there is a sufficient consideration for it in the detriment incurred by the promisee in entrusting his property to my guardianship. But if the thing given by way of consideration is of no value at all, being completely indifferent to both parties, it is insufficient, and the contract is invalid; as, for example, the doing of something which one is already bound to the other party to do, or the surrender of a claim which is known to be unfounded.

In certain exceptional cases, however, considerations which are not valuable are nevertheless accepted as good and sufficient by the law. Thus the existence of a legal obligation may be a sufficient consideration for a promise to fulfil it; as in the case of a promissory note or other negotiable instrument given for the amount of an existing debt. At one time it was supposed to be the law that a merely moral obligation was in the same manner a sufficient basis for a promise of performance, and though this is no longer true as a general proposition, certain particular applications of the principle still survive, while others have been abolished by statute. Thus a promise made by a discharged bankrupt to pay a creditor in full was formerly a binding contract, because made in consideration of the moral obligation which survives the legal indebtedness of an insolvent. For the

(*b*) With the exception of contracts under seal and contracts of record, to which the doctrine of consideration is inapplicable.

same reason, a promise made after majority to pay debts incurred during infancy was binding, until the law was altered in this respect by legislation.

With respect to the rational basis of this doctrine, it is to be noticed that the requirement of consideration is not absolute, but conditional on the absence of a certain formality, namely that of a sealed writing. Form and consideration are two alternative conditions of the validity of contracts and of certain other kinds of agreements. It may be surmised, therefore, that they are founded on the same reasons and fulfil the same functions. They are intended as a precaution against the risk of giving legal efficacy to unconsidered promises and to the levities of speech. The law selects certain reasons and inducements, which are normally sufficient for reasoned and deliberate consent, and holds valid all agreements made on these grounds, even though informal. In all other cases it demands the guarantee of solemn form. There can be little doubt, however, that our law has shown itself too scrupulous in this matter; in other legal systems no such precaution is known, and its absence seems to lead to no ill results (*c*). Even English law has recently shown a tendency to mitigate the rigours of the doctrine of consideration by introducing a principle of equitable estoppel (*cc*).

Although the doctrine of consideration, in the form received by English law, is unknown elsewhere, it is simply a modification of a doctrine known to the civil law and to several modern systems, more especially to that of France. Article 1131 of the French Civil Code provides that: "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet" (*d*). This *cause* or *causa* is a synonym for consideration, and we find the terms used interchangeably in the earlier English authorities (*e*). There is, however, an essential difference between the English and the Continental principle. Unlike the former, the latter never rejects any cause or consideration as

(*c*) *Cf.* D. 44. 4. 2. 3. Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit. See also D. 12. 7. 1. pr.; Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 221 *et seq.*

(*cc*) Cheshire and Fifoot, *Law of Contract* (6th ed.). 82 *et seq.*

(*d*) Salmond, *Essays in Jurisprudence and Legal History*, 219.

(*e*) For a criticism of the doctrine, with suggestions for reform, see the report of the Law Revision Committee, Cmd. 5449 of 1937.

insufficient. Whatever motive or inducement is enough to satisfy the contracting parties is enough to satisfy the law, even though it is nothing more than the *causa liberalitatis* of a voluntary gift. By an obligation *sans cause*, or contract without consideration, French law does not mean a contract made without any motive or inducement (for there are none such), nor a contract made from an inadequate motive or inducement (for the law makes no such distinctions), but a contract made for a consideration which has failed—*causa non secuta*, as the Romans called it. The second ground of invalidity mentioned in the Article cited is the *falsity* of the consideration (*falsa causa*). A consideration may be based on a mistake, so that it is imaginary and not real; as when I agree to buy a horse which, unknown to me, is already dead, or a ship which has been already wrecked, or give a promissory note for a debt which is not truly owing. Finally, a *causa turpis*, or illegal consideration, is as fatal to a contract in French and Roman law as in English.

In English law the failure of consideration (*causa non secuta*) and its unreality due to error (*causa falsa*) are grounds of invalidity only when the absence of such failure or error is expressly or impliedly made a condition of the contract. In a contract for the sale of a chattel, for example. the present existence of the chattel is an implied condition of the validity of the sale (*f*).

(*f*) The French law as to the cause or consideration of a contract will be found in Pothier, *Obligations*, sects. 42–46, and Baudry-Lacantinerie, *Obligations*, sects. 295–327. See also Amos and Walton, *Introduction to French Law* 162 ff.; Walton, "Cause and Consideration in Contracts" (1925), 41 L.Q.R. 506. Whether the English doctrine of consideration is historically connected with the *causa* of the civil law is a matter of dispute, and there is much to be said on both sides. See Holdsworth, *H.E.L.* VIII. 5; Barbour, *The History of Contract in Early English Equity* (Oxford Studies in Social and Legal History, IV.), 63 *et seq.*

CHAPTER 12

LIABILITY

80. The nature and kinds of liability

He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. Where the remedy is a civil one, the party wronged has a right to demand the redress allowed by law, and the wrongdoer has a duty to comply with this demand. In the case of a criminal remedy the wrongdoer is under a duty to pay such penalty as the law through the agency of the courts prescribes (*a*).

The purpose of this chapter and of the two which follow it is to consider the general theory of liability. We shall investigate the leading principles which determine the existence, the incidence, and the measure of responsibility for wrongdoing. The special rules which relate exclusively to particular kinds of wrongs will be disregarded.

Liability is in the first place either civil or criminal, and in the second place either remedial or penal. The nature of these distinctions has been already sufficiently considered in a previous chapter on the Administration of Justice (*b*). Here it need only be recalled that in the case of penal liability the purpose of the law, direct or ulterior, is or includes the punishment of a wrongdoer; in the case of remedial liability, the law has no such purpose at all, its sole intent being the enforcement of the plaintiff's right, and the idea of punishment being wholly irrelevant. The liability of a borrower to repay the money borrowed by him is remedial; that of the publisher of a libel to be imprisoned, or to pay damages to the person injured by him, is penal. All criminal liability is penal; civil liability, on the other hand, is sometimes penal and sometimes remedial.

(*a*) We have already seen that the term liability has another sense in which it is the correlative of any legal power. *Supra*, § 42.
(*b*) *Supra*, §§ 14–16.

81. The theory of remedial liability

The theory of remedial liability presents little difficulty. It might seem at first sight that, whenever the law creates a duty, it should enforce the specific fulfilment of it. There are, however, several cases where, for various reasons, duties are not specifically enforced. They may be classified as follows:—

1. In the first place, there are duties of imperfect obligation —duties the breach of which gives no cause of action, and creates no liability at all, either civil or criminal, penal or remedial. A debt barred by the statute of limitations is a legal debt, but the payment of it cannot be compelled by any legal proceedings (*c*).

2. Secondly, there are many duties which from their nature cannot be specifically enforced after having once been broken. When a libel has already been published, or an assault has already been committed, it is too late to compel the wrongdoer to perform his duty of refraining from such acts. Wrongs of this description may be termed transitory; once committed they belong to the irrevocable past. Others, however, are continuing; for example, the non-payment of a debt, the commission of a nuisance, or the detention of another's property. In such cases the duty violated is in its nature capable of specific enforcement, notwithstanding the violation of it.

3. In the third place, even when the specific enforcement of a duty is possible, it may be, or be deemed to be, more expedient to deal with it solely through the criminal law, or through the creation and enforcement of a substitutive sanctioning duty of pecuniary compensation. It is only in special cases, for example, that the law will compel the specific performance of a contract, instead of the payment of damages for the breach of it.

82. The theory of penal liability

We now proceed to the main subject of our inquiry, namely, the general principles of penal liability. We have to consider the legal theory of punishment, in its application both to the criminal law and to those portions of the civil law in which the idea of punishment is relevant and operative. We have already, in a former chapter, dealt with the purposes of punishment, and we

(*c*) *Supra*, § 43.

there saw that either its end is the protection of society or else that punishment is looked on as an end in itself. We further saw that the aim of protecting society is sought to be achieved by deterrence, prevention and reformation. Of these three methods the first, deterrence, is usually regarded as the primary function of punishment, the others being merely secondary. In our present investigation, therefore, we shall confine our attention to punishment as deterrent. The inquiry will fall into three divisions, relating (1) to the conditions, (2) to the incidence, and (3) to the measure of penal liability (*d*).

The general conditions of penal liability are indicated with sufficient accuracy in the legal maxim, *Actus non facit reum, nisi mens sit rea*—The act alone does not amount to guilt; it must be accompanied by a guilty mind. That is to say, there are two conditions to be fulfilled before penal responsibility can rightly be imposed. The one is the doing of some *act* by the person to be held liable. A man is to be accounted responsible only for what he himself does, not for what other persons do, or for events independent of human activity altogether. The other is the *mens rea* or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer. For although the act may have been objectively wrongful, the mind and will of the doer may have been innocent.

Generally speaking, a man is penally responsible only for those wrongful acts which he does either wilfully or recklessly. Then and only then is the *actus* accompanied by the *mens rea*. But this generalisation is subject to two qualifications. First, the criminal law may include provisions penalising mere negligence, even though this may result simply from inadvertence. Secondly, the law may create offences of strict liability, where guilt may exist without intention, recklessness or even negligence (*e*). Where

(*d*) Division (1) is considered from this section to § 104; division (2) in § 105; and division (3) in §§ 106 and 107.

(*e*) Sir John Salmond regarded inadvertent negligence as a form of *mens rea*. The previous editor preferred to regard inadvertent negligence as outside the scope of *mens rea*, since it is not necessarily a state of mind. See Williams, *Criminal Law* (2nd ed.), s. 14. In so far as it is useful to distinguish crimes of

neither *mens rea* nor inadvertent negligence is present, punishment is generally unjustifiable. Hence inevitable accident or mistake—the absence both of wrongful intention or recklessness and of culpable negligence—is in general a sufficient ground of exemption from penal responsibility. *Impunitus est*, said the Romans, *qui sine culpa et dolo malo casu quodam damnum committit* (*f*).

We shall consider separately these conditions of liability, analysing, first, the conception of an act, and, secondly, that of *mens rea* in its forms of intention, recklessness and negligence.

83. Acts (*g*)

The term act is not capable of being defined with any great precision, since in ordinary language it is used at different times to point different contrasts. Acts may be contrasted with natural occurrences, with thoughts, with omissions or with involuntary behaviour. And in any rational system of law we shall expect to find liability attaching to the act rather than to its opposite. We shall not expect to find a man held liable for gales, thunderstorms and other natural phenomena beyond human control. Nor shall we expect to see him held liable for his thoughts and intentions, which are by themselves harmless, hard to prove and difficult to discipline.

Omissions, on the other hand, may attract liability (*h*). An omission consists in not performing an act which is expected of you either because you normally do it or because you ought to do it, and it is the latter type of omission with which the law is concerned. But while omissions incur legal liability where there is a duty to act, such a duty will in most legal systems be the exception rather than the rule, for it would be unduly oppressive and restrictive to subject men to a multiplicity of duties to

strict liability as crimes requiring no *mens rea*, it is better to include negligence along with intention and recklessness under the general concept.

(*f*) Gaius, III, 211.

(*g*) See Dias, *Jurisprudence* (2nd ed.), Chap. 10; Paton, *A Textbook of Jurisprudence* (3rd ed.), Chap. 13; Fitzgerald, "Voluntary and Involuntary Acts" in *Oxford Essays in Jurisprudence* (ed. Guest), 1; Hart, "The Ascription of Responsibility and Rights" (1948–1949) 49 Proc.Arist.Soc. 171; Hart, "Acts of Will and Responsibility" in *The Jubilee Lectures* (ed. Marshall), 115.

(*h*) See Hughes, "Criminal Omissions" (1957–58) 67 Yale L.J. 590.

perform positive acts. It is for this reason that rights *in rem*, which are rights against everyone, are negative and correspond to duties not to do something rather than to duties to confer positive benefits on the holder of such rights.

The most important distinction for legal purposes, however, is that between voluntary and involuntary acts. Examples of the latter are (1) activities outside normal human control, *e.g.*, the beating of one's heart; (2) automatic reflexes, such as sneezes and twitches, which, though normally spontaneous, can sometimes with difficulty be controlled; and (3) acts performed by persons suffering from some abnormal condition, *e.g.*, acts done in sleep, under hypnosis or in the course of a fit of automatism. In so far as a man cannot help committing acts in these categories, it would be unjust and unreasonable that he should be penalised for them; and in common law such a man would normally be regarded as not having committed the *actus reus* of an offence. Since the majority of these involuntary acts (*e.g.*, those in categories (1) and (2)) are harmless while the rest (*e.g.*, those in category (3)) are rare, the law relating to them is relatively undeveloped. Difficulty arises, however, where a man performs some dangerous act which is involuntary but which he might have avoided committing if he had not allowed himself to fall into such a condition as to be liable to behave in this involuntary way. On the one hand there is no *actus reus* for which to hold him liable but on the other hand he ought to be held responsible for the state into which he permitted himself to fall. What is needed is a general provision to the effect that the involuntariness of the defendant's behaviour shall constitute a defence to a criminal charge unless it is the result of previous deliberate or negligent conduct on his part (*i*).

Now one attempt to provide an account of what distinguishes voluntary from involuntary acts is made by the theory which regards an act as being divisible into (1) a willed muscular contraction, (2) its circumstances and (3) its consequences (*j*). In its

(*i*) Recent developments show that the courts intend to restrict the defence of automatism and that they are inclined to assimilate it as far as possible to insanity in many cases: *R.* v. *Kemp* [1957] 1 Q.B. 399, *Bratty* v. *Att.-Gen. for Northern Ireland* [1963] A.C. 386. See also Williams, *Criminal Law* (2nd ed.), s. 157; Edwards, "Automatism and Criminal Responsibility" (1958) 21 M.L.R. 375.

(*j*) This theory, derived from Thomas Brown, was held by Austin, Stephen and Holmes amongst others, and has greatly influenced criminal law theory on

true sense a voluntary act is said to consist in a willed muscular contraction, which incurs moral or legal liability only by virtue of the circumstances in which it is committed or the consequences which it produces. An involuntary act is regarded therefore as one where the muscular contraction is not willed, its involuntariness consisting precisely in this absence of willing.

This theory, however, creates more difficulties than it solves. In the first place, it rests on dubious psychology. If we consider and examine ordinary examples of what are usually described as acts, we shall fail to find evidence of anything in the nature of a prior act of willing or of desiring either the muscular contraction or its consequences. Abnormal cases, where people find themselves unable to perform actions, may display the actor as willing, setting himself to do the action, contracting his muscles and so on, but the important thing to remember is that these are abnormal cases; we cannot necessarily infer that what occurs in the abnormal must also occur in the normal instance.

Secondly, the theory is utterly inappropriate for the problem of omissions. These negative acts can be either voluntary or involuntary. I may fail to perform an act required by law through forgetfulness or by design; for example I may just forget to make a return of income to the tax authorities, or I may refuse to do so. Alternatively, my failure to carry out my legal duty may result from some condition which prevents me: I may fail to rescue my child from danger because I have fallen asleep or because I am suffering from a fit of epileptic automatism. But in neither case is there any question of muscular contractions; and consequently we cannot contend that the difference between the two kinds of omission is that a muscular contraction was willed in the first case and unwilled in the second.

The different kinds of involuntary behaviour are indeed linked by a common feature, but this consists not in the absence of an actual exercise of will but in the lack of ability to control one's behaviour. If I just forget to file a return of income, my omission will not qualify as involuntary because I could have filed a return had I remembered. We may say then that involuntary acts are

this point. See Austin, *Lectures on Jurisprudence*, Lecture 18; Stephen, *A General View of the Criminal Law of England*, Chap. 5; Holmes, *The Common Law*, 54, 91.

those where the actor lacks the power to control his actions, and involuntary omissions are those where the actor's lack of power to control his actions renders him unable to do the act required.

Thirdly, and quite apart from failing to explain the nature of the difference between voluntary and involuntary behaviour, the theory imposes on the meaning of the term *act* a limitation which seems no less inadmissible in law than contrary to the common usage of speech. We habitually include all material and relevant circumstances and consequences under the name of the act. The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which this result is effected. To trespass on another man's land is a wrongful act, but the act includes the circumstance that the land belongs to another man, no less than the bodily movements by which the trespasser enters upon it. An act has no *natural* boundaries, any more than an event or place has. Its limits must be artificially defined for the purpose in hand for the time being. It is for the law to determine, in each particular case, what circumstances and what consequences shall be counted within the compass of the act with which it is concerned. To ask what act a man has done is like asking in what place he lives.

84. Two classes of wrongful acts

Every wrong is an act which is mischievous in the eye of the law—an act to which the law attributes harmful consequences. These consequences, however, are of two kinds, being either actual or merely anticipated. In other words, an act may be mischievous in two ways—either in its actual results or in its tendencies. Hence it is that legal wrongs are of two kinds. The first consists of those in which the act is wrongful only by reason of accomplished harm which in fact ensues from it. The second consists of those in which the act is wrongful by reason of its mischievous tendencies, as recognised by the law, irrespective of the actual issue. In the first case there is no wrong or cause of action without proof of actual damage; in the second case it is sufficient to prove the act itself, even though in the event no harm has followed it.

For example, if A breaks his contract with B, it is not necessary for B to prove that he was thereby disappointed in his

reasonable expectations, or otherwise suffered actual loss, for the law takes notice of the fact that breach of contract is an act of mischievous tendency, and therefore treats it as wrongful irrespective of the actual issue. The loss, if any, incurred by B is relevant to the measure of damages, but not to the existence of a cause of action. So if I walk across another man's field, or publish a libel upon him, I am responsible for the act without any proof of actual harm resulting from it. For trespass and libel belong to the class of acts which are judged wrongful in respect of their tendencies, and not merely in respect of their results. In other cases, on the contrary, actual damage is essential to the cause of action. Slander, for example, is in general not actionable without proof of some loss sustained by the plaintiff, although libel is actionable *per se*. So if by negligent driving I expose others to the risk of being run over, I am not deemed guilty of any civil wrong until an accident actually happens. The dangerous tendency of the act is not in this case considered a sufficient ground of civil liability.

With respect to this distinction between wrongs which do and those which do not, require proof of actual damage, it is to be noticed that criminal wrongs commonly belong to the latter class. Criminal liability is usually sufficiently established by proof of some act which the law deems dangerous in its tendencies, even though the issue is in fact harmless. The formula of the criminal law is usually: "If you do this, you will be held liable in all events", and not: "If you do this you will be held liable if any harm ensues". An unsuccessful attempt is a ground of criminal liability, no less than a completed offence. So also dangerous and careless driving are criminal offences, though no damage ensues (*k*). This, however, is not invariably so, for criminal responsibility, like civil, sometimes depends on the accident of the event. If I am negligent in the use of firearms, and kill some one in consequence, I am criminally liable for manslaughter; but if by good luck my negligence results in no accomplished mischief, I am free from all responsibility.

As to civil liability, no corresponding general principle can be laid down. In some cases proof of actual damage is required, while in other cases there is no such necessity; and the matter

(*k*) Road Traffic Act, 1960, ss. 2–3.

pertains to the detailed exposition of the law, rather than to legal theory. It is to be noted, however, that whenever this requirement exists, it imports into the administration of civil justice an element of capriciousness from which the criminal law is commonly free. In point of criminal responsibility men are judged by their acts and by the mischievous tendencies of them, but in point of civil liability they are often judged by the actual event. If I attempt to execute a wrongful purpose, I am criminally responsible whether I succeed or not; but my civil liability will often depend upon the accident of the result. Failure in a guilty endeavour amounts to innocence. Instead of saying: "Do this, and you will be held accountable for it", the civil law often says: "Do this if you wish, but remember that you do it at your peril, and if evil consequences chance to follow, you will be answerable for them."

85. Damnum sine Injuria

Although all wrongs are, in fact or in legal theory, mischievous acts, the converse is not true. All damage done is not wrongful. There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it. Harm of this description—mischief that is not wrongful because it does not fulfil even the material conditions of responsibility—is called *damnum sine injuria*, the term *injuria* being here used in its true sense of an act contrary to law (*in jus*), not in its modern and corrupt sense of harm.

Cases of *damnum sine injuria* fall under two heads. There are, in the first place, instances in which the harm done to the individual is nevertheless a gain to society at large. The wrongs of individuals are such only because, and only so far as, they are at the same time the wrongs of the whole community; and so far as this coincidence is imperfect, the harm done to an individual is *damnum sine injuria*. The special result of competition in trade may be ruin to many; but the general result is, or is deemed to be, a gain to society as a whole. Competitors, therefore, do each other harm but not injury. So a landowner may do many things on his own land which are detrimental to the interests of adjoining proprietors. He may so excavate

his land as to withdraw the support required by the buildings on the adjoining property; he may prevent the access of light to the windows of those buildings; he may drain away the water which supplies his neighbour's well. These things are harmful to individuals; but it is held to serve the public interest to allow a man, within wide limits, to do as he pleases with his own (*l*).

The second head of *damnum sine injuria* includes all those cases in which, although real harm is done to the community, yet, owing to its triviality, or to the difficulty of proof, or to any other reason, it is considered inexpedient to attempt its prevention by the law. The mischief is of such a nature that the legal remedy would be worse than the disease (*m*).

86. The place and time of an act

Chiefly, though not exclusively, in consequence of the territorial limits of the jurisdiction of courts, it is often material to determine the place in which an act is done. In general this inquiry presents no difficulty, but there are two cases which require special consideration. The first is that in which the act is done partly in one place and partly in another. If a man standing on the English side of the Border fires at and kills a man on the Scottish side, has he committed murder in England or in Scotland? If a contract is made by correspondence between a merchant in London and another in Paris, is the contract made in England or in France. If by false representations made in Melbourne a man obtains goods in Sydney, is the offence of obtaining goods by false pretences committed in Victoria or in New South Wales? As a matter of fact and of strict logic the correct answer in all these cases is that the act is not done either in the one place or in the other. He who in England shoots a man in Scotland commits murder in Great Britain, regarded as a unity, but not in either of its parts taken in isolation. But no such answer is allowable in law; for, so long as distinct territorial areas of jurisdiction are

(*l*) For the relevance of evil motive, see *infra*, § 93.

(*m*) In the sphere of criminal law only certain acts are made crimes, all other harmful kinds of conduct belonging to the class of *damnum sine injuria*. It is disputed whether a similar principle holds true of tort, or whether there is a general theory of tortious liability for harmful acts. See Winfield, *Textbook of the Law of Tort* (7th ed.), 13; Goodhart, "The Foundation of Tortious Liability" (1938) 2 M.L.R. 1; Williams, "The Foundation of Tortious Liability" (1939) 7 C.L.J. 111.

recognised, the law must assume that it is possible to determine with respect to every act the particular area within which it is committed.

What locality, therefore, does the law attribute to acts which thus fall partly within one territorial division and partly within another? There are three possible answers. It may be said that the act is committed in both places, or solely in that in which it has its commencement, or solely in that in which it is completed. The law is free to choose such one of these three alternatives as it thinks fit in the particular case. The last of them seems to be that which is adopted for most purposes. It has been held that murder is committed in the place in which the death occurs (*n*), and not also in the place in which the act causing the death is done, but the law on these points is not free from doubt (*o*). A contract is made in the place where it is completed, that is to say, where the offer is accepted (*p*) or the last necessary signature to the document is affixed (*q*). The offence of obtaining goods by false pretences is committed in the place in which the goods are obtained (*r*) and not in the place where the false pretence is made (*s*).

(*n*) *Reg.* v. *Coombes* (1786) 1 Lea.Cr.C. 388.

(*o*) *Reg.* v. *Armstrong* (1875) 13 Cox C.C. 184; *Reg.* v. *Keyn* (1876) 2 Ex.D. 63. Berge, "Criminal Jurisdiction and the Territorial Principle" (1932) 30 Mich.L.Rev. 238, argues that every state in which part of the act or its consequence occurs has or should have concurrent jurisdiction. See also Hanbury in (1951) 37 Trans.Grotius Society 171.

(*p*) *Cowan* v. *O'Connor* (1888) 20 Q.B.D. 640.

(*q*) *Muller & Co.'s Margarine Ltd.* v. *Inland Revenue Commissioners* [1900] 1 Q.B. 310; [1901] A.C. 217.

(*r*) *Reg.* v. *Ellis* [1899] 1 Q.B. 230; *R.* v. *Harden* [1963] 1 Q.B. 8.

(*s*) The question is fully discussed in the case of *Reg.* v. *Keyn* (1876) 2 Ex. D. 63, in which the captain of a German steamer was tried in England for manslaughter by negligently sinking an English ship in the channel and drowning one of the passengers. One of the minor questions in the case was that of the place in which the offence was committed. Was it on board the English ship or on board the German steamer, or on board neither of them? Four of the Judges of the Court for Crown Cases Reserved, namely, Denman J., Bramwell B., Coleridge C.J. and Cockburn C.J., agreed that if the offence had been wilful homicide it would have been committed on the English ship. Denman J. and Coleridge C.J. applied the same rule to negligent homicide. Cockburn C.J. doubted as to negligent homicide. Bramwell B. said (p. 150): "If the act was wilful, it is done where the will intends it should take effect: alter when it is negligent". For a further discussion of the matter, see Stephen's *History of Criminal Law*, II. 9–12, and Oppenhoff's annotated edition of the *German Criminal Code* (13th ed. 1896) 28. The German doctrine is that an act is committed in the place where it is begun. See also Terry, *Principles of Anglo-American Law*, 598–606, and *Edmundson* v. *Render* [1905] 2 Ch. 320.

A second case in which the determination of the locality of an act gives rise to difficulty is that of negative acts. In what place does a man omit to pay a debt or to perform a contract? The true answer is apparently that a negative act takes place where the corresponding positive act *ought* to have taken place. An omission to pay a debt occurs in the place where the debt is payable (*t*). If I make in England a contract to be performed in France, my failure to perform it takes place in France and not in England. The presence of a negative act is the absence of the corresponding positive act, and the positive act is absent from the place in which it ought to have been present.

The time of an act. The position of an act in time is determined by the same considerations as its position in space. An act which begins today and is completed tomorrow is in truth done neither today nor tomorrow, but in that space of time which includes both. But if necessary the law may date it from its commencement, or from its completion, or may regard it as continuing through both periods. For most purposes the date of an act is the date of its completion, just as its place is the place of its completion (*u*).

A negative act is done at the time at which the corresponding positive act ought to have been done. The date of the non-payment of a debt is the day on which it becomes payable.

87. Causation (*v*)

A system of law, as we have seen, may hold a man liable either for performing acts which are dangerous in tendency or for causing actual damage or injury. In the latter type of case liability is imposed on him for the damage in fact resulting from his

(*t*) *Northey Stone Co.* v. *Gidney* [1894] 1 Q.B. 99.

(*u*) If the law dates the commission of a wrong from the completion of it, it follows that there are cases in which a man may commit a wrong after his death. If A excavates his own land so as to cause, after an interval, the subsidence of the adjoining land of B, there is no wrong done until the subsidence happens: *Backhouse* v. *Bonomi* (1861) 9 H.L.C. 503; *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App.Cas. 127. What shall be said, then, if A is dead in the meantime? The wrong, it seems, is not done by his successors in title: *Hall* v. *Duke of Norfolk* [1900] 2 Ch. 493; *Greenwell* v. *Low Beechburn Colliery* [1897] 2 Q.B. 165. The law, therefore, must hold either that there is no wrong at all, or that it is committed by a man who is dead at the date of its commission.

(*v*) The leading monograph on the subject is Hart and Honoré, *Causation in the Law*; see also by the same authors articles of the same title in (1956) 72 L.Q.R. 58, 260, 398, and further discussion by Williams in "Causation in the Law" (1961) C.L.J. 62.

act; he will not normally be held accountable for damage in no way caused by his own behaviour. Causation then is a concept which plays an important part in legal discourse.

It is, however, a difficult concept, and the common law cases on causation do not make the discussion of the problem any easier. For though courts readily agree that such questions must be decided on common-sense principles rather than on the basis of abstruse philosophical theory, the language which they use in actually deciding them is often of a highly metaphorical and figurative character, owing little to common sense or common speech. So intractable at times has the problem of causation seemed, that there is a temptation to suggest that lawyers should discard inquiries into causation and concentrate rather on the question of responsibility. Instead of investigating whether the defendant's act was the cause of the plaintiff's injuries, they should inquire whether the defendant ought to be held responsible; and this type of question can be answered, it is said, according to policy and without regard to the conceptual difficulties inherent in the notion of cause (*w*).

Tempting as this suggestion is, it offers hopes which are in fact illusory. It is hard to see how questions of responsibility can be decided without first deciding questions of causation. If A carelessly drops a lighted match on the floor of B's house and the house is burned to the ground, we should not hold A liable if it transpired that C had simultaneously been setting fire to another part of the house or that the house had at that very moment been struck by lightning. If A is to be held responsible for the damage to B's house, he must first be shown to have caused it. Indeed the idea of compensation is that of making amends for damage which one has *caused* to another, not that of being an insurer of all the damage which may befall that other from any cause. Similar principles obtain in the criminal law. If X shoots at Y and Y falls dead, we should not, despite X's wrongful intention, convict him of the murder or manslaughter of Y if we found that the death had been caused by a shot fired from some other gun or by a sudden heart attack occurring before the shot was fired.

(*w*) See expressions of this view quoted by Hart and Honoré (1956) 72 L.Q.R. 58. See also Hart and Honoré, *Causation in the Law*, 8–7, 83–102, 230–276.

But while in criminal and civil cases responsibility often depends on causation, no rule of logic dictates this principle. In logic other solutions are equally possible. In civil law a man could be held liable to another whenever he is careless and regardless of whether he has caused damage to him or not. In criminal law a man could be held equally guilty whether he has succeeded or not in his intentions. But this is not the position adopted by the common law.

Now the legal concept of causation is often said to be based on the common sense notion of cause. On this point three observations may be made. First, while this notion plays a considerable part in common speech, common speech itself provides no neat analysis of the concept. We can look to common sense for the usage of the term *cause* but not for an explanatory description of this usage; the latter is to be found by philosophical reflection on such usage. Consequently in so far as the legal concept is built on the foundation of the ordinary notion, it is built on a notion which has not been explicitly defined or analysed by common sense. Secondly, the legal concept, though based on the ordinary notion, will diverge from it on account of the need for lawyers to provide answers to questions for which common sense has no solution. If A wrongfully loads B's luggage on the wrong train and the train is derailed and the luggage damaged, has A caused this damage? This is not the sort of question which arises in ordinary day-to-day conversation, nor is it one which could be readily answered according to the ordinary notion of causation. It is, however, just the sort of problem that courts and lawyers have to grapple with.

Thirdly, a distinction must be drawn between explanatory and attributive inquiries, both of which are involved in causal investigations. If a house has been burnt down, the main point of an inquiry may be to discover how this happened; if a man is found dead, the *post mortem* inquiry serves to investigate what he died of. This sort of explanatory inquiry is complete when all the facts leading up to the incident have been discovered. The inquiry about the house in the example above would be complete once we knew the house was full of inflammable gas, that a stone was thrown through the window, and that its impact on the floor inside caused a spark which ignited the gas. The *post mortem* would be

complete if it was established that the man had been stabbed, that he had been taken to hospital and injected with an antibiotic to which he was allergic and that the injection had set up a fatal reaction. But attributive inquiries begin where explanations leave off. Once we know what happened to the house, we are now in a position to ask whether the conflagration was caused by the throwing of the stone. Once we know how the man died, we can inquire whether the stabbing caused the death. And here the scientist, the pathologist and the detective can no longer assist, for at this stage we no longer need more facts; we need to assess the situation in the light of the facts we have.

Now law courts often have to engage in both kinds of investigation. First, evidence may have to be heard to establish how the accident happened. Then in the light of its findings of fact, a court may have to decide whether the defendant's act or omission should be regarded as the cause of the plaintiff's damage or the victim's injury; and it is this second sort of question which constitutes the legal question about causation and which involves the problem of defining what counts as a cause for legal purposes. Typically the lawyer is concerned to decide whether, in a case where damage results to B from a conjunction of A's act and some other circumstance, as in the examples given, A can be said to have caused the damage. Here the legal problem is to discover the criteria for asserting that the additional circumstance prevents the act from being the cause of the damage; and this is another facet of the general problem of finding out the criteria for regarding one event as the cause of another, because where some combining circumstance prevents an act from qualifying as the cause of some resulting damage, such a circumstance will usually itself be regarded as the cause.

Ordinarily, where some event results from a combination of factors and we wish to identify one of these factors as the cause, we fasten on two different types of occurrence which we tend to regard as causes. We look upon (a) abnormal factors and (b) human acts (and perhaps those of animals) as causes. If a house burns down, the fire obviously results from a combination of factors, one of which is the presence of oxygen. This, however, would not be regarded as the cause of the fire unless its presence was abnormal in the circumstances. A fire in a laboratory might

be said to be caused by the presence of oxygen, if this was a part of the laboratory from which oxygen was generally excluded and into which oxygen was introduced by accident. But what will be considered to be the cause of the burning of the house is, not the presence of oxygen, but either some unusual event or circumstance (*e.g.*, an electrical short-circuit) or else some human act (*e.g.* the setting fire to the house by some person).

Why it is that abnormal events and human acts are regarded as causes *par excellence* is more a question for philosophy than for jurisprudence, but where either of such factors is to be found, it is clear that a special point has been reached by any investigation. For once either of these has been detected, we have a factor which we can seek to eliminate from future situations, thereby avoiding such incidents later on, and part of the point of identifying such factors as causes is to single them out as final stopping-places of the inquiry.

In law, where we have the typical problem of deciding whether event A is the cause of event B or whether " the chain of causation has been snapped " by some *novus actus interveniens*, X, we may expect to find that the event X is regarded as severing the causal connection wherever X is either some abnormal circumstance or some deliberate human act. If A stabs B and B is taken to hospital, where, despite the fact that he is shown to be allergic to terramycin, he is nevertheless injected with a large dose of it, then his treatment and not the stab wound would qualify in common law as the cause of B's death; for the treatment was quite abnormal in the circumstances (*x*). Or if on his way to hospital B had been strangled by C, here again A's attack would be prevented from being the cause; for the cause of the death would now be C's deliberate act.

Many of the reported cases appear to work on these principles without explicitly acknowledging them. Where an abnormal circumstance or event is not held to sever the causal connection, it will usually be found that the circumstance, though abnormal, was known to the defendant, who sought to take advantage of it.

(*x*) As in the case of *R.* v. *Jordan* (1956) 40 Cr.App.R. 152. *Cf. R.* v. *Smith* [1959] 2 Q.B. 35, where subsequent treatment combined with the previous injury to cause the victim's death but where such treatment was not wholly abnormal and therefore did not operate to break the causal connection between the wound given by the accused and the victim's death.

As the law puts it, intended consequences are never too remote. A difficult case to fit into any theory is that of *Re Polemis* (*y*), where the defendants were held liable for damage resulting from a combination of factors. The defendants' servant carelessly dropped a plank into the ship's hold, the plank struck a spark, and the spark ignited petrol vapour whose presence in the hold was unsuspected. The defendants were held liable for the loss by fire of the ship. Hart and Honoré suggested that while an abnormal circumstance or event normally "snaps the chain of causation", an abnormal circumstance will only do so if its occurrence is subsequent to the defendant's act and not if it is simultaneous with it. Here the abnormal circumstance, the presence of the vapour, already existed before the defendants' servant dropped the plank. But *Re Polemis* has since been disapproved by the Privy Council in the case of the *Wagon Mound* (*z*), which, it seems, will be taken as depriving the former case of any binding authority in English law (*a*). It seems then that any abnormal circumstance contributing to the result may sever the causal connection, regardless of the time of its occurrence. To this there is one exception, enshrined in the common law rule that you must take the plaintiff as you fir him. If you wrongfully injure someone and it turns out that he has some condition of which you are unaware and which renders the injury more serious, you will nevertheless be held responsible for all the damage suffered. If you wilfully or negligently bump into a man who, unknown to you, has an egg-shell skull and who thereby suffers grave injury, you are liable for all the injury suffered. Where the abnormal circumstance consists in a condition of the plaintiff himself, it will not sever the causal link, for in this respect the law takes the view that if you injure people by negligence or by design, then you act at your peril (*b*).

Cases in which the alleged *novus actus interveniens* consists of some human act are often cases in which the defendant contends that the plaintiff himself caused the damage which he suffered. The decisions on these and other cases on this problem suggest

(*y*) [1921] 3 K.B. 560.
(*z*) [1961] A.C. 388.
(*a*) See *Doughty* v. *Turner Manufacturing Co. Ltd.* [1964] 1 Q.B. 518: *Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 Q.B. 405.
(*b*) Salmond, *Torts* (14th ed.), 719–720.

that though the courts regard a human act by the plaintiff or some third party as preventing the defendant's act from being the cause, they will not so regard an act (whether by the plaintiff or a third party) as severing the causal link if this act was in some way not wholly free. If, as in the rescue cases, the act was done out of a legal or a moral duty; if the act was forced on the plaintiff by the danger in which the defendant placed him; or if the act was an automatic and natural reaction—in such cases it will not suffice to prevent the defendant's act from counting as the cause of the damage.

88. Mens rea

We have seen that the conditions of penal liability are sufficiently indicated by the maxim, *Actus non facit reum, nisi mens sit rea*. A man is responsible, not for his acts in themselves, but for his acts coupled with the *mens rea* or guilty mind with which he does them. Before imposing punishment, the law must be satisfied of two things: first, that an act has been done which by reason of its harmful tendencies or results is fit to be repressed by way of penal discipline; and secondly, that the mental attitude of the doer towards his deed was such as to render punishment effective as a deterrent for the future, and therefore just. The form which *mens rea* assumes will depend on the provisions of the particular legal system. Criminal liability may require the wrongful act to be done intentionally or with some further wrongful purpose in mind, or it may suffice that it was done recklessly; and in each case the mental attitude of the doer is such as to make punishment effective. If he intentionally chose the wrong, penal discipline will furnish him with a sufficient motive to choose the right instead for the future. If, on the other hand, he committed the forbidden act without wrongful intent, but yet realising the possibility of the harmful result, punishment will be an effective inducement to better conduct in the future.

Yet there are other cases in which, for sufficient or insufficient reasons, the law is content with a lower form of *mens rea*. This is the case, as was already noticed, with crimes of negligence (*c*).

(*c*) Sir John Salmond regarded inadvertent negligence as a form of *mens rea*, although inadvertent negligence does not require any particular state of mind; and this is surely reasonable, since negligent offences differ sharply

A person may be held responsible for some crimes if he did not do his best as a reasonable man to avoid the consequence in question. Sometimes, however, the law goes even beyond this; holding a man responsible for his acts, independently altogether of any wrongful state of mind or culpable negligence. Wrongs which are thus independent of fault may be distinguished as wrongs of *strict liability*.

It follows that in respect of the requirement of fault, wrongs are of three kinds:—

(1) Intentional or Reckless Wrongs, in which the *mens rea* amounts to intention, purpose, design, or at least foresight. In such wrongs defences like mistake operate to negative the existence of *mens rea*.

(2) Wrongs of Negligence, in which the *mens rea* assumes the less serious form of mere carelessness, as opposed to wrongful intent or foresight. With these wrongs defences such as mistake will only negative *mens rea* if the mistake itself is not negligent.

(3) Wrongs of Strict Liability, in which the *mens rea* is not required, neither wrongful intent nor culpable negligence being recognised as a necessary condition of responsibility; and here defences like mistake are of no avail.

We shall deal with these three classes of wrongs, and these three forms of liability, in the order mentioned.

89. Intention (*d*)

An intention is the purpose or design with which an act is done. This may consist of an intention to perform some further act, an intention to bring about certain consequences or perhaps merely an intention to do the act itself. My intention in buying a gun may be to kill someone with it; my intention in shooting at him may be to cause his death; but if the latter act is described not as shooting at him but as killing him, then my intention can be said to be to do this very thing, to kill him.

from offences not requiring *mens rea*, i.e., offences of strict liability, which make no allowance for the fact that the accused may have had no fair chance of conforming to the law's requirements; offences of negligence penalise those who ought to have and could have conformed and were therefore at fault.

(*d*) See Passmore and Heath, "Intentions" (1955) 29 Arist.Soc.Supp. 131; Anscombe, "Intention" (1956–57) 57 Proc.Arist.Soc. 321. Legal writers have often defined intention as consisting of foresight of consequences together with a desire of such consequences: *e.g.*, Holmes, *The Common Law*, 53; Salmond, *Jurisprudence* (7th ed.), § 133.

An unintentional act is one lacking such purpose or design. To do something unintentionally is to do it without meaning to do it. Through inadvertence I may disregard a traffic signal; through forgetfulness I may omit to pay a debt. An act such as killing, which consists of a cause and an effect, may be unintentional when the actor brings about consequences which he does not intend. I may shoot X dead by accident, being unaware that the wind will alter the direction of my shot. I may kill him by mistake, wrongly imagining him to be someone else. In the former case I fail to foresee the consequences, in the latter I am ignorant of some of the circumstances.

Whether an act is to be termed intentional or unintentional must depend partly on the description of the act itself. If in the latter case above my act is described as shooting at X, then it qualifies as intentional. If it is described as killing X, it must qualify as unintentional, for I did not intend to kill X. In a sense such acts are partly intentional and partly unintentional, and many acts fall into this category. If I trespass on A's land believing it to be my own, I intend to enter upon land which in fact belongs to A but I do not intend to enter-upon-land-belonging-to-A. If a woman marries again during the lifetime of her husband believing him to be dead, she does not commit bigamy, for though she intends to marry again while her husband is in fact alive, she does not intend to marry-again-during-her-husband's-lifetime. Where an act is in part intentional and in part unintentional, liability, if it exists at all, must either be absolute or be based on recklessness or negligence.

Where the intention consists of an intention to produce certain consequences, this is sometimes explained as a combination of foresight and desire (*e*). But while intended consequences must be foreseen—for one cannot aim at a consequence which is unforeseen—the converse is not true. Consequences can be foreseen without being intended. A doctor may administer certain treatment, knowing that it will be painful but that it will cure the patient. To show that in such a case the doctor cannot be said (without further evidence) to intend to cause the patient pain, we may construct another example where the pain would be intended.

(*e*) *Supra*, note (*d*).

Suppose for instance that the doctor pricks the patient's skin to test his perception of pain: here there is a deliberate intention to cause pain as a means to some further end.

Where a consequence is expected, it is usually intended but this need not be the case. An operating surgeon may know very well that his patient will probably die of the operation; yet he does not intend the fatal consequence which he expects. He intends the recovery which he hopes for but does not expect.

Consequences which are intended are normally also expected, but this is not always so. One can be said to intend a consequence which is foreseen as possible but highly improbable. If I fire a rifle in the direction of a man a mile away, I may know perfectly well that the chance of hitting him is not one in a thousand; I may fully expect to miss him; nevertheless I intend to hit him if this is what I am trying to do.

Finally intention is not identical with desire. I may desire something with all my heart, but unless I do something by way of aiming at it I cannot be said to intend it. Conversely I can be said to intend something without desiring it. A thing may be intended, not for its own sake but merely as the means to an end. Here the end is intended and desired, while the means, though intended may perhaps not be desired; indeed it may be utterly indifferent to me or even undesired. If I kill a man in order to rob him, it may be that I do not desire his death but would much prefer to be able to achieve my objective in some other way. The doctor who inflicts pain to test for pain perception will not normally have an actual desire to inflict pain but will on the contrary regret the necessity of it.

We have seen that consequences which are foreseen as certain or highly probable need not be, but usually are, intended. A system of law, however, could provide that a man be held liable for such consequences, even though he did not intend them. In the first place, such a rule would obviate the need for difficult inquiries into the mental element. But secondly, and more important, the rule could be justified on the ground that a man should not do acts which he foresees will involve consequential harm to others, whether or not he intends to cause this harm. Such behaviour is clearly reckless or blameworthy, unless the risk can be justified by reason of the social interest of the act itself.

An operation which is known to be likely to prove fatal will be justifiable if it is carried out to remedy some highly dangerous condition; it would hardly be justified if performed simply to remove a birthmark or scar. With regard to murder English law adopts the rule that a person is responsible for consequences foreseen as the certain or highly probable outcome of his act, regardless of whether he intended them. Thus, if I do an act which I know is very likely to kill Smith and he dies as a result, I cannot be heard to say that I did not intend his death. Indeed the law has gone further and provided that one may be liable for consequences foreseeable by the reasonable man as certain or highly probable, whether or not the actor himself foresaw them (*f*). Thus if I intentionally do some unlawful act on a man which I do not realise, but which a reasonable man would realise, is highly likely to cause death or serious injury to him, this is enough to render me guilty of murder if he dies. In this respect foreseen, and even foreseeable consequences, are put on the same footing as consequences which are intended.

This, however, does not apply to cases involving mere knowledge of statistical probability where there is no certainty in the concrete instance. A manufacturer establishes a factory in which he employs many workmen who are daily exposed to the risk of dangerous machinery or processes. He knows for a certainty that from time to time fatal accidents will, notwithstanding all precautions, occur to the workmen so employed. A military commander orders his troops into action, well knowing that many of them will lose their lives. Such consequences are certainly not intended and would hardly qualify as the result of recklessness. For it is not necessarily reckless to incur a risk if an adequate social advantage is to be gained from the enterprise.

Both in this special connection and generally then it is to be observed that the law may, and sometimes does, impute liability, outside the strict definition of intention, for what is called constructive intention. Consequences which are in fact the outcome of negligence merely are sometimes in law dealt with as intentional. Thus he who intentionally does grievous bodily harm to another, though with no desire to kill him, or certain expectation of his death, is guilty of murder if death

(*f*) *D.P.P.* v. *Smith* [1961] A.C. 290.

ensues. It does not seem possible to lay down any general principle as to the cases in which such a constructive intention beyond the scope of his actual intention is thus imputed by law to a wrongdoer. This is a matter pertaining to the details of the legal system. It is sometimes said, indeed, that a person is presumed in law to intend the natural or necessary results of his actions (*g*). This, however, is much too wide a statement, for, if true, it would eliminate from the law the distinction between intentional and negligent wrongdoing, merging all negligence in constructive wrongful intent. A statement much nearer the truth is that the law frequently—though by no means invariably—treats as intentional all consequences due to that form of negligence which is distinguished as recklessness—all consequences, that is to say, which the actor foresees as the probable results of his wrongful act (*h*). We have seen that on occasions the law may even dispense with the need for actual foresight on the part of the actor, and provide that the latter shall be deemed to foresee such consequences as a reasonable man in the actor's position would have foreseen (*i*). The foresight of the reasonable man is of course an obviously useful evidential test whereby to infer what the actor himself foresaw, but the rule just mentioned has transformed it into a presumption of law which cannot, it seems, be rebutted. The result is the existence in law of a type of constructive recklessness.

It may also be observed that in English law, especially criminal law, the intention that is material is usually the generic and not the specific intent. Thus if A shoots at B intending to kill him, but the shot actually kills C, this is held to be

(*g*) *R.* v. *Harvey* (1823) 2 B. & C. 264: "A party must be considered in point of law to intend that which is the necessary or natural consequence of that which he does." *Cf. Freeman* v. *Pope* (1870) 5 Ch.App. 540; *Ex parte Mercer* (1886) 17 Q.B.D. 298. See the discussion in Williams, *op. cit.* (2nd ed.), § 35.

(*h*) Thus, in criminal law, crimes of "malice" can be committed either intentionally or recklessly (*infra*, § 91); but some crimes, such as attempt, conspiracy, rape and treason, generally require intention and cannot be committed by recklessness merely (Williams, *op. cit.*, § 22). In the law of tort, recklessness is equated with intention in deceit (*Derry* v. *Peek* (1889) 14 App. Cas. 337).

(*i*) *D.P.P.* v. *Smith* [1961] A.C. 290. See Williams, *op. cit.*, s. 35. It seems, however, that the courts may minimise the effect of this case and require proof of actual foresight on the part of the actor himself and regard the "reasonable man" test as evidential only: *Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745. See also Buxton, "The Retreat from Smith" (1966) Cr.L.R. 195.

murder of C. So also if A throws a stone at one window and breaks another, it is held to be malicious damage to the window actually broken (*j*). This doctrine, which is known as the doctrine of transferred malice, applies only where the harm intended and the harm done are of the same kind. If A throws a stone at a human being and unintentionally breaks a window, he cannot be convicted of malicious damage to the window (*k*).

90. Motives (*l*)

A wrongful act is seldom intended and desired for its own sake. The wrongdoer has in view some ulterior object which he desires to obtain by means of it. The evil which he does to another, he does and desires only for the sake of some resulting good which he will obtain for himself. The desire for this good is the motive of his act.

Motives, though closely related and similar to intentions, differ from intentions in certain respects. First, an intention relates to the immediate objectives of an act, while a motive relates to the object or series of objects for the sake of which the act is done. The immediate intent of the thief is to appropriate another person's money, while his ulterior objective may be to buy food with it or to pay a debt. Secondly, a man's motive for an act consists in a desire for something which will confer a real or imagined benefit of some kind on the actor himself, whereas his intention need not relate to some personal interest of this kind. The point of asking what a man intends is to discover what he is trying to achieve. The point of asking for his motive is to find out what personal advantage he is seeking to gain; and a motiveless act is one aimed at no such personal advantage.

In explaining a man's motives we may sometimes describe them in either specific or general terms. The thief in the example above may be said to steal to buy food, or to steal out of necessity.

(*j*) *Cf. R.* v. *Latimer* (1886) 17 Q.B.D. 359 (maliciously striking at B and wounding C held to be a malicious wounding of C).

(*k*) *R.* v. *Pembliton* (1874) 2 C.C.R. 119. *Cf.* Williams, *op. cit.*, Chap. 4. For a discussion of the concept of "kind", see Williams, "Language and the Law" (1945) 61 L.Q.R. 189 *et seq.*, especially at 193–194. For a further discussion of intention and recklessness in criminal law, see J. W. C. Turner, "*Mens Rea* and Moterists" (1933) 5 C.L.J. 61; same, "The Mental Element in Crimes at Common Law", in *The Modern Approach to Criminal Law*, 195.

(*l*) See J. F. Lever, "Means, Motives, and Interests in the Law of Tort" in *Oxford Essays in Jurisprudence* (ed. Guest), 50.

So acts may be said to be done for revenge, out of curiosity and so on, all of which are common mental states relating to a future state of affairs desired by the actor as in some way benefiting him. Intentions cannot be described in such general terms.

The objective of one wrongful act may be the commission of another. I may make a die with intent to coin bad money; I may coin bad money with intent to utter it; I may utter it with intent to defraud. Each of these acts is or may be a distinct criminal offence, and the intention of any one of them is immediate with respect to that act itself, but ulterior with respect to all that go before it in the series.

A person's ulterior intent may be complex instead of simple; he may act from two or more concurrent motives instead of from one only. He may institute a prosecution, partly from a desire to see justice done, but partly also from ill-will towards the defendant. He may pay one of his creditors preferentially on the eve of bankruptcy, partly from a desire to benefit him at the expense of the others, and partly from a desire to gain some financial advantage for himself. Now the law, as we shall see later, sometimes makes liability for an act depend upon the motive with which it is done. The Bankruptcy Act, for example, regards as fraudulent any payment made by a debtor immediately before his bankruptcy with intent to prefer one of his creditors to the others. In all such cases the presence of mixed or concurrent motives raises a difficulty of interpretation. The phrase " with intent to ", or its equivalents, may mean any one of at least four different things:—(1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient if it is one of several concurrent intents; (3) that it must be the chief or dominant intent, any others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case (*m*).

(*m*) For a discussion of this matter, see *Ex p. Hill* (1883) 23 Ch.D. 695 at 704, per Bowen L.J.; also *Ex p. Taylor* (1886) 18 Q.B.D. 295; *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] A.C. 435 at 445, per Viscount Simon L.C., and at 473, per Lord Wright.

91. Malice

Closely connected with the law and theory of intentional wrongdoing is the legal use of the word malice. In a narrow and popular sense this term means ill-will, spite, or malevolence; but its legal signification is much wider. Malice means in law wrongful intention or recklessness (*n*). Any act done with one of these mental elements is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin malitia (*o*) means badness, physical or moral—wickedness in disposition or in conduct—not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent or motive.

We have seen, however, that we must distinguish between the immediate intention with which an act is done and its ulterior purpose or motive. The term malice is applied in law to both these, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of two distinct things. We mean either that it is done intentionally (or alternatively recklessly), or that it is done with some wrongful motive. In the phrases malicious homicide and malicious injury to property, malicious is merely a collective term for intention and recklessness. I burn down a house maliciously if I burn it on purpose, or realising the possibility that what I do will set it on fire. There is here no reference to any ulterior purpose or motive. But, on the other hand, malicious prosecution does not mean any intentional prosecution; it means, more narrowly, a prosecution inspired by some motive of which the law disapproves. A prosecution is malicious, for example, if its ulterior intent is the extortion of money from the accused. So, also, with the malice which is needed to make a man liable for defamation on a privileged occasion; I do not utter defamatory statements maliciously simply because I utter them intentionally (*p*).

(*n*) See J. Ll. J. Edwards, *Mens Rea in Statutory Offences* (1955), Chap. 1; Williams, *Criminal Law: The General Part* (2nd ed.), § 30.

(*o*) See for example D. 4. 3. 1 pr.

(*p*) It is to malice in one only of these two uses that the well-known definition given in *Bromage* v. *Prosser* (1825) 4 Barn. & C. 247, is applicable: "Malice in common acceptation means ill-will against a person: but in its legal sense it means a wrongful act done intentionally, without just cause or

Although the word *malitia* is not unknown to the Roman lawyers, the usual and technical name for wrongful intent is *dolus*, or more specifically *dolus malus*. *Dolus* and *culpa* are the two forms of *mens rea*. In a narrower sense, however, *dolus* includes merely that particular variety of wrongful intent which we term fraud—that is to say, the intent to deceive (*pp*). From this limited sense it was extended to cover all forms of wilful wrongdoing. The English term fraud has never received an equally wide extension. It resembles *dolus*, however, in having a double use. In its narrower sense it means deceit, as we have just said, and is commonly opposed to force. In a wider sense it includes all forms of dishonesty, that is to say, all wrongful conduct inspired by a desire to derive profit from the injury of others. In this sense fraud is commonly opposed to malice in its popular sense. I act fraudulently when the motive of my wrongdoing is to derive some material gain for myself, whether by way of deception, force, or otherwise. But I act maliciously when my motive is the pleasure of doing harm to another rather than the acquisition of any material advantage for myself. To steal property is fraudulent; to damage or destroy it is malicious.

92. Relevance and irrelevance of motives

We have already seen in what way and to what extent a man's immediate intent is material in a question of liability. As a general rule no act is a sufficient basis of responsibility unless it is done either wilfully or negligently. Intention and negligence are the two alternative conditions of penal liability.

We have now to consider the relevance or materiality, not of the immediate, but of the ulterior intent. To what extent does the law take into account the motives of a wrongdoer? To what extent will it inquire, not merely what the defendant has done, but why he has done it? To what extent is malice, in the sense of improper motive, an element in legal wrongdoing?

In answer to this question we may say generally (subject, however, to very important qualifications) that in law a man's

excuse". See, to the same effect, *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889) 23 Q.B.D. at p. 612, per Bowen L.J.; and *Allen* v. *Flood* [1898] A.C. at p. 94, per Lord Watson.

(*pp*) D. 4. 3. 1. 2.

motives are irrelevant. As a general rule no act otherwise lawful becomes unlawful because done with a bad motive; and conversely no act otherwise unlawful is excused or justified because of the motives of the doer, however good. The law will judge a man by what he does, not by the reasons for which he does it.

"It is certainly," says Lord Herschell (*q*), "a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motives which dictated it." So it has been said (*r*): "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." "Much more harm than good," says Lord Macnaghten (*s*), "would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would I think be intolerable."

An illustration of this irrelevance of motives is the right of a landowner to do harm to adjoining proprietors in certain defined ways by acts done on his own land. He may intercept the access of light to his neighbour's windows, or withdraw by means of excavation the support which his land affords to his neighbour's house, or drain away the water which would otherwise supply his neighbour's well. His right to do all these things depends in no way on the motive with which he does them. The law cares nothing whether his acts are inspired by an honest desire to improve his own property, or by a malevolent impulse to damage that of others. He may do as he pleases with his own (*t*).

(*q*) *Allen* v. *Flood* [1898] A.C. at p. 123.
(*r*) *Corporation of Bradford* v. *Pickles* [1895] A.C. 587, at p. 598.
(*s*) *Allen* v. *Flood* [1898] A.C. 92, at p. 152.
(*t*) The Roman law as to the rights of adjoining proprietors was different. Harm done *animo nocendi*, that is to say, with a malicious motive, was frequently actionable. D. 39. 3. 1. 12. The German Civil Code, sect. 226, provides quite generally that the exercise of a right is unlawful when its only motive is to harm another person, and a similar rule has been recognised in France to some extent. See Gutteridge, "Abuse of Rights" (1933) 5 C.L.J. 22. The English rule has been subjected to a great deal of adverse academic criticism: see Gutteridge, *op. cit.*; Allen, "Legal Morality and the *Jus Abutendi*", *Legal Duties* 95 *et seq.*, reprinted from (1924) 40 L.Q.R. 164; Williams, "The Foundation of Tortious Liability" (1939) 7 C.L.J. 111, at 125 *et seq.*, and literature there cited; Pound, *The Spirit of the Common Law* 209; Sullivan in (1955) 8 *Current Legal Problems*, 61.

93. Exceptions to the irrelevance of motives

Criminal attempts constitute the first of the exceptions to the rule that a person's ulterior intent or motive is irrelevant in law. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of an attempt, and can render unlawful an otherwise lawful act. So, if a man standing beside a haystack strikes a match, this act, which will be quite lawful and innocent if done with the purpose of lighting his pipe, will be unlawful and criminal if done with the purpose of setting fire to the haystack; for then it will constitute the crime of attempted arson. A second exception comprises all those cases in which a particular intent forms part of the definition of a criminal offence. Burglary, for example, consists in breaking and entering a dwelling-house by night with intent to commit a felony therein. So forgery consists in making a false document with intent to defraud. In all such instances the ulterior intent is the source, in whole or part, of the mischievous tendency of the act, and is therefore material in law.

In civil as opposed to criminal liability the ulterior objective is very seldom relevant. In almost all cases the law looks to the act alone, and makes no inquiries into the motives from which it proceeds. There are, however, certain exceptions even in the civil law. There are cases where it is thought expedient in the public interest to allow certain specified kinds of harm to be done to individuals, so long as they are done for some good and sufficient reason; but the ground of this privilege falls away so soon as it is abused for bad ends. In such cases, therefore, malice is an essential element in the cause of action. Examples of wrongs of this class are defamation (in cases of privilege) and malicious prosecution. In these instances the plaintiff must prove malice, because in all of them the defendant's act is one which falls under the head of *damnum sine injuria* so long, but so long only, as it is done with good intent.

It should also be observed that though motives are seldom relevant to determine the legality or otherwise of an act, yet, once it is shown that an illegal act has been committed, the motives of the defendant may become highly relevant. In a criminal case, where the penalty for the offence is not fixed by law, the defendant's motives may be an important factor for the

court to take into account in deciding on sentence. In a civil case the defendant's motives may be taken into account where the court decides to award aggravated damages.

94. Jus necessitatis

We shall conclude our examination of the theory of wilful wrongdoing by considering a special case in which motive operates as a ground of excuse. This is the case of the *jus necessitatis*. So far as the abstract theory of responsibility is concerned, an act which is necessary is not wrongful, even though done with full and deliberate intention. It is a familiar proverb that necessity knows no law: *Necessitas non habet legem*.

Necessity, however, does not mean inevitability. An act which can in no possible manner be avoided and as to which the actor has no choice cannot properly be regarded as an act in the full sense at all. An act which is necessary, on the other hand, is one where the actor could have chosen otherwise but where he had highly compelling reasons for the choice he made. A situation of so-called necessity is, in analysis, one in which there is a competition of values—on the one hand, the value of obedience to the general principles of law, and, on the other hand, some value regarded as possessing a higher claim in the particular circumstances. Here, the law itself permits a departure from its own general rules. For example, it would be lawful in an emergency to damage the property of another in order to save life.

Another factor operating to admit the defence of necessity is that it commonly involves the presence of some motive of such exceeding strength as to overcome any fear that can be inspired by the threat of legal penalties. The *jus necessitatis* is the right of a man to do that from which he cannot be dissuaded by any terror of legal punishment. Where threats are necessarily ineffective, they should not be made, and their fulfilment is the infliction of needless and uncompensated evil (*u*).

The common illustration of this right of necessity where punishment would be ineffective is the case of two drowning men clinging to a plank that will not support more than one

(*u*) Though the threats are ineffective, their fulfilment is not necessarily so. The punishment of those acting out of necessity might be an additional deterrent to those not acting out of necessity: if the law does not excuse the former, the latter can entertain no hope of excuse or acquittal.

of them. It may be the moral duty of him who has no one dependent on him to sacrifice himself for the other who is a husband or a father; it may be the moral duty of the old to give way to the young. But it is idle for the law to lay down any other rule save this, that it is the right of the stronger to use his strength for his own preservation. Another familiar case of necessity is that in which shipwrecked sailors are driven to choose between death by starvation on the one side and murder and cannibalism on the other. A third case is that of crime committed under the pressure of illegal threats of death or grievous bodily harm. "If", says Hobbes (*v*), "a man by the terror of present death be compelled to do a fact against the law, he is totally excused; because no law can oblige a man to abandon his own preservation."

It is to be noticed that the test of necessity in these cases is not the powerlessness of any possible, but that of any reasonable punishment. It is enough if the lawless motives to an act will necessarily countervail the fear of any penalty which it is just and expedient that the law should threaten. If burning alive were a fit and proper punishment for petty theft, the fear of it would probably prevent a starving wretch from stealing a crust of bread; and the *jus necessitatis* would have no place. But we cannot place the rights of property at so high a level. There are cases, therefore, in which the motives to crime cannot be controlled by any reasonable punishment. In such cases morality demands that no punishment be administered, since it seems morally unjust to punish a man for doing something which he or any ordinary man could not resist doing—*i.e.*, could not morally resist doing, even given the countervailing motive of the maximum punishment reasonable for the offence.

It may be submitted that where necessity involves a choice of some value higher than the value of obedience to the letter of the law, it is always a legal defence. Where, however, the issue is merely one of the futility of punishment, evidential difficulties prevent any but the most limited scope being permitted to the *jus necessitatis*. In how few cases can we say with any approach to certainty that the possibility of self-control is really absent, that there is no true choice between good and evil, and that the deed is one for which the doer is rightly irresponsible. In this

(*v*) *Leviathan*, Chap. 27: *Eng. Works*, III. 288.

conflict between the requirements of theory and the difficulties of practice the law has resorted to compromise. While in some few instances necessity is admitted as a ground of excuse, as for example in treason (*w*), it is in most cases regarded as relevant to the measure rather than to the existence of liability. It is acknowledged as a reason for the reduction of the penalty, even to a nominal amount, but not for its total remission. Homicide in the blind fury of irresistible passion is not innocent, but neither is it murder; it is reduced to the lower level of manslaughter. Shipwrecked sailors who kill and eat their comrades to save their own lives are in law guilty of murder itself; but the clemency of the Crown will commute the sentence to a short term of imprisonment (*x*).

95. Negligence (*y*)

We have considered the first of the three classes into which injuries are divisible, namely those which are intentional or wilful, and we have now to deal with the second, namely wrongs of negligence (*z*).

Negligence is culpable carelessnesss. "It is", says Willes J. (*a*), "the absence of such care as it was the duty of the defendant to use." What then is meant by carelessness? It is clear, in the first place, that it excludes wrongful intention. These are two contrasted and mutually inconsistent mental attitudes of a person towards his acts and their consequences. No result which is due to carelessness can have been also intended. Nothing which was intended can have been due to carelessness (*b*).

It is to be observed, in the second place, that carelessness or negligence does not necessarily consist in thoughtlessness or

(*w*) *R.* v. *M'Growther* (1746) Foster 13; 18 St.Tr. 391.

(*x*) *R.* v. *Dudley* (1884) 14 Q.B.D. 273. The law as to compulsion and necessity is discussed by Williams in (1953) 6 *Current Legal Problems*, 216 and in *Criminal Law: The General Part* (2nd ed.), Chaps. 17, 18.

(*y*) On care and the lack of it, see A. R. White, *Attention*, Chap. 5.

(*z*) In Roman law negligence is signified by the terms *culpa* and *negligentia*, as contrasted with *dolus* or wrongful intention. Care, or the absence of *negligentia*, is *diligentia*. The use of the word diligence in this sense is obsolete in modern English, though it is still retained as an archaism of legal diction. In ordinary usage, diligence is opposed to idleness, not to carelessness.

(*a*) *Grill* v. *General Iron Screw Colliery Co.* (1866) L.R. 1 C.P. at p. 612.

(*b*) *Kettlewell* v. *Watson* (1882) 21 Ch.D. 685, at p. 706: "Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design."

inadvertence. This is doubtless the commonest form of it, but it is not the only form. If I do harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no danger, I am certainly guilty of negligence. But there is another form of negligence, in which there is no thoughtlessness or inadvertence whatever. If I drive furiously down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly and intentionally expose them to the danger. Yet if a fatal accident happens, I am liable, at the most, not for wilful, but for negligent homicide. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently (c)

Negligence then is failure to use sufficient care, and this failure may result from a variety of factors. A negligent motorist for example may be careless in several different ways. Through inadvertence he may fail to notice what is happening and what the probable consequences of his conduct will be. Through miscalculation he may misjudge his speed, that of other road-users, the width of the road and other conditions. He may drive carelessly by reason of poor vision, innate clumsiness or lack of motoring skill. Or he may err in none of these ways; he may simply appreciate the risks involved and decide to take them, and insofar as we deem it wrong to take the risk we shall hold him negligent in so doing. This latter type of negligence differs from the others in that the defendant deliberately takes a risk which he fully appreciates; and the greater our feeling that the

(c) It is held by some that negligence consists essentially in inadvertence. See Austin, Lecture XX; Birkmeyer, *Strafrecht*, § 17; Clark, *Analysis of Criminal Liability*, Chap. 9. The issue seems to be purely one of terminology. There are in reality three forms of fault: namely, (1) that in which the consequences are foreseen and wrongfully intended; (2) that in which they are not intended but are foreseen and should have been avoided; and (3) that in which they are neither foreseen nor intended, but ought to have been foreseen and avoided. The suggestion now being considered is that the term negligence should be confined to case (3) alone. The objection to the suggestion is that it runs counter to ordinary usage and that it would, if accepted, rob us of a useful generic term for cases (2) and (3), which are sometimes, though by no means always, classed together in law.

risk should not have been incurred, the grosser in our estimation is the negligence, until we arrive at the point where a flagrantly unjustifiable risk has been incurred and this we stigmatize as recklessness. The practical importance of this is that, as already seen, recklessness is frequently for legal purposes classed with intention.

96. The duty of care

Carelessness is not culpable, or a ground of legal liability, save in those cases in which the law has imposed a duty of carefulness. In all other cases complete indifference as to the interests of others is allowable. No general principle can be laid down, however, with regard to the existence of this duty, for this is a matter pertaining to the details of the concrete legal system, and not to abstract theory. Carelessness is lawful or unlawful, as the law sees fit to provide. In the criminal law liability for negligence is quite exceptional. Speaking generally, crimes are wilful wrongs, the alternative form of *mens rea* being deemed an insufficient ground for the rigour of criminal justice. This, however, is not invariably the case, negligent homicide, for example, being a criminal offence. In the civil law, on the other hand, no such distinction is commonly drawn between the two forms of *mens rea*. In general we may say that whenever an act would be a civil wrong if done intentionally, it is also a civil wrong if done negligently. When there is a legal duty not to do a thing on purpose, there is commonly a legal duty to take care not to do it accidentally. To this rule, however, there are certain exceptions—instances in which wrongful intent, or at least recklessness, is the necessary basis even of civil liability. In these cases a person is civilly responsible for doing harm wilfully, but is not bound to take any care not to do it. He must not, for example, deceive another by any wilful or reckless falsehood, but unless there are special circumstances giving rise to a duty of care, he is not answerable for false statements which he honestly believes to be true, however negligent he may be in making them (*d*).

(*d*) The law on this topic was fully reviewed by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

97. The standard of care

Carelessness may exist in any degree, and in this respect it differs from the other form of *mens rea*. Intention either exists or it does not; there can be no question of the degree in which it is present. The degree of carelessness varies directly with the risk to which other persons are exposed by the act in question. He is careless, who, without intending evil, nevertheless exposes others to the danger of it, and the greater the danger the greater the carelessness. The risk depends, in its turn, on two things: first, the magnitude of the threatened evil, and second, the probability of it. The greater the evil is, and the nearer it is, the greater is the carelessness of him who creates the danger.

Inasmuch, therefore, as carelessness varies in degree, it is necessary to know what degree of it is requisite to constitute culpable negligence. What measure of care does the law demand? What amount of anxious consideration for the interests of others is a legal duty, and within what limits is indifference lawful?

We have first to notice a possible standard of care which the law might have adopted but has not. It does not demand the highest degree of care of which human nature is capable. I am not liable for harm ignorantly done by me, merely because by some conceivable exercise of prudential foresight I might have anticipated the event and so avoided it. Nor am I liable because, knowing the possibility of harm, I fail to take every possible precaution against it. The law demands not that which is possible, but that which is reasonable in view of the magnitude of the risk. Were men to act on any other principle than this, excess of caution would paralyse the business of the world. The law, therefore, allows every man to expose his fellows to a certain measure of risk, and to do so even with full knowledge. If an explosion occurs in my powder mill, I am not necessarily liable to those injured inside the mill (*e*), even though I established and carried on the industry with full knowledge of its dangerous character. This is a degree of indifference to the safety of other men's lives and property which the law deems permissible because not excessive. Inasmuch as the carrying of firearms and

(*e*) *Read* v. *Lyons* [1947] A.C. 156.

the driving of automobiles are known to be the occasions of frequent harm, extreme care and the most scrupulous anxiety as to the interests of others would prompt a man to abstain from those dangerous forms of activity. Yet it is expedient in the public interest that those activities should go on, and therefore that men should be exposed to the incidental risks of them. Consequently the law does not insist on any standard of care which would include them within the limits of culpable negligence. It is for the law to draw the line as best it can, so that while prohibiting unreasonable carelessness, it does not at the same time demand unreasonable care.

On the other hand it is not sufficient that I have acted in good faith to the best of my judgment and belief, and have used as much care as I myself believed to be required of me in the circumstances of the case. The question in every case is not whether I honestly thought my conduct sufficiently careful, but whether in fact it attained the standard of due care established by law.

What standard then does the law actually adopt? It demands the amount of care which is reasonable in the circumstances of the particular case (*f*). This obligation to use reasonable care is very commonly expressed by reference to the conduct of a "reasonable man" or of an "ordinarily prudent man", meaning thereby a reasonably prudent man. "Negligence", it has been said (*g*), "is the omitting to do something that a reasonable man would do, or the doing something which a reasonable man would not do." "We ought", it has been said (*h*), "to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. . . . The care taken by a prudent man has always been the rule laid down." The reference to the "ordinary man" does not mean that it is in all cases a defence to show that the defendant behaved as the average man would have behaved, for there are instances where the court has considered that even the usual standard of conduct falls short of the "reasonable" minimum (*i*). "Reasonable" in short, seems to refer not to the

(*f*) *Ford* v. *L. & S.W. Ry.* (1862) 2 F. & F. 730.
(*g*) *Blyth* v. *Birmingham Water Works Co.* (1856) 25 L.J.Ex. at 213.
(*h*) *Vaughan* v. *Menlove* (1837) 3 Bing.N.C. 475.
(*i*) Salmond, *Torts* (14th ed.), 296–297.

average standard, but to the standard that the jury or judge think ought to have been observed in the particular case.

In determining the standard to be required, there are two chief matters for consideration. The first is the magnitude of the risk to which other persons are exposed, while the second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of any conduct will depend upon the proportion between these two elements. To expose others to danger for a disproportionate object is unreasonable, whereas an equal risk for a better cause may lawfully be run without negligence. By driving trains at the rate of fifty miles an hour, railway companies have caused many fatal accidents which could quite easily have been avoided by reducing the speed to ten miles, but this additional safety would be attained at too great a cost of public convenience, and therefore in neglecting this precaution the companies do not fall below the standard of reasonable care and are not guilty of negligence (*j*).

In conclusion, a word may be said upon the maxim *Imperitia culpae adnumeratur* (*k*). It is a settled principle of law that want of skill or of professional competence amounts to negligence. He who will exercise any trade or profession must bring to the exercise of it such a measure of skill and knowledge as will suffice for reasonable efficiency, and he who has less than this practises at his own risk. At first sight this maxim may seem to require a degree of care far in excess of what is reasonably to be expected of the ordinary person, but further consideration will show that this is not so. The ignorant physician who kills his patient, or the unskilled blacksmith who lames the horse shod by him, is legally responsible, not because he is ignorant or unskilful—for skill and knowledge may be beyond his reach—but because, being unskilful or ignorant, he ventures to undertake a business which calls for qualities which he does not possess. No man is bound in law to be a good surgeon or a capable attorney, but all men are bound not to act as surgeons or attorneys until and unless they are good and capable as such.

98. Degrees in negligence

Where a system of law recognises only one standard of care, it does not follow that it must recognise only one degree of

(*j*) *Ford* v. *L. & S.W. Ry.* (1862) 2 F. & F. 730. (*k*) *Just. Inst.* 4. 3. 7

negligence. For since negligence consists in falling below the standard of care recognised by law, the further the defendant falls below this, the greater his negligence.

We have already seen that in assessing whether a man is guilty of negligence regard must be had to the seriousness of the danger to which his actions expose others, to the degree of probability that the danger would occur and to the importance of the object of the defendant's own activity. Clearly the greater the danger and the greater its likelihood, the greater the defendant's carelessness in not taking precautions against it; and conversely the more important and socially valuable his own objective, the smaller his carelessness. There are degrees of negligence then and these could be taken into account by law for both criminal and civil purposes. In crimes of negligence the law could provide that the greater the negligence the greater the punishment. We have seen that English law does not recognise many offences of negligence, but an acceptance of the different gradations of carelessness can be found in the law relating to road traffic. Here a distinction is drawn between ordinary negligence, criminal negligence and gross negligence. Ordinary negligence is such failure to use care as would render a person civilly but not criminally liable; criminal negligence is a greater failure and a greater falling below the standard of care, and renders a man guilty of a driving offence—and even within this category the law distinguishes between the less negligent offence of careless driving and the more negligent offence of dangerous driving; gross negligence is a yet greater fall below the standard and is such a wholly unreasonable failure to take care as to make the defendant guilty not only of a driving offence but also, in the event of his conduct resulting in another person's death, of manslaughter.

Equally for civil purposes the law could take account of different degrees of negligence. It could provide that the greater the defendant's negligence, the greater the compensation he must make to the plaintiff. This, however, is not the position adopted by English law, which for civil purposes recognises only one standard of care and therefore only one degree of negligence. Whenever a person is under a duty to take any care at all, he is bound to take that amount of it which is deemed reasonable under the circumstances; and the absence of this care is culpable negligence.

Although this is probably a correct statement of English law, attempts have been made to establish two or even three distinct standards of care and degrees of negligence. Some authorities, for example, distinguish between gross negligence (*culpa lata*) and slight negligence (*culpa levis*), holding that a person is sometimes liable for the former only, and at other times even for the latter. In some cases we find even a threefold distinction maintained, negligence being either gross, ordinary, or slight (*l*). These distinctions are based partly upon Roman law, and partly upon a misunderstanding of it, and notwithstanding some judicial dicta to the contrary we may say with some confidence that no such doctrine is known to the law of England (*m*). The distinctions so drawn are hopelessly indeterminate and impracticable. On what principle are we to draw the line between gross negligence and slight? Even were it possible to establish two or more standards, there seems no reason of justice or expediency for doing so. The single standard of English law is sufficient for all cases. Why should any man be required to show more care than is reasonable under the circumstances, or excused if he shows less?

In connection with this alleged distinction between gross and slight negligence it is necessary to consider the celebrated doctrine of Roman law to the effect that the former (*culpa lata*) is equivalent to wrongful intention (*dolus*)—a principle which receives occasional expression and recognition in English law also. *Magna*

(*l*) See, for example, Smith's *Leading Cases* (13th ed.), I. 190 (Notes to *Coggs* v. *Bernard*).

(*m*) See *Hinton* v. *Dibbin* (1842) 2 Q.B. at p. 661, *per* Denman C.J.: "It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists". *Wilson* v. *Brett* (1843) 11 M. & W. at p. 113, *per* Rolfe B.: "I said I could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet". *Grill* v. *General Iron Screw Colliery Co.* (1866) L.R. 1 C.P. at p. 612, *per* Willes J.: "No information has been given us as to the meaning to be attached to gross negligence in this case, and I qvite agree with the *dictum* of Lord Cranworth in *Wilson* v. *Brett* that gross negligence is ordinary negligence with a vituperative epithet, a view held by the Exchequer Chamber in *Beal* v. *South Devon Ry.*" *Doorman* v. *Jenkins* (1834) 2 Ad. & El. at p. 265, *per* Denman C.J.: "I thought and I still think it impossible for a judge to take upon himself to say whether negligence is gross or not". Salmond, *Torts* (14th ed.), 298–299; Pollock, *Torts* (15th ed.), 339; Street, *Foundations of Legal Liability*, I. 98. See, however, for a full discussion of the matter, and an expression of the contrary opinion, *Beven on Negligence*, I. Chap. II.

culpa dolus est (*n*), said the Romans. In its literal interpretation, indeed, this is untrue, for we have already seen that the two forms of *mens rea* are wholly inconsistent with each other, and that no degree of carelessness can amount to design or purpose. Yet the proposition, though inaccurately expressed, has a true signification. Although *real* negligence, however gross, cannot amount to intention, *alleged* negligence may. Alleged negligence which, if real, would be exceedingly gross, is probably not negligence at all, but wrongful purpose. Its grossness raises a presumption against its reality. For we have seen that carelessness is measured by the magnitude and imminence of the threatened mischief. Now the greater and more imminent the mischief, the more probable is it that it is intended. Genuine carelessness is very unusual and unlikely in extreme cases. Men are often enough indifferent as to remote or unimportant dangers to which they expose others, but serious risks are commonly avoided by care unless the mischief is desired and intended. The probability of a result tends to prove intention and therefore to disprove negligence. If a new-born child is left to die from want of medical attention or nursing, it *may* be that its death is due to negligence only, but it is more probable that it is due to wrongful purpose and malice aforethought. He who strikes another on the head with an iron bar *may* have meant only to wound or stun, and not to kill him, but the probabilities are the other way (*o*).

In certain cases, as has already been indicated in dealing with the nature of intention, the presumption of fact that a person intends the probable consequences of his actions has hardened into a presumption of law and become irrebuttable. In those cases

(*n*) D. 50. 16. 226. See also D. 17. 1. 29. pr., D. 47. 4. 1. 2., D. 11. 6. 1. 1.: *Lata culpa plane dolo comparabitur.*

(*o*) In *Le Lievre* v. *Gould* [1893] 1 Q.B. at p. 500, it is said by Bowen L.J.: "If the case had been tried with a jury, the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud". Literally read, this implies that, though gross negligence cannot *be* fraud, it may be *evidence* of it, but this of course is impossible. If two things are inconsistent with each other, one of them cannot be evidence of the other. The true meaning is that alleged or admitted negligence may be so gross as to be a ground for the inference that it is in reality fraud and not negligence at all: see also *Kettlewell* v. *Watson* (1882) 21 Ch.D. at p. 706, *per* Fry J.

that which is negligence in fact is deemed wrongful intent in law. It is constructive, though not actual intent. The law of homicide supplies us with an illustration. Murder is wilful homicide, and manslaughter is negligent homicide, but the boundary line as drawn by the law is not fully coincident with that which exists in fact. Thus, an intent to cause grievous bodily harm is imputed as an intent to kill, if death ensues. The justification of such conclusive presumptions of intent is twofold. In the first place, as already indicated, very gross negligence is probably in truth not negligence at all, but wrongful purpose; and in the second place, even if it is truly negligence, yet by reason of its grossness it is as bad as intent, in point of moral deserts, and therefore may justly be treated and punished as if it were intent. The law, accordingly, will sometimes say to a defendant: "Perhaps, as you allege, you were merely negligent and had no actual wrongful purpose; nevertheless you will be dealt with just as if you had, and it will be conclusively presumed against you that your act was wilful. For your deserts are no better than if you had in truth intended the mischief which you have so recklessly caused. Moreover it is exceedingly probable, notwithstanding your disclaimer, that you did indeed intend it; therefore no endeavour will be made on your behalf to discover whether you did or not."

99. The subjective and objective theories of negligence

There are two rival theories of the meaning of the term negligence. According to the one, negligence is a state of mind; according to the other, it is not a state of mind but merely a type of conduct. These opposing views may conveniently be distinguished as the subjective and objective theories of negligence. The one view was adopted by Sir John Salmond, the other by Sir Frederick Pollock. We shall consider in turn the arguments for each view, and then attempt an evaluation of them.

(1) *The subjective theory of negligence.* Sir John Salmond's view was that a careless person is a person who does not *care*. Although negligence is not synonymous with thoughtlessness or inadvertence, it is nevertheless, on this view, essentially an attitude of *indifference*. Now indifference is exceedingly apt to

produce thoughtlessness or inadvertence; but it is not the same thing, and may exist without it. If I am indifferent as to the results of my conduct, I shall very probably fail to acquire adequate foresight and consciousness of them; but I may, on the contrary, make a very accurate estimate of them, and yet remain equally indifferent with respect to them.

Negligence, therefore, on this view, essentially consists in the *mental attitude of undue indifference with respect to one's conduct and its consequences* (*p*).

(2) *The objective theory of negligence.* The other theory is that negligence is not a subjective, but an objective fact. It is not a particular state of mind or form of the *mens rea* at all, but a particular kind of conduct. It is a breach of the duty of taking care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct (*q*). To drive at night without lights is negligence, because to carry lights is a precaution taken by all reasonable and prudent men for the avoidance of accidents. To take care, therefore, is no more a mental attitude or state of mind than to take cold is. This view obtains powerful support from the law of tort, where it is clearly settled that negligence means a failure to achieve the objective standard of the reasonable man (*r*). If the defendant has failed to achieve this standard it is no defence for him to show that he was anxious to avoid doing harm and took the utmost care of which *he* was capable. The same seems to hold good in criminal law.

The truth contained in the subjective theory is that in certain situations any conclusions as to whether a man had been negligent will depend partly on conclusions as to his state of mind. In criminal law a sharp distinction is drawn between intentionally causing harm and negligently causing harm, and in deciding whether the accused is guilty of either we must have regard to

(*p*) Sir John Salmond quoted Merkel's *Lehrbuch des deutschen Strafrechts*, sects. 32 and 33.

(*q*) Pollock, *Torts* (15th ed.), 336: "Negligence is the contrary of diligence, and no one describes diligence as a state of mind." It may be answered that this simply plays upon two meanings of the word "diligence". Diligence to-day means activity, which is not a state of mind; but originally and in contrast to negligence it meant care, which has at least a mental element.

(*r*) *Supra*, § 97.

his knowledge, aims, motives and so on. Cases of apparent negligence may, upon examination of the party's state of mind, turn out to be cases of wrongful intention. A trap door may be left unbolted, in order that one's enemy may fall through it and so die. Poison may be left unlabelled, with intent that some one may drink it by mistake. A ship's captain may wilfully cast away his ship by the neglect of the ordinary rules of good seamanship. A father who neglects to provide medicine for his sick child may be guilty of wilful murder, rather than of mere negligence. In none of these cases, nor indeed in any others, can we distinguish between intentional and negligent wrongdoing, save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences. Externally and objectively, the two classes of offences are indistinguishable.

The subjective theory then has the merit of making clear the distinction between intention and negligence. The wilful wrongdoer desires the harmful consequences, and therefore does the act in order that they may ensue. The negligent wrongdoer does not desire the harmful consequences, but in many cases is careless (if not wholly, yet unduly) whether they ensue or not, and therefore does the act notwithstanding the risk that they may ensue. The wilful wrongdoer is liable because he desires to do the harm; the negligent wrongdoer may be liable because he does not sufficiently desire to avoid it. He who will excuse himself on the ground that he meant no evil is still open to the reply: Perhaps you did not, but at all events you might have avoided it if you had sufficiently desired so to do; and you are held liable not because you desired the mischief, but because you were careless and indifferent whether it ensued or not.

But to identify negligence with any one state of mind is a confusion and an oversimplification. We have seen that negligence consists in failure to comply with a standard of care and that such failure can result from a variety of factors, including ignorance, inadvertence and even clumsiness. Now while it is true that these may often result from indifference, there is no reason to suppose that they must in all cases arise from this source. To imagine otherwise is to salvage the subjective theory that negligence consists in the mental attitude of indifference at the

expense of adopting a hypothesis which has no particular plausibility and no special merit other than that of supporting the subjective theory itself. In fact if wrongful intention is not in issue, and the question is simply whether the defendant caused the harm without any fault on his part or by his unintentional fault, the question is to be settled by ascertaining whether his conduct conformed to the standard of the reasonable man. In this case the state of his mind is not quite irrelevant. For the standard of care represents the degree of care which should be used in the circumstances, and his knowledge or lack of knowledge may be relevant in assessing what the circumstances were. The question may then be whether a reasonable man, knowing only what the defendant knew, would have acted as did the defendant.

But his state of mind is not conclusive. In certain circumstances it may be held in law that a reasonable man would know things that the defendant did not know, and the defendant will be blamed for not knowing and held liable because he ought to know. In such cases the law relating to negligence requires the defendant at his peril to come up to an objective standard and declines "to take his personal equation into account" (*s*).

100. The theory of strict liability

We now proceed to consider the third class of wrongs, namely, those of strict liability (*t*). These are the acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence. They are the exceptions to the general requirement of fault. It may be thought, indeed, that in the civil as opposed to the criminal law, strict liability should be the rule rather than the exception. It may be said: "It is

(*s*) Holmes, *The Common Law*, 108. On negligence and recklessness see the controversy between White (1961) 24 M.L.R. 592; Fitzgerald (1962) 25 M.L.R. 49; Williams, *ibid.*; White, *ibid.* 437. For a discussion and criticism of the view that the idea of degrees of negligence is nonsensical see Hart, "Negligence, Mens Rea and Criminal Responsibility," *Oxford Essays in Jurisprudence* (ed. Guest), 29.

(*t*) The expression formerly used was "absolute" liability, but since exceptions are always recognised to so-called absolute liability, Sir Percy Winfield suggested that a better term was "strict" liability ("The Myth of Absolute Liability" (1926) 42 L.Q.R. 37), and this suggestion has since been judicially adopted (*Northwestern Utilities* v. *London Guarantee, etc., Co.* [1936] A.C. 108, 118, 119, 126).

clear that in the criminal law liability should in all ordinary cases be based upon the existence of *mens rea*. No man should be punished criminally unless he knew that he was doing wrong, or unless, at least, a reasonable person in his shoes could have avoided the harmful result by taking reasonable care. Inevitable mistake or accident should be a good defence. But why should the same principle apply to civil liability? If I do another man harm, why should I not be made to pay for it? What does it matter to him whether I did it wilfully, or negligently, or by inevitable accident? In either case I have actually done the harm, and therefore should be bound to *undo* it by paying compensation. For the essential aim of civil proceedings is redress for harm suffered by the plaintiff, not punishment for wrong done by the defendant; therefore the rule of *mens rea* should be deemed inapplicable."

It is clear, however, that this is not the law of England, and it seems equally clear that there is no sufficient reason why it should be. For unless damages are at the same time a deserved penalty inflicted upon the defendant, they are not to be justified as being a deserved recompense awarded to the plaintiff. In the first place they in no way undo the wrong or restore the former state of things. The wrong is done and cannot be undone. If by accident I burn down another man's house, the only result of enforcing compensation is that the loss has been transferred from him to me; but it remains as great as ever for all that. The mischief done has been in no degree abated. Secondly, the idea of compensation is related to that of fault, for it consists in the restoring of a balance by the person who has disturbed it; but if the defendant from whom compensation is sought is not at fault, he can hardly be taken to have disturbed the balance which needs to be redressed. If I am not in fault, there is no more reason why I should insure other persons against the harmful issues of my own activity, than why I should insure them against lightning or earthquakes. Unless some definite gain is to be derived by transferring loss from one head to another, sound reason, as well as the law, requires that the loss should lie where it falls (*u*).

(*u*) The question is discussed in Holmes's *Common Law*, 81-96, and in Pollock's *Law of Torts* (15th ed.), 96 *et seq.*

101. The extent of strict liability

Although the requirement of fault is general throughout the civil and criminal law, there are numerous exceptions to it. The considerations on which these are based are various, but the most important is the difficulty of procuring adequate proof of intention or negligence. In the majority of instances, indeed, justice requires that this difficulty be honestly faced; but in certain special cases it is circumvented by a provision that proof of intention or negligence is unnecessary and that liability is strict. In this way we shall certainly punish some who are innocent, but in the case of civil liability this is not a very serious matter—since men know that in such cases they act at their peril, and are content to take the risk—while in respect of criminal liability such a provision applies only in the case of less serious offences (*v*). Whenever, therefore, the strict doctrine of *mens rea* would too seriously interfere with the administration of justice by reason of the evidential difficulties involved in it, the law tends to establish a form of strict liability. Nevertheless, strict liability in criminal law remains open to serious objection. A man should, we feel, be given a reasonable chance to conform his conduct to the requirements of law. It is true that some mistakes and some accidents are culpable and would not have occurred but for the defendant's negligence. Others, however, could not have been avoided however much care had been taken, and to penalise a man for unavoidable mistakes or accidents is to fail to afford him a reasonable opportunity of complying with the law. The difficulty of procuring adequate proof of intention or negligence could be met quite simply by allowing the defendant to shoulder the burden of proving his innocence. In this event it would be for him to show that he acted neither intentionally nor through negligence and that any accident or mistake on his part was not culpable. This unfortunately is not the present position in English law, which recognises many offences of strict liability.

(*v*) As to *mens rea* in criminal responsibility, see *R.* v. *Tolson* (1873) 23 Q.B.D. 168; *R.* v. *Prince* (1875) L.R. 2 C.C. 154; *Chisholm* v. *Doulton* (1889) 22 Q.B.D. 736; Kenny, *Outlines of Criminal Law* (ed. Turner 1962), 23 *et seq.*; R. M. Jackson, "Absolute Prohibition in Statutory Offences" in *The Modern Approach to Criminal Law*, 262, reprinted from (1936) 6 C.L.J. 83. The arguments for and against strict liability in criminal law are carefully reviewed in Howard, *Strict Responsibility*.

In proceeding to consider the chief instances of strict liability we find that the matter falls into three divisions, namely—(1) Mistake of Law, (2) Mistake of Fact, and (3) Accident.

102. Mistake of law

It is a principle recognised not only by our own but by other legal systems that ignorance of the law is no excuse for breaking it. *Ignorantia juris neminem excusat.* The rule is also expressed in the form of a legal presumption that every one knows the law. The presumption is irrebuttable: no diligence of inquiry will avail against it, and no inevitable ignorance or error will serve for justification. Whenever a man is thus held accountable for breaking a law which he did not know, and which he could not by due care have acquired a knowledge of, we have a type of strict liability.

The reasons rendered for this somewhat rigorous principle are three in number. In the first place, the law is in legal theory definite and knowable; it is the duty of every man to know that part of it which concerns him; therefore innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because in general they can and ought to know it.

In the second place, even if invincible ignorance of the law is in fact possible, as indeed it is, the evidential difficulties in the way of the judicial recognition of such ignorance are insuperable, and for the sake of any benefit derivable therefrom it is not advisable to weaken the administration of justice by making liability dependent on well-nigh inscrutable conditions touching knowledge or means of knowledge of the law. Who can say of any man whether he knew the law, or whether during the course of his past life he had an opportunity of acquiring a knowledge of it by the exercise of due diligence?

Thirdly and lastly, the law is in most instances derived from and in harmony with the rules of natural justice. It is a public declaration by the state of its intention to maintain by force those principles of right and wrong which have already a secure place in the moral consciousness of men. The common law is in great part nothing more than common honesty and common

sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right. If not to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts. He who goes about to harm others when he believes that he can do so within the limits of the law, may justly be required by the law to know those limits at his peril. This is not a form of activity that need be encouraged by any scrupulous insistence on the formal conditions of legal responsibility.

It must be admitted, however, that while each of these considerations is valid and weighty, they do not constitute an altogether sufficient basis for so stringent and severe a rule (*w*). None of them goes the full length of the rule. That the law is knowable throughout by all whom it concerns is an ideal rather than a fact in any system as indefinite and mutable as our own. That it is impossible to distinguish invincible from negligent ignorance of the law is by no means wholly true. It may be doubted whether this inquiry is materially more difficult than many which courts of justice undertake without hesitation; and here again the difficulty of proving the defendant's knowledge of the law could be surmounted by providing that the defendant should bear the burden of establishing non-negligent ignorance (*x*). That he who breaks the law of the land disregards at the same time the principles of justice and honesty is in many instances far from the truth. In a complex legal system a man requires other guidance than that of common sense and a good conscience. The fact seems to be that the rule in question, while in general sound, does not in its full extent and uncompromising rigidity admit of any sufficient justification. Indeed, it may be said that certain exceptions to it are in course of being developed, particularly in respect of the defence of "claim of right" in criminal law (*y*).

(*w*) The rule is not limited to civil and criminal liability, but extends to other departments of the law. It prevents, for example, the recovery of money paid under a mistake of law, though that which is paid under a mistake of fact may be reclaimed.

(*x*) See Andenaes "*Ignorantia Legis* in Scandinavian Criminal Law" in *Essays in Criminal Science* (ed. Mueller), 217.

(*y*) For an extended discussion, see Williams, *Criminal Law: The General Part* (2nd ed.), Chap. 8.

103. Mistake of fact

In respect of the influence of ignorance or error upon legal liability, we have inherited from Roman law a familiar distinction between law and fact. By reason of his ignorance of the law no man will be excused, but it is commonly said that inevitable ignorance of fact is a good defence (*z*). This, however, is far from an accurate statement of English law. It is much more nearly correct to say that mistake of fact is an excuse only within the sphere of the criminal law, while in the civil law responsibility is commonly strict in this respect. So far as civil liability is concerned, it is a general principle of our law that he who intentionally or semi-intentionally (see § 89) interferes with the person, property, reputation, or other rightful interests of another does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstance which justified his act. If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own. If in absolute innocence and under an inevitable mistake of fact I meddle with another's goods, I am liable for all loss incurred by the true owner (*a*). If, intending to arrest A, I arrest B by mistake instead, I am liable to him, notwithstanding the greatest care taken by me to ascertain his identity. If I falsely but innocently make a defamatory statement about another, I am liable to him, however careful I may have been to ascertain the truth. There are, indeed, exceptions to this rule of strict civil liability for mistake of fact, but they are not of such number or importance as to cast any doubt on the validity of the general principle (*b*).

In the criminal law, on the other hand, the matter is otherwise, and it is here that the contrast between mistake of law and mistake of fact finds its true application. Absolute criminal responsibility for a mistake of fact is quite exceptional. An

(*z*) *Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.* D. 22. 6. 9. pr.

(*a*) *Hollins* v. *Fowler* (1874) L.R. 7 H.L. 757; *Consolidated Co.* v. *Curtis* [1892] 1 Q.B. 495.

(*b*) It may be noted that, as regards the tort of negligence, an entirely innocent error as to facts may make an act which would otherwise be negligent non-negligent. Thus an act which would be negligent if it were known that a third party was present and would be imperilled may not be negligent if the defendant was innocently (*i.e.*, without breach of duty to come to know) ignorant of this fact.

instance of it is the liability of him who abducts a girl under the legal age of consent. Inevitable mistake as to her age is no defence; he must take the risk (*c*).

A word may be said as to the historical origin of this failure of English law to recognise inevitable mistake as a ground of exemption from civil liability. Ancient modes of procedure and proof were not adapted for inquiries into mental conditions. By the practical difficulties of proof early law was driven to attach exclusive importance to overt acts. The subjective elements of wrongdoing were largely beyond proof or knowledge, and were therefore disregarded as far as possible. It was a rule of our law that intent and knowledge were not matters that could be proved or put in issue. "It is common learning", said one of the judges of King Edward IV, "that the intent of a man will not be tried, for the devil himself knoweth not the intent of a man" (*d*). The sole question which the courts would entertain was whether the defendant did the act complained of. Whether he did it ignorantly or with guilty knowledge was entirely immaterial. This rule, however, was restricted to civil liability. It was early recognised that criminal responsibility was too serious a thing to be imposed upon an innocent man simply for the sake of avoiding a difficult inquiry into his knowledge and intention. In the case of civil liability, on the other hand, the rule was general. The success with which it has maintained itself in modern law is due in part to its undeniable utility in obviating inconvenient or even impracticable inquiries, and in part to the influence of the conception of redress in minimising the importance of fault as a condition of penal liability.

104. Accident

Unlike mistake, inevitable accident is commonly recognised by our law as a ground of exemption from liability. It is needful, therefore, to distinguish accurately between these two things, for they are near of kin. Every act which is not done intentionally is done either accidentally or by mistake. It is done accidentally when the consequences are unintended. It is done by mistake, when the consequences are intended but the actor is

(*c*) *R.* v. *Prince* (1875) L.R. 2 C.C. 154.
(*d*) Y.B. 17 Edw. IV. 2.

ignorant of some material circumstance (*e*). If I drive over a man in the dark because I do not know that he is in the road, I injure him accidentally; but if I procure his arrest, because I mistake him for someone who is liable to arrest, I injure him, not accidentally, but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it, but falsely believed in the existence of a circumstance which would have served to justify it. So if by insufficient care I allow my cattle to escape into my neighbour's field, their presence there is due to accident; but if I put them there because I wrongly believe that the field is mine, their presence is due to mistake. In neither case did I intend to wrong my neighbour, but in the one case my intention failed as to the consequence, and in the other as to the circumstance.

Accident, like mistake, is either culpable or inevitable. It is culpable when due to negligence, but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. Inevitable accident is commonly a good defence, both in the civil and in the criminal law.

To this rule, however, there are, at least, in the civil law, important exceptions. These are cases in which the law insists that a man shall act at his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts (*f*), or to construct a reservoir of water (*g*), or to accumulate upon his land any substance which will do damage to his neighbours if it escapes (*h*), he will do all these things *suo periculo* (though none of them are *per se* wrongful), and will answer for all ensuing damage, notwithstanding consummate care. So also every man is strictly responsible for the trespasses of his cattle (*i*). If my horse or my ox escapes from my land to that of another man, I am answerable for it without any proof of negligence (*j*).

(*e*) The distinction between accident and mistake is neatly explained in Austin, "A Plea for Excuse" (1956–57) 57 Proc.Arist.Soc. 1.

(*f*) *Filburn* v. *Aquarium Co.* (1890) 25 Q.B.D. 258.

(*g*) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

(*h*) *Pickard* v. *Smith* (1861) 10 C.B.(N.S.) 470.

(*i*) *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10.

(*j*) The history of the principle of strict liability has been the subject of some controversy. It is universally agreed that in primitive law a man was, in

105. Vicarious responsibility

Hitherto we have dealt exclusively with the conditions of liability, and it is needful now to consider its incidence. Normally and naturally the person who is liable for a wrong is he who does it. Yet both ancient and modern law admit instances of vicarious liability in which one man is made answerable for the acts of another. In more primitive systems, however, the impulse to extend vicariously the incidence of liability receives free scope in a manner altogether alien to modern notions of justice. It is in barbarous times considered a very natural thing to make every man answerable for those who are kin to him. In the Mosaic legislation it is deemed necessary to lay down the express rule that "Fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin" (*k*). Plato in his *Laws* does not deem it needless to emphasise the same principle (*l*). Furthermore, so long as punishment is conceived rather as expiative, retributive, and vindictive, than as deterrent and reformative, it might seem reasonable for the incidence of liability to be determined by *consent*, and for a guilty man to provide a substitute to bear his penalty and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment but there is no reason why the victim should be one person rather than another.

Morally, however, such proceedings would be indefensible. Most people would agree that punishment, since it consists of the

general, strictly liable for his own acts, though there were cases where the law came quite early to make some inquiry into the question of fault. The dispute has turned on the question of liability for the acts of one's slaves or servants, animals, and inanimate objects. According to one view, early law started with strict liability for these acts also, and the course of legal development was in the direction of a relaxation of the early rules. According to the other view the opposite was the case: early law had in general no conception of vicarious liability for servants or of liability for chattels, and the course of legal development was in the direction of establishing and strengthening such liability. The first view was propounded in the United States by Dean Wigmore, and in England adopted by Sir John Salmond and Sir William Holdsworth, and received the somewhat hesitating adherence of Pollock and Maitland. The second view was held in the United States by Mr. Justice Holmes, and supported by Glanville Williams.

(*k*) *Deut.* xxiv. 16.

(*l*) *Laws* 856. On the vicarious responsibility of the kindred in early law, see Lea, *Superstition and Force* (4th ed.), 13–20, and Tarde, *La Philosophie Pénale*, 136–140.

infliction of pain, must be justified, for to inflict pain without justification is immoral and itself an evil. Now it is justifiable to punish an offender, provided that the punishment is not out of all proportion to the offence, because the evil inflicted is a means to a greater good, *i.e.*, the protection of society; because the wrongdoer has forfeited, of his own volition, the right not to have evil inflicted on him, since he might have abstained from his wrongdoing; and because the punishment may serve to turn him away from his wrongdoing. But where punishment is inflicted on some person other than the actual offender, the law is treating the victim as a mere means to an end. In such a case the victim's own conduct is not in question, nor is there any suggestion of reforming the victim himself; he is being penalised merely for the greater good of others. And this is to regard him as less than a person; it is to use him as a thing. In so far as the law is in harmony with morality it will avoid vicarious liability in criminal law, and in English criminal law vicarious liability, though existing, is exceptional (*m*).

Modern civil law recognises vicarious liability in two chief classes of cases. In the first place, masters are responsible for the acts of their servants done in the course of their employment. In the second place, representatives of dead men are liable for deeds done in the flesh by those whom they represent. We shall briefly consider each of these two forms.

It has been sometimes said that the responsibility of a master for his servant has its historical source in the responsibility of an owner for his slave. This, however, is certainly not the case. The English doctrine of employer's liability is of comparatively recent growth. It has its origin in the legal presumption, gradually become conclusive, that all acts done by a servant in and about his master's business are done by his master's express or implied authority, and are therefore in truth the acts of the master for which he may be justly held responsible (*n*). No employer will be allowed to say that he did not

(*m*) See Williams, *Criminal Law* (2nd ed.), Chap. 7.

(*n*) Salmond, *Essays in Jurisprudence and Legal History*, 161–163; Wigmore, "Responsibility for Tortious Acts", *Select Essays in Anglo-American Legal History*, III. 520–537; Street, *Foundations of Legal Liability*, II., Chaps. 41–43; Holdsworth, *H.E.L.*, VIII. 472 *et seq.*

authorise the act complained of, or even that it was done against his express injunctions, for he is liable none the less. This conclusive presumption of authority has now, after the manner of such presumptions, disappeared from the law, after having permanently modified it by establishing the principle of employer's liability. Historically, as we have said, this is a fictitious extension of the principle, *Qui facit per alium facit per se*. Formally, it has been reduced to the laconic maxim, *Respondeat superior*.

The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? Who could establish liability in such a case, were evidence of authority required, or evidence of the want of it admitted (*o*).

A further reason for the vicarious responsibility of employers is that employers usually are, while their servants usually are not, financially capable of the burden of civil liability. It is felt, probably with justice, that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained. Such delegation confers upon impecunious persons means and opportunities of mischief which would otherwise be confined to those who are financially competent. It disturbs the correspondence which would otherwise exist between the capacity of doing harm and the capacity of paying for it. It is requisite for the efficacy of civil justice that this delegation of powers and functions should be permitted only on the condition that he who delegates them shall remain answerable for the acts of his servants, as he would be for his own (*p*).

(*o*) Here again a possible solution would be to require the master to undertake the burden of disproving complicity.

(*p*) This reason is not given full effect to by the law, for vicarious liability in English law does not generally extend to the acts of independent

A second form of vicarious responsibility is that of living representatives for the acts of dead men. There is no doubt that criminal responsibility must die with the wrongdoer himself, but with respect to penal redress the question is not free from difficulty. For in this form of liability there is a conflict between the requirements of the two competing principles of punishment and compensation. The former demands the termination of liability with the life of the wrongdoer, while the latter demands its survival. In this dispute the older common law approved the first of those alternatives. The received maxim was: *Actio personalis moritur cum persona* (q). A man cannot be punished in his grave; therefore it was held that all actions for penal redress, being in their true nature instruments of punishment, must be brought against the living offender and must die with him. Modern opinion rejects this conclusion, and by various statutory provisions the old rule has been almost entirely abrogated. It is considered that although liability to afford redress ought to depend in point of *origin* upon the requirements of punishment, it should depend in point of *continuance* upon those of compensation. For when this form of liability has once come into existence, it is a valuable right of the person wronged; and it is expedient that such rights should be held upon a secure tenure, and should not be subject to extinction by a mere irrelevant accident such as the death of the offender. There is no sufficient reason for drawing any distinction in point of survival between the right of a creditor to recover his debt and the right of a man who has been injured by assault or defamation to recover compensation for the loss so suffered by him.

As a further argument in the same sense, it is to be observed that it is not strictly true that a man cannot be punished after his death. Punishment is effective not at the time it is inflicted, but at the time it is threatened. A threat of evil to be inflicted upon a man's descendants at the expense of his estate will undoubtedly exercise a certain deterrent influence upon him; and the apparent injustice of so punishing his descendants for the offences of their predecessor is in most cases no more than apparent. The right of succession is merely the right to acquire

contractors. For a further discussion of the justifications, real or supposed, of vicarious liability, see Baty, *Vicarious Liability*.

(q) On the history of this maxim see Holdsworth, *H.E.L.*, III. 576–584.

the dead man's estate, subject to all charges which, on any grounds, and apart altogether from the interests of the successors themselves, may justly be imposed upon it (r).

106. The measure of criminal liability

We have now considered the conditions and the incidence of penal liability. It remains to deal with the measure of it, and here we must distinguish between criminal and civil wrongs, for the principles involved are fundamentally different in the two cases.

In considering the measure of criminal liability it will be convenient to bestow exclusive attention upon the deterrent purpose of the criminal law, remembering, however, that the conclusions so obtained are subject to possible modification by reference to those other purposes of punishment which we thus provisionally disregard.

Were men perfectly rational, so as to act invariably in accordance with an enlightened estimate of consequences, the question of the measure of punishment would present no difficulty. A draconian simplicity and severity would be perfectly effective. It would be possible to act on the Stoic paradox that all offences involve equal guilt, and to visit with the utmost rigour of the law every deviation, however slight, from the appointed way. In other words, if the deterrent effect of severity were certain and complete, the most efficient law would be that which by the most extreme and undiscriminating severity effectually extinguished crime. Were human nature so constituted that a threat of burning all offenders alive would with certainty prevent all breaches of the law, then this would be an effective penalty for all offences from high treason to petty larceny. So greatly, however, are men moved by the impulse of the moment, rather than by a rational estimate of future good and evil, and so ready are they to face any future evil which falls short of the inevitable, that the utmost rigour is sufficient only for the diminution of crime, not for the

(r) There is a second application of the maxim, *Actio personalis moritur cum persona*, which seems equally destitute of justification. According to the common law an action for penal redress died not merely with the wrongdoer but also with the person wronged. This rule also has been abrogated by statute in large part. There can be little doubt that in all ordinary cases, if it is right to punish a person at all, his liability should not cease simply by reason of the death of him against whom his offence was committed. The right of the

extinction of it. It is needful, therefore, in judging the merits of the law, to subtract from the sum of good which results from the partial prevention of offences, the sum of evil which results from the partial failure of prevention and the consequent necessity of fulfilling those threats of evil by which the law had hoped to effect its purpose. The perfect law is that in which the difference between the good and the evil is at a maximum in favour of the good, and the rules as to the measure of criminal liability are the rules for the attainment of this maximum. It is obvious that it is not attainable by an indefinite increase of severity. To substitute hanging for imprisonment as the punishment for petty theft would doubtless diminish the frequency of this offence (*s*), but it is certain that the evil so prevented would be far outweighed by that which the law would be called on to inflict in the cases in which its threats proved unavailing.

In every crime there are three elements to be taken into account in determining the appropriate measure of punishment. These are (1) the motives to the commission of the offence, (2) the magnitude of the offence, and (3) the character of the offender.

1. *The motive of the offence.* Other things being equal, the greater the temptation to commit a crime the greater should be the punishment. This is an obvious deduction from the first principles of criminal liability. The object of punishment is to counteract by the establishment of contrary and artificial motives the natural motives which lead to crime. The stronger these natural motives the stronger must be the counteractives which the law supplies. If the profit to be derived from an act is great, or the passions which lead men to it are violent, a corresponding strength or violence is an essential condition of the efficacy of repressive discipline. We shall see later, however, that this principle is subject to a very important limitation, and that there are many cases in which extreme temptation is a ground of extenuation rather than of increased severity of punishment.

person injured to receive redress should descend to his representatives like any other proprietary interest.

(*s*) In fact such a substitution might only diminish the frequency of conviction and punishment, for juries and courts might well be loth to bring in findings of guilt. See Page, *Crime and the Community*, 54.

2. *The magnitude of the offence.* Other things being equal, the greater the offence, that is to say the greater the sum of its evil consequences or tendencies, the greater should be its punishment. At first sight, indeed, it would seem that this consideration is irrelevant. Punishment, it may be thought, should be measured solely by the profit derived by the offender, not by the evils caused to other persons; if two crimes are equal in point of motive, they should be equal in point of punishment, notwithstanding the fact that one of them may be many times more mischievous than the other. This, however, is not so, and the reason is twofold.

(*a*) The greater the mischief of any offence the greater is the punishment which it is profitable to inflict with the hope of preventing it. For the greater this mischief the less is the proportion which the evil of punishment bears to the good of prevention, and therefore the greater is the punishment which can be inflicted before the balance of good over evil attains its maximum. Assuming the motives of larceny and of homicide to be equal, it may be profitable to inflict capital punishment for the latter offence, although it is certainly unprofitable to inflict it for the former. The increased measure of prevention that would be obtained by such severity would, in view of the comparatively trivial nature of the offence, be obtained at too great a cost.

(*b*) A second and subordinate reason for making punishment vary with the magnitude of the offence is that, in those cases in which different offences offer themselves as alternatives to the offender, an inducement is thereby given for the preference of the least serious. If the punishment of burglary is the same as that of murder, the burglar has obvious motives for not stopping at the lesser crime. If an attempt is punished as severely as a completed offence, why should any man repent of his half-executed purposes?

3. *The character of the offender.* The worse the character or disposition of the offender the more severe should be his punishment. Badness of disposition is constituted either by the strength of the impulses to crime, or by the weakness of the impulses towards law-abiding conduct. One man may be worse than another because of the greater strength and prevalence

within him of such anti-social passions as anger, covetousness, or malice; or his badness may lie in a deficiency of those social impulses and instincts which are the springs of right conduct in normally constituted men. In respect of all the graver forms of law-breaking, for one man who abstains from them for fear of the law there are thousands who abstain by reason of quite other influences. Their sympathetic instincts, their natural affections, their religious beliefs, their love of the approbation of others, their pride and self-respect, render superfluous the threatenings of the law. In the degree in which these impulses are dominant and operative, the disposition of a man is good; in the degree in which they are wanting or inefficient, it is bad.

In both its kinds badness of disposition is a ground for severity of punishment. If a man's emotional constitution is such that normal temptation acts upon him with abnormal force, it is for the law to supply in double measure the counteractive of penal discipline. If he is so made that the natural influences towards well-doing fall below the level of average humanity, the law must supplement them by artificial influences of a strength that is needless in ordinary cases.

Any fact, therefore, which indicates depravity of disposition is a circumstance of aggravation, and calls for a penalty in excess of that which would otherwise be appropriate to the offence. One of the most important of these facts is the repetition of crime by one who has been already punished. The law rightly imposes upon habitual offenders penalties which bear no relation either to the magnitude or to the profit of the offence. A punishment adapted for normal men is not appropriate for those who, by their repeated defiance of it, prove their possession of abnormal natures (*t*). A second case in which the same principle is applicable is that in which the mischief of an offence is altogether disproportionate to any profit to be derived from it by the offender. To kill a man from mere wantonness, or merely in order to facilitate the picking of his pocket, is a proof of extraordinary depravity beyond anything that is imputable to him who commits homicide only through the stress of passionate indignation or under the influence of great temptation. A third case is that of offences from which normal

(*t*) The preventive function of punishment is an additional reason for sentencing habitual offenders to such punishments as long terms of imprisonment.

humanity is adequately dissuaded by such influences as those of natural affection. To kill one's father is in point of magnitude no worse a crime than any other homicide, but it has at all times been viewed with greater abhorrence, and by some laws punished with greater severity, by reason of the depth of depravity which it indicates in the offender. Lastly it is on the same principle that wilful offences are punished with greater rigour than those which are due merely to negligence.

An additional and subordinate reason for making the measure of liability depend upon the character of the offender is that badness of disposition is commonly accompanied by deficiency of sensibility. Punishment must increase as sensibility diminishes. The more depraved the offender the less he feels the shame of punishment; therefore the more he must be made to feel the pain of it. A certain degree of even physical insensibility is said to characterise those who commit crimes of violence; and the indifference with which death itself is faced by those who in the callousness of their hearts have not scrupled to inflict it upon others is a matter of amazement to normally constituted men.

We are now in a position to deal with a question which we have already touched upon but deferred for fuller consideration, namely the apparent paradox involved in the rule that punishment must increase with the temptation to the offence. As a general rule this proposition is true; but it is subject to a very important qualification. For in certain cases the temptation to which a man succumbs may be of such a nature as to rebut that presumption of bad disposition which would in ordinary circumstances arise from the commission of the offence. He may, for example, be driven to the act not by the strength of any bad or self-regarding motives, but by that of his social or sympathetic impulses. In such a case the greatness of the temptation, considered in itself, demands severity of punishment, but when considered as a disproof of the degraded disposition which usually accompanies wrongdoing it demands leniency; and the latter of these two conflicting considerations may be of sufficient importance to outweigh the other. If a man remains honest until he is driven in despair to steal food for his starving children, it is perfectly consistent with the deterrent theory of punishment to deal with him less severely than with him who steals from no

other motive than cupidity. He who commits homicide from motives of petty gain, or to attain some trivial purpose, deserves to be treated with the utmost severity, as a man thoroughly callous and depraved. But he who kills another in retaliation for some intolerable insult or injury need not be dealt with according to the measure of his temptations, but should rather be excused on account of them.

107. The measure of civil liability

We have seen that penal redress involves both the compensation of the person injured and the punishment, in a sense, of the wrongdoer. Yet in measuring civil liability the law attaches more importance to the principle of compensation than to that of fault. For it is measured exclusively by the magnitude of the offence, that is to say, by the amount of loss inflicted by it. Apart from some exceptions (*u*) it takes no account of the character of the offender, and so visits him who does harm through some trivial want of care with as severe a penalty as if his act had been prompted by deliberate malice. Similarly it takes no account of the motives of the offence; he who has everything and he who has nothing to gain are equally punished, if the damage done by them is equal. Finally, it takes no account of probable or intended consequences, but solely of those which actually ensue; wherefore the measure of a wrongdoer's liability is not the evil which he meant to do, but that which he has succeeded in doing. If one man is made to pay higher damages than another, it is not because he is more guilty, but because he has had the misfortune to be more successful in his wrongful purposes, or less successful in the avoidance of unintended issues.

Yet it is not to be suggested that this form of civil liability is unjustifiable. Penal redress possesses advantages more than sufficient to counterbalance any such objections to it. More especially it possesses this, that while other forms of punishment, such as imprisonment, are uncompensated evil, penal redress is the gain of him who is wronged as well as the loss of the wrongdoer.

(*u*) In certain cases higher damages may be awarded, where the defendant's motives, malice or conduct have increased the plaintiff's suffering. In others higher damages may be awarded to punish the defendant for his behaviour. For the difference between aggravated and exemplary damages *Cf. Rookes* v. *Barnard* [1964] A.C. 1129.

Further, this form of remedy gives to the persons injured a direct interest in the efficient administration of justice—an interest which is almost absent in the case of the criminal law. It is true, however, that the law of penal redress, taken by itself, falls so far short of the requirements of a rational scheme of punishment that it would by itself be totally insufficient. In all modern and developed bodies of law its operation is supplemented, and its deficiencies made good, by a co-ordinate system of criminal liability. These two together, combined in due proportions, constitute a very efficient instrument for the maintenance of justice.

CHAPTER 13

THE LAW OF PROPERTY

108. Meanings of the term property

The substantive civil law (*a*) is divisible into three great departments, namely the law of property, the law of obligations, and the law of status. The first deals with proprietary rights *in rem*, the second with proprietary rights *in personam*, and the third with personal or non-proprietary rights, whether *in rem* or *in personam*. In this chapter we shall consider in outline the first of these branches, and we shall then proceed to deal in the same manner with the law of obligations. The law of status, on the other hand, is not of such a nature as to require or repay any further consideration from the point of view of general theory.

The term property, which we here use as meaning proprietary rights *in rem*, possesses a singular variety of different applications having different degrees of generality. These are the following:—

1. *All legal rights.* In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law*. This usage, however, is obsolete at the present day, though it is common enough in the older books. Thus Blackstone speaks of the property (*i.e.* right) which a master has in the person of his servant, and a father in the person of his child. "The inferior", he says (*b*) "hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior." So Hobbes says (*c*): "Of things held in propriety, those that are dearest to a man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection; and after them riches and means of living". In like manner Locke (*d*) tells us that "every man has a property in

(*a*) Substantive law, as opposed to the law of procedure; civil law, as opposed to criminal.

(*b*) Blackstone, III. 143. "The child hath no property in his father or guardian as they have in him." *Ibid.*

(*c*) *Leviathan*, Chap. XXX; *Eng. Wks.* III. 329.

(*d*) *Treatise on Civil Government*, II. Chap. v, sect. 27.

his own person ", and he speaks elsewhere (*e*) of a man's right to preserve " his property, that is, his life, liberty, and estate ".

2. *Proprietary rights* (*dominium and status*). In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattels, shares, and the debts due to him are his property; but not his life or liberty or reputation. In this sense we may oppose to Locke's statement, that a man has a property in his own person, the saying of Ulpian: *Dominus membrorum suorum nemo videtur* (*f*). This is probably the most frequent application of the term at the present day, but in the case of a word having so many recognised varieties of usage it is idle to attempt to single out any one of them as exclusively correct.

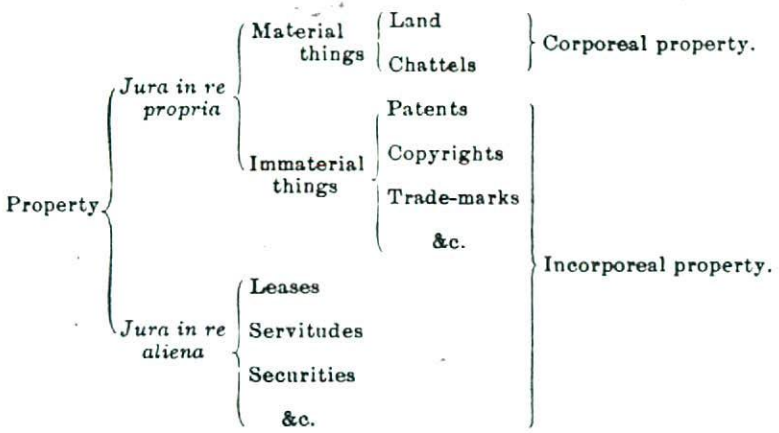
3. *Proprietary rights in rem* (*dominium and obligatio*). In a third application, which is that adopted in this chapter, the term includes not even all proprietary rights, but only those which are both proprietary and *in rem*. The law of property is the law of proprietary rights *in rem*, the law of proprietary rights *in personam* being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not.

4. *Corporeal property* (*dominium corporis and dominium juris*). Finally, in the narrowest use of the term, it includes nothing more than corporeal property—that is to say, the right of ownership in a material object, or that object itself. Thus property is defined by Ahrens (*g*) as " a material object subject to the immediate power of a person ", and Bentham (*h*) considers as metaphorical and improper the extension of the term to include other rights than those which relate to material things.

(*e*) *Ibid.* Chap. vii, sect. 87.
(*f*) D. 9. 2. 13. pr.
(*g*) *Droit Naturel*, II. sect. 55.
(*h*) *Principles*, 231; *Works*. I. 108. So Puchta, sect. 231: Nur an . . . körperlichen Gegenständen ist Eigenthum möglich.

109. Kinds of property

All property is, as we have already seen, either corporeal or incorporeal. Corporeal property is the right of ownership in material things; incorporeal property is any other proprietary right *in rem*. Incorporeal property is itself of two kinds, namely (1) *jura in re aliena* or encumbrances, whether over material or immaterial things (for example, leases, mortgages, and servitudes), and (2) *jura in re propria* over immaterial things (for example, patents, copyrights, and trade-marks). The resulting threefold division of property appears in the following Table:—



110. The ownership of material things

The owner of a material object is he who owns a right to the aggregate of its uses. He who has merely a special and definitely limited right to the use of it, such as a right of way or other servitude, is not an owner of the thing but merely an encumbrancer of it. The definition, however, must not be misunderstood. Ownership is the right of *general* use, not that of absolute or unlimited use. He is the owner of a thing who is entitled to all those uses of it which are not specially excepted and cut off by the law. No such right as that of absolute and unlimited use is known to the law. All lawful use is either general (that is to say, residuary) or specific, the former being ownership, and the latter encumbrance.

The limits thus imposed upon an owner's right of use are of two kinds. The first are the various limits imposed upon ownership by the general law. They are the various applications of the maxim: *Sic utere tuo ut alienum non laedas*—a legal principle whose function it is to restrain within due bounds the opposing maxim that a man may do as he pleases with his own. In the interests of the public or of a man's neighbours many uses of the things which are his are wholly excluded from his right of ownership.

The second class of restrictions upon an owner's right of use consists of those which flow from the existence of encumbrances vested in other persons. My land may be mortgaged, leased, charged, bound by restrictive covenants, and so on, yet I remain the owner of it none the less. For I am still entitled to the residue of its uses, and whatever right over it is not specifically vested in some one else is vested in me. The residuary use so left to me may be of very small dimensions; some encumbrancer may own rights over it much more valuable than mine; but the ownership of it is in me and not in him. Were his right to determine to-morrow in any manner, my own, relieved from the encumbrance which now weighs it down, would forthwith spring up to its full stature and have again its full effect. No right loses its identity because of an encumbrance vested in some one else. That which is a right of ownership when there are no encumbrances, remains a right of ownership notwithstanding any number of them.

Inasmuch as the right of ownership is a right to the aggregate of the uses of the thing, it follows that ownership is necessarily permanent. No person having merely a temporary right to the use of a thing can be the owner of the thing, however general that right may be while it lasts. He who comes after him is the owner; for it is to him that the residue of the uses of the thing pertains. It is to be understood, however, that by a permanent right is meant nothing more than a right which is capable of lasting as long as the thing itself which is its subject-matter, however long or short that duration may be.

Even as the generality of ownership involves its permanence, so its permanence involves the further essential feature of inheritance. The only permanent rights which can be owned by a

mortal man are those which can be handed down by him to his successors or representatives on his death. All others are temporary, their duration being necessarily limited to the lifetime of him in whom they are vested. The right of ownership, therefore, is essentially an inheritable right. It is capable of surviving its owner for the time being. It belongs to the class of rights which are divested by death but are not extinguished by it.

Summing up the conclusions to which we have attained, we may define the right of ownership in a material thing as the general, permanent, and inheritable right to the uses of that thing (*k*).

According to the ancient English doctrine there can be no owner of *land* except the Crown itself. The fee simple of land—the greatest right in it which a subject can possess—is not in truth ownership, but a mere encumbrance upon the ownership of the Crown. Although this theory is still sometimes maintained in words it now has no practical consequences. Before 1926 it had a consequence in the distinction between escheat and the taking of goods as *bona vacantia*. When a tenant in fee simple died without leaving an heir or devisee, the land reverted or escheated to the Crown, or, if it had been held of a mesne lord, to the mesne lord. That is to say, the interest of the Crown or mesne lord, which had never been divested, but had merely been encumbered by the fee simple, would through the destruction of this encumbrance become once more an interest in demesne. In the case of chattels it was otherwise. They could be owned by the subject no less than by the Crown. It is true that if the owner of them died intestate without kin, they would go to the Crown as *bona vacantia*, just as land held of the Crown would go to the Crown as an escheat. But between these two processes there was a profound difference in legal theory. In the case of chattels the Crown succeeded to the right which was vested in the dead man; his ownership was

(*k*) The full power of alienation and disposition is an almost invariable element in the right of ownership, but cannot be regarded as essential, or included in the definition of it. A married woman subject to a restraint on anticipation is none the less the owner of her property, though she cannot alienate or encumber it.

Austin (3rd ed.) 817 defines the right of ownership as a "right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration, over a determinate thing".

continued in the Crown, just as it would have been continued in his next-of-kin had there been any. But in the case of escheat, as already said, the right of the dead man had come to an end, and the Crown succeeded to no right of his, but simply came into its own again.

This distinction has been abolished by sections 45 and 46 of the Administration of Estates Act, 1925, which provide that on the death of a person intestate and without next-of-kin entitled under the new rules of descent, his land shall not escheat but shall go to the Crown as *bona vacantia*. At the present day, therefore, there is nothing to prevent us from speaking of the fee simple of land as the ownership of it, the right of the Crown being viewed, accordingly, not as vested and continuing ownership subject to an encumbrance, but as a contingent right of succession to an intestate owner.

111. Movable and immovable property

Among material things the most important distinction is that between movables and immovables, or, to use terms more familiar in English law, between chattels and land. In all legal systems these two classes of objects are to some extent governed by different rules, though in no system is the difference so great as in our own.

Considered in its legal aspect, an immovable, that is to say, a piece of land, includes the following elements:—

1. A determinate portion of the earth's surface.

2. The ground beneath the surface down to the centre of the world. All the pieces of land in England meet together in one terminable point at the earth's centre.

3. Possibly the column of space above the surface *ad infinitum*. "The earth", says Coke, "hath in law a great extent upwards, not only of water as hath been said, but of ayre and all other things even up to heaven; for *Cujus est solum, ejus est usque ad coelum*" (*l*). The authenticity of this doctrine, however, is not wholly beyond dispute. It would prohibit as an actionable trespass all use of the air-space above the appropriated surface of the earth, at whatever height this use took place, and however little it could affect the interests of the landowner. It

(*l*) Co. Litt. 4 a. On the maxim see note in (1931) 47 L.Q.R. 14.

may be that the law recognises no right of ownership in the air-space at all, or at least no right of exclusive use, but merely prohibits all acts which by their nature or their proximity interfere with the full enjoyment and use of the surface (*m*). By the German Civil Code (Art. 905), the owner of land owns the space above it, but has no right to prohibit acts so remote from the surface that they in no way affect his interests. In England it is now expressly provided by statute (*n*) that the flight of aircraft at a reasonable height above the ground is not actionable at the suit of the owner or occupier of the land below.

4. All objects which are on or under the surface in its natural state; for example, minerals and natural vegetation. All these are part of the land, even though they are in no way physically attached to it. Stones lying loose upon the surface are in the same category as the stone in a quarry.

5. Lastly, all objects placed by human agency on or under the surface, with the intention of permanent annexation. These become part of the land, and lose their identity as separate movables or chattels; for example, buildings, walls, and fences. *Omne quod inaedificatur solo cedit*, said the Roman law (*o*). Provided that the requisite intent of permanent annexation is present, no physical attachment to the surface is required. A wall built of stones without mortar or foundations is part of the land on which it stands (*p*). Conversely, physical attachment, without the intent of permanent annexation, is not in itself enough. Carpets, tapestries, or ornaments nailed to the floor or walls of a house are not thereby made part of the house (*q*).

(*m*) On this question see *Pickering* v. *Rudd* (1815) 4 Camp. 219; *Fay* v. *Prentice* (1845) 1 C.B. 828; *Wandsworth Board of Works* v. *United Telegraph Co.* (1884) 13 Q.B.D. 904; *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10; McNair, *Law of the Air* (3rd ed.), Chap. 2.

(*n*) Civil Aviation Act, 1949, s. 40, repeating the Air Navigation Act, 1920.

(*o*) Just. *Inst.* 2. 1. 29. See also Gaius, 2. 73; Superficies solo cedit.

(*p*) *Monti* v. *Barnes* [1901] 1 K.B. 205.

(*q*) Similar law is contained in Article 95 of the German Civil Code: "Things are not part of the land, which are attached to it simply for a temporary purpose". It is only by slow degrees and with imperfect consistency that our law has worked out any intelligible principle on this difficult matter; and although the rule as stated in the text may be accepted as the main guiding principle, it cannot be said even yet that English law has succeeded in establishing any uniform doctrine applicable to all cases. Even where a chattel has become a fixture, and so part of the land, persons other than the owner of the land may have rights of removal. Thus tenants for life or for years have certain rights of removing chattels affixed by themselves for trade, ornamental, and domestic purposes.

Money buried in the ground is as much a chattel as money in its owner's pocket (*r*).

It is clear that the distinction between movables and immovables is in truth and in fact applicable to material objects only. Yet the law has made an unfortunate attempt to apply it to *rights* also. Rights no less than things are conceived by the law as having a local situation, and as being either movable or permanently fixed in a definite locality. The origin of this illogical conception is to be found in the identification of rights of ownership with the material things which are the objects of them. I am said to own land and chattels, as well as easements, shares, debts, contracts, and patents. All these things are equally property, and since some of them have a local situation and can be truly classed as movable or immovable, the law has been led by inadvertence to attribute these qualities to all of them. It has recognised in things which are incorporeal certain attributes which in truth pertain to things corporeal only. It has divided the whole sphere of proprietary rights by reference to a distinction which is truly applicable not to rights at all, but to physical objects. Nor is this merely a peculiarity of English law, for it is found in Continental systems also (*s*).

On what principle, then, does the law determine whether a right is to be classed as immovable or as movable? The general rule is that a right has in this respect the same quality as its subject-matter. All rights over immovable things, whether rights *in re propria* or rights *in re aliena*, are themselves to be classed as immovable property; unless, indeed, as in the case of mortgages, they are merely accessory to debts or other *bona mobilia*.

(*r*) Unlike a chattel, a piece of land has no natural boundaries. Its separation from the adjoining land is purely arbitrary and artificial, and it is capable of subdivision and separate ownership to any extent that may be desired. The lines of subdivision are usually vertical, but may be horizontal. The surface of land, for example, may belong to one man and the substrata to another. Each story of a house may have a different owner. In *Midland Ry.* v. *Wright* [1901] 1 Ch. 738, it was held that a right has been acquired by prescription to the surface of land belonging to a railway company, although a tunnel beneath the surface remained the property of the company as having been continuously in its occupation.

(*s*) Baudry-Lacantinerie, *Des Biens*, sect. 123, "We know that rights, regarded as incorporeal things, are properly speaking neither movables nor immovables. But by a fiction the law classes them as one or the other according to the nature of their subject-matter". See also Dernburg's *Pandekten*, I sect. 74.

in which case they may partake, for some purposes at least, of the quality of the thing to which they are appurtenant. Similarly all rights over movables are *bona mobilia* themselves. So far there is no difficulty. What shall we say, however, of those rights which have no material objects at all, such as a copyright, a patent, the good-will of a business, a trade-mark, or the benefit of a contract? The answer is that all such rights are classed by the law as movable. For the class of movable property is residuary, and includes all rights which can make good no claim to be classed as immovable.

The law not merely classifies rights as movable and immovable, but goes further in the same direction, and attributes local situation to them. It undertakes to say not merely *whether* a right exists, but *where* it exists. Nor is this a difficult task in the case of those rights which have determinate material things as their objects. A servitude or other *jus in re aliena* over a piece of land is situated in law where the land is situated in fact. A right over a chattel is movable property, and where the chattel goes the right goes also. But where there is no material object at all, what are we to say as to the local situation of the right? Where is a debt situated, or a share in a company, or the benefit of a contract, or a copyright? Such questions can be determined only by more or less arbitrary rules based upon analogy, and it is to be regretted that it has been thought needful to ask and answer them at all. As the law stands, however, it contains several rules based on the assumption that all property which exists must exist *somewhere* (*t*), and for the application of these rules the determination of the local situation of rights is necessary, even though it leads into the region of legal fictions. "The legal conception of property", says Lord Lindley (*a*), "appears to me to involve the legal conception of existence somewhere. . . . To talk of property as existing nowhere is to use language which to me is unintelligible."

The leading principle as to the local situation of rights is that

(*t*) For example, the jurisdiction of English courts in the administration of deceased persons' estates depends on the deceased having left property in England. Portions of revenue law and of private international law are also based on the assumption that all proprietary rights possess a local situation.

(*a*) *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.* [1901] A.C. at p. 236.

they are situated where they are exercised and enjoyed. Rights over material things therefore have the same situation as those things themselves. The good-will of a business is situated in the place where the business is carried on (*b*). Debts are in general situated in the place where the debtor resides since it is there that the creditor must go to get his money (*c*).

112. Real and personal property

Derived from and closely connected with the distinction between immovable and movable property is that between real and personal property. These are two cross divisions of the whole sphere of proprietary rights. Real property and immovable property form intersecting circles which are very nearly though not quite coincident. The law of real property is almost equivalent to the law of land, while the law of personal property is all but identical with the law of movables. The partial failure of coincidence is due not to any logical distinction, but to the accidental course of legal development; and to this extent the distinction between real and personal property is purely arbitrary and possesses no scientific basis. Real property comprises all rights over land, with such additions and exceptions as the law has seen fit to establish. All other proprietary rights, whether *in rem* or *in personam*, pertain to the law of personal property.

The distinction between real and personal property has no logical connection with that between rights *in rem* and *in personam*. There is, however, an historical relation between them,

(*b*) *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.* [1901] A.C. at p. 236.

(*c*) There are certain cases, however, which have been decided on the assumption that incorporeal property possesses no local situation at all. For this reason it was held in *Smelting Co. of Australia* v. *Commissioners of Inland Revenue* [1897] 1 Q.B. 172, that a share of a New South Wales patent, together with the exclusive right of using it within a certain district of that colony, was not property "locally situated out of the United Kingdom" within the meaning of sect. 59 (1) of the Stamp Act, 1891. "I do not see", says Lopes L.J. at p. 181, "how a share in a patent, or a licence to use a patent, which is not a visible or tangible thing, can be said to be locally situate anywhere". See, however, as to this case, the observations of Vaughan Williams L.J. in *Muller & Co.'s Margarine Ltd.* v. *Inland Revenue Commissioners* [1900] 1 Q.B. at p. 322, and of Lord Lindley on appeal in the House of Lords [1901] A.C. at p. 237. See further, as to the local situation of incorporeal property, *Att.-Gen.* v. *Dimond* (1831) 1 Cr. & J. 356; *Commr. of Stamps* v. *Hope* [1891] A.C. 476; *Danubian Sugar Factories* v. *Commissioners of Inland Revenue* [1901] 1 K.B. 545; *Re Clark* [1904] 1 Ch. 294.

inasmuch as they are both derived from the same source, namely, the Roman distinction between actions *in rem* and actions *in personam*. Real property meant originally that which was recoverable in a real action, while personal property was that which was recoverable in a personal action, and this English distinction between real and personal actions was derived by Bracton and other founders of our law from the *actiones in rem* and *in personam* of Justinian, though not without important modifications of the Roman doctrine (*d*).

In connection with the distinctions between movable and immovable, and between real and personal property, we must notice the legal significance of the term chattel. This word has apparently three different meanings in English law:

1. A movable physical object; for example, a horse, a book, or a shilling, as contrasted with a piece of land.

2. Movable property, whether corporeal or incorporeal; that is to say, chattels in the first sense together with all proprietary rights except those which are classed as immovable. In this usage debts, shares, contracts, and other choses in action are chattels, no less than furniture or stock-in-trade. So also are patents, copyrights, and other rights *in rem* which are not rights over land. This double use of the word chattel to indicate both material things and rights is simply an application, within the sphere of movable property, of the metonymy which is the source of the distinction between corporeal and incorporeal property.

3. Personal property, whether movable or immovable, as opposed to real property. In this sense leaseholds are classed as chattels, because of the special rule by which they are excluded from the domain of real property.

113. Rights in re propria in immaterial things

The subject-matter of a right of property is either a material or an immaterial thing. A material thing is a physical object;

(*d*) In English law the real action was one that gave the *res* back to the plaintiff: personal actions did not originally do this (Holdsworth, *H.E.L.*, II. 247). In classical Roman law the *condemnatio* even in an *actio in rem* was primarily for a sum of money (Gaius IV. 48; Buckland, *Text-book of Roman Law* (2nd ed. 1932) 658). Another difference was that the English real action was confined to the recovery of certain interests in land held by free tenure (Holdsworth, *H.E.L.*, II. 261); the Roman *actio in rem* was not thus limited. See generally T. C. Williams, "The Terms Real and Personal in English Law" (1888) 4 L.Q.R. 394.

an immaterial thing is anything else which may be the subject-matter of a right (*e*). It is to things of the former class that the law of property almost wholly relates. In the great majority of cases a right of property is a right to the uses of a material object (*f*). It is the chief purpose of this department of the law to allot to every man his portion in the material instruments of human well-being—to divide the earth and the fullness of it among the men who live in it. The only immaterial things which are recognised by law as the subject-matter of rights of this description are the various *immaterial products of human skill and labour*. Speaking generally we may say that in modern law every man owns that which he creates. That which he produces is his, and he has an exclusive right to the use and benefit of it. The immaterial product of a man's brains may be as valuable as his land or his goods. The law, therefore, gives him a proprietary right in it, and the unauthorised use of it by other persons is a violation of his ownership, no less than theft or trespass is. These immaterial forms of property are of five kinds (*g*) :—

1. *Patents*. The subject-matter of a patent-right is an invention. He whose skill or labour produces the idea of a new

(*e*) Under the head of material things we must class the *qualities* of matter so far as they are capable in law of being in themselves the objects of rights. The qualities which thus admit of separate legal appropriation are two in number, namely force and space. Electricity is in law a chattel, which can be owned, sold, stolen, and otherwise rightfully and wrongfully dealt with. Definite portions of empty space are capable of appropriation and ownership, no less than the material objects with which other portions of space are filled. The interior of my house is as much mine as are the walls and the roof. It is commonly said that the owner of land owns also the space above the surface *usque ad coelum*. Whether this is truly so is a doubtful point as the law stands, but there is no theoretical difficulty in allowing the validity of such a claim to the ownership of empty space.

(*f*) The material object that is the subject-matter of the right of property may be valued not for its own sake but as a means to the acquisition of other objects or of services. This is true of coins and bank notes, cheques, shares and bonds. The last three are a compound of proprietary right *in rem* and *in personam*: *in rem* in respect of the piece of paper, and *in personam* in respect of the money to which the holder of the paper is entitled. It will be remembered that in the present chapter proprietary rights *in personam* are not being considered.

(*g*) The distinction between *corporeal* and *incorporeal* things must not be confounded with the present distinction between *material* and *immaterial* things. The latter is a logical distinction, but the former is a mere artifice of speech. An incorporeal thing is a kind of right, namely, any right which is not identified with some material thing which is its subject-matter. An immaterial thing is not a right but the subject-matter of one. It is any subject-matter of a right except a material object.

process, instrument, or manufacture, has that idea as his own in law. He alone is entitled to use it and to draw from it the profit inherent in it.

2. *Literary copyright.* The subject-matter of this right is the literary expression of facts or thoughts. He to whose skill or labour this expression is due has in it a proprietary right of exclusive use.

3. *Artistic copyright.* Artistic design in all its various forms, such as drawing, painting, sculpture, and photography, is the subject-matter of a right of exclusive use analogous to literary copyright. The creations of an artist's skill or of a photographer's labour are his exclusive property. The object of this right is not the material thing produced, but the *form* impressed upon it by the maker. The picture, in the concrete sense of the material paint and canvas, belongs to him who purchases it; but the picture, in the abstract sense of the artistic form made visible by that paint and canvas, belongs to him who made it. The former is material property, the latter is immaterial. The right in each case is one of exclusive use. The right to the material picture is infringed by destroying it or taking it away. The right to the immaterial picture is infringed by making material pictures which embody it.

4. *Musical and dramatic copyright.* A fourth class of immaterial things consists of musical and dramatic works. The immaterial product of the skill of the musician or the playwright is the subject-matter of a proprietary right of exclusive use which is infringed by any unauthorised performance or representation.

5. *Commercial good-will; trade-marks and trade-names.* The fifth and last species of immaterial things includes commercial good-will and the special forms of it known as trade-marks and trade-names. He who by his skill and labour establishes a business acquires thereby an interest in the good-will of it, that is to say, in the established disposition of customers to resort to him. To this good-will he has an exclusive right which is violated by any one who seeks to make use of it for his own advantage, as by falsely representing to the public that he is himself carrying on the business in question. Special forms of this right of commercial good-will are rights to trade-names and trade-marks. Every man has an exclusive right to the name

under which he carries on business or sells his goods—to this extent at least that no one is at liberty to use that name for the purpose of deceiving the public and so injuring the owner of it. He has a similar right to the exclusive use of the marks which he impresses upon his goods, and by which they are known and identified in the market as his.

114. Leases

Having now considered the different kinds of rights *in re propria* which fall within the law of property, we proceed to deal with the various rights *in re aliena* to which they may be subject. As already stated (*h*), the chief of these are four in number, namely Leases, Servitudes, Securities, and Trusts. The nature of a trust has been sufficiently examined in another connection (*i*), and it is necessary here to consider the other three types only (*j*). And first of leases or tenancies.

Although a lease of land and a bailment of chattels are transactions of essentially the same nature, there is no term which, in its recognised use, is sufficiently wide to include both. The term bailment is never applied to the tenancy of land, and although the term lease is not wholly inapplicable in the case of chattels, its use in this connection is subject to arbitrary limitations. It is necessary, therefore, in the interests of orderly classification, to do some violence to received usage, in adopting the term lease as a generic expression to include not merely the tenancy of land, but all kinds of bailments of chattels, and all encumbrances of incorporeal property which possess the same essential nature as a tenancy of land.

A lease, in this generic sense, is that form of encumbrance which consists in a right to the possession and use of property owned by some other person (*k*). It is the outcome of the

(*h*) *Supra*, § 43.

(*i*) *Supra*, § 46.

(*j*) Encumbrances are not confined to the law of property, but pertain to the law of obligations also. Choses in action may be mortgaged, settled in trust, or otherwise made the subject-matter of *jura in re aliena*, no less than land and chattels. Much, therefore, of what is to be said here touching the nature of the different forms of encumbrance is equally applicable to the law of rights *in personam*.

(*k*) A licence to use property is traditionally distinguished from a lease in the respect that a licensee does not have possession. But this distinction has recently been blurred by English courts, which have recognised the possibility

separation of ownership and possession. This separation of ownership and possession may be either rightful or wrongful, and if rightful it is an encumbrance of the owner's title (*l*).

The right which is thus encumbered by a lease is usually the ownership of a material object, and more particularly the ownership of land. Here as elsewhere the material object is identified in speech with the right itself. We say that the *land* is leased, just as we say that the land is owned or possessed. The lessee of land is he who rightfully possesses it, but does not own it. The lessor of land is he who owns it, but who has transferred the possession of it to another. Encumbrance by way of lease is not confined, however, to the right of ownership of a material object. All rights may be leased which can be possessed, that is to say, which admit of continuing exercise; and no rights can be leased which cannot be possessed, that is to say, which are extinguished by their exercise. A servitude appurtenant to land, such as a right of way, is leased along with the land itself. The owner of a lease may encumber it with a sub-lease. The owner of a patent or copyright may grant a lease of it for a term of years, entitling the lessee to the exercise and use of the right but not to the ownership of it. Even obligations may be encumbered in the same fashion, provided that they admit of continuing or repeated exercise; for example, annuities, shares, money in the public funds, or interest-bearing debts. All these may be rightfully possessed without being owned, and owned without being possessed, as when they are settled in trust for a tenant for life with remainder to some one else.

Is it essential that a lease should be of less duration than the right which is subject to it? This is almost invariably the case; land is leased for a term of years or for life, but not in perpetuity; the owner of a thing owns it for ever, but the lessee of it possesses it for a time. We may be tempted, therefore, to regard this

of a possessory licence. See the criticism by A. D. Hargreaves in (1953) 69 L.Q.R. 466.

(*l*) We have already seen that freehold estates in land less than the fee simple are regarded as parts of ownership and not as encumbrances upon ownership. This contrast between, say, the estate for life (otherwise called life interest), which is regarded as part of ownership, and the lease for a term of years, which is regarded as an encumbrance upon ownership, is a peculiarity of English law. In Roman law the usufruct (the analogy of our estate for life), was regarded as an encumbrance.

Possession by way of *security* only, *e.g.*, a pledge, is from one point of view a lease and from another point of view a security.

diference of duration as essential, and to define a lease as a right to the temporary exercise of a right vested in some one else. But this is not so. There is no objection in principle to a lease of land in perpetuity, or to a lease of a patent or copyright for the full term of its existence. It may be objected that a lease of this description would not be a true lease or encumbrance at all, but an assignment of the right itself; that the grantee would become the owner of the right, and not a mere encumbrancer; and in favour of this contention it may be pointed out that a sub-lease for the whole term is construed in English law as an assignment of the term, a sub-lease being necessarily shorter than the term, if only by a single day (*m*).

Whatever the actual rule of English law may be, however, there is nothing in legal theory to justify us in asserting that any such difference of duration is essential to the existence of a true lease. A lease exists whenever the rightful possession of a thing is separated from the ownership of it; and although this separation is usually temporary, there is no difficulty in supposing it permanent. I may own a permanent right to exercise another right without owning the latter right itself. The ownership may remain dormant, deprived of any right of exercise and enjoyment, in the hands of the lessor. I am not necessarily the owner of a patent, because I have acquired by contract with the owner a right to the exclusive use of it during the whole term of its duration. So far as legal principle is concerned, I may still remain the owner of a lease, although I may have granted a sub-lease to another for the whole residue of the term. To assign a lease and to sub-let it for the whole term are in the intention of the parties and in legal theory two entirely different transactions. The assignment is a substitution of one tenant for another, the assignor retaining no rights whatever. The sub-lease, on the contrary, is designed to leave the original relation of landlord and tenant untouched, the sub-lessee being the tenant of the lessee and not of the original lessor (*n*).

(*m*) *Beardman* v. *Wilson* (1868) L.R. 4 C.P. 57.

(*n*) An example of a lease in perpetuity is the emphyteusis of Roman law. In consequence of its perpetuity the Roman lawyers were divided in opinion as to the true position of the tenant or *emphyteuta*, some regarding him as an owner and others as an encumbrancer. The law was finally settled in the latter sense. Just. *Inst.* III. 24. 3.

115. Servitudes

A servitude is that form of encumbrance which consists in a right to the limited use of a piece of land without the possession of it; for example, a right of way over it, a right to the passage of light across it to the windows of a house on the adjoining land, a right to depasture cattle upon it, or a right to derive support from it for the foundations of an adjoining building (*o*).

It is an essential characteristic of a servitude that it does not involve the possession of the land over which it exists. This is the difference between a servitude and a lease. A lease of land is the rightful possession and use without the ownership of it, while a servitude over land is the rightful use without either the ownership or the possession of it. There are two distinct methods in which I may acquire a road across another man's property. I may agree with him for the exclusive possession of a defined strip of the land; or I may agree with him for the use of such a strip for the sole purpose of passage, without any exclusive possession or occupation of it. In the first case I acquire a lease; in the second a servitude (*p*).

Servitudes are of two kinds, which may be distinguished as private and public. A private servitude is one vested in a determinate individual; for example, a right of way, of light, or of support, vested in the owner of one piece of land over an adjoining piece or a right granted to one person of fishing in the water of another, or of mining in another's land. A public

(*o*) The term servitude (*servitus*) is derived from Roman law, and has scarcely succeeded in obtaining recognition as a technical term of English law. It is better, however, than the English *easement*, inasmuch as easements are in the strict sense only one class of servitudes as above defined. The present discussion must be taken as confined to English law. No attempt is made to state the Roman law of servitudes.

(*p*) In English law it is only over land that servitudes are recognised. Land is of such a nature as to admit readily of non-possessory uses, whereas the use of a chattel usually involves the possession of it for the time being, however brief that time may be. The non-possessory use of chattels, even when it exists, is not recognised by the law as an encumbrance of the ownership, so as to run with it into the hands of assignees. A possible exception in equity is indicated by the decision of the Privy Council in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926] A.C. 108. This case was not followed, however, by the decision of the High Court in *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [1958] 2 Q.B. 146. The continuing rights of patentees in respect of chattels manufactured under their licence may also be mentioned (see *National Phonograph Co.* v. *Menck* [1911] A.C. 336), but the rights reserved are generally in respect of price-maintenance, not user. In Roman law servitudes in respect of chattels were possible, *e.g.*, the usufruct of a slave.

servitude is one vested in the public at large or in some class of indeterminate individuals; for example, the right of the public to a highway over land in private ownership; the right of the public to navigate a river of which the bed belongs to some private person, the right of the inhabitants of a parish to use a certain piece of private ground for the purposes of recreation.

Servitudes are further distinguishable in the language of English law as being either appurtenant or in gross. A servitude appurtenant is one which is not merely an encumbrance of one piece of land, but is also accessory to another piece. It is a right of using one piece for the benefit of another; as in the case of a right of way from A's house to the high road across B's field, or a right of support for a building, or a right to the access of light to a window. The land which is burdened with such a servitude is called the servient land or tenement; that which has the benefit of it is called the dominant land or tenement. The servitude runs with each of the tenements into the hands of successive owners and occupiers. Both the benefit and the burden of it are concurrent with the ownership of the lands concerned. A servitude is said to be in gross, on the other hand, when it is not so attached and accessory to any dominant tenement for whose benefit it exists. An example is a public right of way or of navigation or of recreation, or a private right of fishing, pasturage, or mining (*q*).

116. Securities

A security is an encumbrance, the purpose of which is to ensure or facilitate the fulfilment or enjoyment of some other right (usually though not necessarily a debt) vested in the same person (*r*). Such securities are of two kinds, which may be

(*q*) An *easement*, in the strictest sense, means a particular kind of servitude, namely, a private and appurtenant servitude which is not a right to take any *profit* from the servient land. A right of way or of light or of support is an easement; but a right to pasture cattle or to dig for minerals is in English law a distinct form of servitude known as a profit. This distinction is unknown in other systems, and it has no significance in juridical theory. Its practical importance lies in the rule that an easement must (it seems) be appurtenant, while a profit may be either appurtenant or in gross.

(*r*) The term security is also used in a wider sense to include not only securities over property, but also the contract of suretyship or guarantee—a mode of ensuring the payment of a debt by the addition of a second and accessory debtor, from whom payment may be obtained on default of the principal debtor. With this form of security we are not here concerned, since it pertains not to the law of property, but to that of obligations.

distinguished as mortgages and liens, if we use the latter term in its widest permissible sense (*s*). In considering the nature of this distinction we must first notice a plausible but erroneous explanation. A mortgage, it is sometimes said, is a security created by the *transfer* of the debtor's property to the creditor, while a lien is merely an encumbrance of some sort created in favour of the creditor over property which remains vested in the debtor; a mortgagee is the owner of the property, while a pledgee or other lienee is merely an encumbrancer of it. This, however, is not a strictly accurate account of the matter, though it is true in the great majority of cases. A mortgage may be created by way of encumbrance, no less than by way of transfer (*t*); and a mortgagee does not necessarily become the owner of the property mortgaged. A lease, for example, is mortgaged at law, not by the assignment of it, but by the grant of a sub-lease to the creditor, so that the mortgagee becomes not the owner of the lease but an encumbrancer of it. Similarly, the legal fee simple in freehold land is mortgaged at law by the grant to the mortgagee of a long term of years (*u*). A mortgage by transfer is now possible in England only in the case of chattels

Inasmuch, therefore, as a mortgage is not necessarily the transfer of the property to the creditor, what is its essential characteristic? The question is one of considerable difficulty, but the true solution is apparently this. A lien is a right which is *in its own nature* a security for a debt and nothing more; for example, a right to retain possession of a chattel until payment, a right to distrain for rent, or a right to receive payment out of a certain fund. A mortgage, on the contrary, is a right which is in its own nature an independent or principal right, and not a mere security for another right, but which is artificially cut down and limited, so that it may serve in the particular case as a security and nothing more; for example, the fee simple of land, a lease of land for a term of years, or the ownership of a chattel.

(*s*) The word lien has not succeeded in attaining any fixed application as a technical term of English law. Its use is capricious and uncertain, and we are at liberty, therefore, to appropriate it for the purpose mentioned in the text, i.e., to include all forms of security except mortgages.

(*t*) As we shall see, a mortgage by way of transfer is none the less an encumbrance also—an encumbrance, that is to say, of the beneficial ownership which remains vested in the mortgagor.

(*u*) Law of Property Act, 1925, ss. 85, 86.

The right of the lienee is vested in him *absolutely*, and not merely by way of security; for it is itself nothing more than a security. The right of a mortgagee, on the contrary, is vested in him conditionally and *by way of security only*, for it is in itself something more than a mere security. A lien cannot survive the debt secured; it ceases and determines *ipso jure* on the extinction of the debt. It is merely the shadow, so to speak, cast by the debt upon the property of the debtor (*a*). But the right vested in a mortgagee has an independent existence. It will, or may, remain outstanding in the mortgagee even after the extinction of the debt. When thus left outstanding, it must be re-transferred or surrendered to the mortgagor, and the right of the mortgagor to this re-assignment or surrender is called his right or equity of redemption. The existence of such an equity of redemption is therefore the test of a mortgage. In liens there is no such right, for there is nothing to redeem. The creditor owns no right which he can be bound to give back or surrender to his debtor. For his right of security has come to its natural and necessary termination with the termination of the right secured (*b*).

Mortgages are created either by the transfer of the debtor's right to the creditor, or by the encumbrance of it in his favour. The first of these methods is peculiar to mortgages, for liens can be created only by way of encumbrance. Whenever a debtor

(*a*) Of course, if the lienor has in pursuance of his rights taken possession of the property, the discharge of the debt will not *ipso facto* destroy the possession, but merely his right to retain it against the debtor. Henceforth the lienor holds as bailee at will from the debtor; as against third parties he has possession for many purposes, *e.g.*, theft.

(*b*) It is not essential to a mortgage that the right vested in the mortgagee should in actual fact survive the right secured by it, so as to remain outstanding and redeemable. It is sufficient that in its nature it should be capable of doing so, and therefore requires to be artificially restricted by an obligation or condition of re-assignment or surrender. This re-assignment or surrender may be effected by act of the law, no less than by the act of the mortgagee. The creation of a term of years in land by way of security is necessarily a mortgage and not a lien, even though by s. 116 of the Law of Property Act, 1925, such a term comes to an end *ipso jure* on the payment of the debt.

A new type of security was created by the Law of Property Act, 1925, s. 87, in the charge by deed by way of legal mortgage. On the face of it this might seem to be a lien, not a mortgage; yet it is provided that "the mortgagee shall have the same protection, powers and remedies" as if a mortgage term had been created. It is generally supposed that these words have not the effect of creating a mortgage term in law, and accordingly that the creation of a legal charge over a lease is not a breach of a covenant against underletting.

transfers his right to the creditor by way of security, the result is necessarily a mortgage; for there can be no connection between the duration of the debt so secured and the natural duration of the right so transferred. The right transferred may survive the debt, and the debtor therefore retains the right of redemption which is the infallible test of a mortgage. When on the other hand a debtor *encumbers* his right in favour of the creditor, the security so created is either a mortgage or a lien according to circumstances. It is a mortgage, if the encumbrance so created is independent of the debt secured in respect of its natural duration; for example, a term of years or a permanent servitude. It is a lien, if the encumbrance is in respect of its natural duration dependent on, and coincident with, the debt secured; for example, a pledge, a vendor's lien, a landlord's right of distress, or an equitable charge on a fund.

Speaking generally, any alienable and valuable right whatever may be the subject-matter of a mortgage. Whatever can be transferred can be transferred by way of mortgage; whatever can be encumbered can be encumbered by way of mortgage. Whether I own land, or chattels, or debts, or shares, or patents, or copyrights, or leases, or servitudes, or equitable interests in trust funds, or the benefit of a contract, I may so deal with them as to constitute a valid mortgage security. Even a mortgage itself may be transferred by the mortgagee to some creditor of his own by way of mortgage, such a mortgage of a mortgage being known as a sub-mortgage.

In a mortgage by way of transfer the debtor, though he assigns the property to his creditor, remains none the less the beneficial or equitable owner of it himself (*c*). A mortgagor, by virtue of his equity of redemption, has more than a mere personal right against the mortgagee to the re-conveyance of the property; he is already the beneficial owner of it. This double ownership of mortgaged property is merely a special form of trust. The mortgagee holds in trust for the mortgagor, and has himself no beneficial interest, save so far as is required for the

(*c*) In the case of the mortgage of a legal estate in freehold land by demise, which is the only form of legal mortgage of a legal estate in freehold now possible, the mortgagor is the legal owner of the freehold interest and the beneficial or equitable owner of the leasehold interest created by way of mortgage.

purposes of an effective security. On the payment or extinction of the debt the mortgagee becomes a mere trustee and nothing more; the ownership remains vested in him, but is now bare of any vestige of beneficial interest. A mortgage, therefore, has a double aspect and nature. Viewed in respect of the *nudum dominium* vested in the mortgagee, it is a transfer of the property; viewed in respect of the beneficial ownership which remains vested in the mortgagor, it is merely an encumbrance of it.

The prominence of mortgage as the most important form of security is a peculiarity of English law. In Roman law, and in the modern Continental systems based upon it, the place assumed by mortgages in our system is taken by the lien (*hypotheca*) in its various forms. The Roman mortgage (*fiducia*) fell wholly out of use before the time of Justinian, having been displaced by the superior simplicity and convenience of the *hypotheca* (*d*); and in this respect modern Continental law has followed the Roman. There can be no doubt that a similar substitution of the lien for the mortgage would immensely simplify and improve the law of England. The complexity and difficulty of the English law of security—due entirely to the adoption of the system of mortgages—must be a source of amazement to a French or German lawyer. Whatever can be done by way of mortgage in securing a debt can be done equally well by way of lien, and the lien avoids all that extraordinary disturbance and complication of legal relations which is essentially involved in the mortgage. The best type of security is that which combines the most efficient protection of the creditor with the least interference with the rights of the debtor, and in this latter respect the mortgage falls far short of the ideal. The true form of security is a lien, leaving the full legal and equitable ownership in the debtor, but vesting in the creditor such rights and powers (as of sale, possession, and so forth) as are required, according to the nature of the subject-matter, to give the creditor sufficient protection, and lapsing *ipso jure* with the discharge of the debt secured (*e*).

Liens are of various kinds, none of which present any difficulty or require any special consideration.

(*d*) Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 314 *et seq.*

(*e*) This is one of the reforms effected by the Torrens system of real property law in force in Australasia. The so-called mortgages of land under that system are in reality merely liens.

1. *Possessory liens*—consisting in the right to retain possession of chattels or other property of the debtor. Examples are pledges of chattels, and the liens of innkeepers, solicitors, and vendors of goods.

2. *Rights of distress or seizure*—consisting in the right to take possession of the property of the debtor, examples being the right of distress for rent, and the right of the occupier of land to distrain cattle trespassing on it.

3. *Powers of sale.* This is a form of security seldom found in isolation, for it is usually incidental to the right of possession conferred by one or other of the two preceding forms of lien.

4. *Powers of forfeiture*—consisting in a power vested in the creditor of destroying in his own interest some adverse right vested in the debtor. Examples are a landlord's right of re-entry upon his tenant, and a vendor's right of forfeiting the deposit paid by the purchaser.

5. *Charges*—consisting in the right of a creditor to receive payment out of some specific fund or out of the proceeds of the realisation of specific property. The fund or property is said to be charged with the debt.

117. Modes of acquisition: possession

Having considered the various forms which proprietary rights *in rem* assume, we proceed to examine the modes of their acquisition. An attempt to give a complete list of these titles would here serve no useful purpose, and we shall confine our attention to four of them which are of primary importance. These are the following: Possession, Prescription, Agreement, and Inheritance.

The possession of a material object is a title to the ownership of it. He who claims a chattel or a piece of land as his, and makes good his claim in *fact* by way of possession, makes it good in *law* also by way of ownership. There is, however, an important distinction to be drawn. For the thing so possessed may, or may not, already belong to some other person. If, when possession of it is taken by the claimant, it is as yet the property of no one—*res nullius* as the Romans said—the possessor acquires a title good against all the world. The fish of the sea and the fowls of the air belong by an absolute title to him who

first succeeds in obtaining possession of them. This mode of acquisition is known in Roman law as *occupatio*.

On the other hand, the thing of which possession is taken may already be the property of some one else. In this case the title acquired by possession is good, indeed, against all third persons, but is of no validity at all against the true owner. Possession, even when consciously wrongful, is allowed as a title of right against all persons who cannot show a better, because a prior, title in themselves. Save with respect to the rights of the original proprietor, my rights to the watch in my pocket are much the same, whether I bought it honestly, or found it, or abstracted it from the pocket of some one else. If it is stolen from me, the law will help me to the recovery of it. I can effectually sell it, lend it, give it away, or bequeath it, and it will go on my death intestate to my next of kin. Whoever acquires it from me, however, acquires in general nothing save my limited and imperfect title to it, and holds it, as I do, subject to the superior claims of the original owner.

A thing owned by one man and thus adversely possessed by another has in truth two owners. The ownership of the one is absolute and perfect, while that of the other is relative and imperfect, and is often called, by reason of its origin in possession, possessory ownership.

If a possessory owner is wrongfully deprived of the thing by a person other than the true owner, he can recover it. For the defendant cannot set up as a defence his own possessory title, since it is later than, and consequently inferior to, the possessory title of the plaintiff. Nor can he set up as a defence the title of the true owner—the *jus tertii*, as it is called; the plaintiff has a better, because an earlier, title than the defendant, and it is irrelevant that the title of some other person, not a party to the suit, is better still. The expediency of this doctrine of possessory ownership is clear. Were it not for such a rule, force and fraud would be left to determine all disputes as to possession, between persons of whom neither could show an unimpeachable title to the thing as the true owner of it (*f*).

(*f*) Applications of the rule of possessory ownership may be seen in the cases of *Armory* v. *Delamirie* (1722) 1 Str. 504; 1 Smith L.C. (13th ed.), 393; *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1; and *Perry* v. *Clissold* [1907] A.C. 73. For the contrasting rules of Roman law see Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 62 *et seq.*

118. Prescription

Prescription (*g*) may be defined as the effect of lapse of time in creating and destroying rights; it is the operation of time as a vestitive fact. It is of two kinds, namely (1) positive or acquisitive prescription and (2) negative or extinctive prescription. The former is the creation of a right, the latter is the destruction of one, by the lapse of time. An example of the former is the acquisition of a right of way by the *de facto* use of it for twenty years. An instance of the latter is the destruction of the right to sue for a debt after six years from the time at which it first became payable.

Lapse of time, therefore, has two opposite effects. In positive prescription it is a title of right, but in negative prescription it is a divestitive fact. Whether it shall operate in the one way or in the other depends on whether it is or is not accompanied by *possession*. Positive prescription is the investitive operation of lapse of time *with* possession, while negative prescription is the divestitive operation of lapse of time *without* possession. Long possession creates rights, and long want of possession destroys them. If I possess an easement for twenty years without owning it, I begin at the end of that period to own as well as to possess it. Conversely if I own land for twelve years without possessing it, I cease on the termination of that period either to own or to possess it. In both forms of prescription, fact and right, possession and ownership, tend to coincidence. *Ex facto oritur ius*. If the root of fact is destroyed, the right growing out of it withers and dies in course of time. If the fact is present, the right will in the fullness of time proceed from it (*h*).

In many cases the two forms of prescription coincide. The property which one person loses through long dispossession is

(*g*) The term prescription (*praescriptio*) has its origin in Roman law. It meant originally a particular part of the *formula* or written pleadings in a law suit—that portion, namely, which was written first (*praescriptum*) by way of a preliminary objection on the part of the defendant. *Praescriptio fori*, for example, meant a preliminary plea to the jurisdiction of the court. So *praescriptio longi temporis* was a plea that the claim of the plaintiff was barred by lapse of time. Hence, by way of abbreviation and metonymy (other forms of prescription being forgotten) prescription in the modern sense. For a comparison of the Roman and English rules of prescription see Buckland and McNair, *Roman Law and Common Law* (2nd ed.). 117 *et seq.*, 413 *et seq.*

(*h*) For a criticism of the English rules of positive prescription see Holdsworth, *Historical Introduction to the Land Law*, 279 *et seq.*

often at the same time acquired by some one else through long possession. Yet this is not always so, and it is necessary in many instances to know whether legal effect is given to long possession, in which case the prescription is positive, or to long want of possession, in which case the prescription is negative. I may, for example, be continuously out of possession of my land for twelve years, without any other single person having continuously held possession of it for that length of time. It may have been in the hands of a series of trespassers against me and against each other. In this case, if the legally recognised form of prescription is positive, it is inoperative, and I retain my ownership. But if the law recognises negative prescription instead of positive (as in this case our own system does) my title will be extinguished. Who in such circumstances will acquire the right which I thus lose, depends not on the law of prescription, but on the rules as to the acquisition of things which have no owner. The doctrine that prior possession is a good title against all but the true owner, will confer on the first of a series of adverse possessors a good title against all the world so soon as the title of the true owner has been extinguished by negative prescription (*i*).

The rational basis of prescription is to be found in the presumption of the coincidence of possession and ownership, of fact and of right. Owners are usually possessors, and possessors are usually owners. Fact and right are normally coincident; therefore the former is evidence of the latter. That a thing is possessed *de facto* is evidence that it is owned *de jure*. That it is not possessed raises a presumption that it is not owned either. Want of possession is evidence of want of title. The longer the possession or want of possession has continued, the greater is its evidential value. That I have occupied land for a day raises a very slight presumption that I am the owner of it; but if I continue to occupy it for twenty years, the presumption becomes

(*i*) *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1. But if the first adverse possessor took under an instrument of conveyance executed by a person who had no right to convey, he will be estopped from denying the validity of the deed as against other beneficiaries under it: *Dalton* v. *Fitzgerald* [1897] 2 Ch. 86.

For other consequences of the rule that prescription by adverse occupation of land is negative, not positive, see *Tichborne* v. *Weir* (1892) 67 L.T. 735 and *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391, both commented upon by Holdsworth, *Historical Introduction to the Land Law*, 286 *et seq.*

indefinitely stronger. If I have a claim of debt against a man, unfulfilled and unenforced, the lapse of six months may have but little weight as evidence that my claim is unfounded or that it has been already satisfied; but the lapse of ten years may amount to ample proof of this.

If, therefore, I am in possession of anything in which I claim a right, I have evidence of my right which differs from all other evidence, inasmuch as it grows stronger instead of weaker with the lapse of years. The tooth of time may eat away all other proofs of title. Documents are lost, memory fails, witnesses die. But as these become of no avail, an efficient substitute is in the same measure provided by the probative force of long possession. So also with long want of possession as evidence of want of title; as the years pass, the evidence in favour of the title fades, while the presumption against it grows ever stronger.

Here, then, we have the chief foundation of the law of prescription. For in this case, as in so many others, the law has deemed it expedient to confer upon a certain species of evidence conclusive force. It has established a conclusive presumption in favour of the rightfulness of long possession, and against the validity of claims which are vitiated by long want of possession. Lapse of time is recognised as creative and destructive of rights, instead of merely as evidence for and against their existence. In substance, though not always in form, prescription has been advanced from the law of evidence to a place in the substantive law.

The conclusive presumption on which prescription is thus founded falls, like all other conclusive presumptions, more or less wide of the truth. Yet in the long run, if used with due safeguards, it is the instrument of justice. It is not true as a matter of fact that a claim unenforced for six years is always unfounded, but it may be wise for the law to act as if it were true. For the effect of thus exaggerating the evidential value of lapse of time is to prevent the persons concerned from permitting such delays as would render their claims in reality doubtful. In order to avoid the difficulty and error that necessarily result from the lapse of time, the presumption of the coincidence of fact and right is rightly accepted as final

after a certain number of years. Whoever wishes to dispute this presumption must do so within that period; otherwise his right, if he has one, will be forfeited as a penalty for his neglect. *Vigilantibus non dormientibus jura subveniunt.*

Prescription is not limited to rights *in rem*. It is found within the sphere of obligations as well as within that of property. Positive prescription, however, is possible only in the case of rights which admit of continuing exercise and enjoyment. Most rights of this nature are rights *in rem*. Rights *in personam* are commonly extinguished by their exercise, and therefore cannot be acquired by prescription. And even in that minority of cases in which positive prescription is theoretically possible, modern law, at least, has seen no occasion for allowing it. This form of prescription, therefore, is peculiar to the law of property. Negative prescription, on the other hand, is common to the law of property and to that of obligations. Most obligations are destroyed by the lapse of time, for since the ownership of them cannot be accompanied by their continuing exercise, there is nothing to preserve them from the destructive influence of delay in their enforcement (*k*).

Negative prescription is of two kinds, which may be distinguished as perfect and imperfect. The latter is commonly called the limitation of actions, the former being then distinguished as prescription in a narrow and specific sense. Perfect prescription is the destruction of the principal right itself, while imperfect prescription is merely the destruction of the accessory *right of action*, the principal right remaining in existence. In other words, in the one case the right is wholly destroyed, but in the other it is merely reduced from a perfect and enforceable right to one which is imperfect and unenforceable. In the case of the mere limitation of actions the still subsisting right may act as a defence, though not as a ground of action; and subsequent events, such as a later promise to pay the "barred" debt, may revive the right of action.

An example of perfect prescription is the destruction of the

(*k*) It is clear, however, that until a debt or other obligation is actually due and enforceable, no presumption against its validity can arise through the lapse of time. Therefore prescription runs, not from the day on which the obligation first arises, but from that on which it first becomes enforceable *Agere non valenti non currit praescriptio.*

ownership of land through dispossession for twelve years. The owner of land who has been out of possession for that period does not merely lose his right of action for the recovery of it, but also loses the right of ownership itself (*l*). So also the title to chattels is now extinguished as soon as the right of action for wrongful conversion or detention is extinguished (*m*). An example of imperfect prescription, on the other hand, is the case of the creditor. He loses in six years his right of action for the debt; but the debt itself is not extinguished, and continues to be due and owing (*n*).

119. Agreement

We have already considered the general theory of agreement as a title of right. It will be remembered that we used the term to include not merely contracts but all other bilateral acts in the law, that is to say, all expressions of the consenting wills of two or more persons directed to an alteration of their legal relations. Agreement in this wide sense is no less important in the law of property than in that of obligations.

As a title of proprietary rights *in rem*, agreement is of two kinds, namely assignment and grant. By the former, existing rights are transferred from one owner to another; by the latter, new rights are created by way of encumbrance upon the existing rights of the grantor. The grant of a lease of land is the creation by agreement, between grantor and grantee, of a leasehold vested in the latter and encumbering the freehold vested in the former. The assignment of a lease, on the other hand, is the transfer by agreement of a subsisting leasehold from the assignor to the assignee.

Agreement is either formal or informal. We have already sufficiently considered the significance of this formal element in general. There is, however, one formality known to the law of property which required special notice, namely, the delivery of possession. That *traditio* was an essential element in the voluntary transfer of *dominium* was a fundamental principle of Roman law. *Traditionibus et usucapionibus dominia rerum, non*

(*l*) This rule is now contained in the Limitation Act, 1939, s. 16.
(*m*) Limitation Act, 1939, s. 3 (2), altering the previous law.
(*n*) Limitation Act, 1939, s. 2.

nudis pactis transferuntur (*o*). So in English law, until the year 1845, land could in theory be conveyed by no other method than by the delivery of possession. No deed of conveyance was in itself of any effect. It is true that in practice this rule was for centuries evaded by taking advantage of that fictitious delivery of possession which was rendered possible by the Statute of Uses. But it is only by virtue of a modern statute (*p*), passed in the year mentioned, that the ownership of land can in legal theory be transferred without the possession of it. In the case of chattels the common law itself succeeded, centuries ago, in cutting down to a very large extent the older principle. Chattels can be assigned by deed without delivery, and also by sale without delivery. The equitable ownership in both land and chattels can be transferred by mere declaration of trust, without transfer of possession. But a gift of chattels to take effect at law requires to this day to be completed by the transfer of possession (*q*).

In this requirement of *traditio* we may see a curious remnant of an earlier phase of thought. It is a relic of the times when the law attributed to the fact of possession a degree of importance which at the present day seems altogether disproportionate. Ownership seems to have been deemed little more than an accessory of possession. An owner who had ceased to possess had almost ceased to own, for he was deprived of his most important rights. A person who had not yet succeeded in obtaining possession was not an owner at all, however valid his claim to the possession may have been. The transfer of a thing was conceived as consisting essentially in the transfer of the possession of it. The transfer of *rights*, apart from the visible transfer of *things*, had not yet been thought of.

So far as the requirement of *traditio* is still justifiably retained by the law, it is to be regarded as a formality accessory to the agreement, and serving the same purposes as other formalities. It supplies evidence of the agreement, and it preserves for the parties a *locus poenitentiae*, lest they be prematurely bound by unconsidered consent (*r*).

(*o*) C. 2. 3. 20.
(*p*) Stat. 8 & 9 Vict. c. 106, s. 2.
(*q*) *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57.
(*r*) D. 50. 17. 54.

It is a leading principle of law that the title of a grantee or assignee cannot be better than that of his grantor or assignor. *Nemo plus juris ad alium transferre potest, quam ipse haberet* (*s*). No man can transfer or encumber a right which is not his. To this rule, however, there is a considerable number of important exceptions. The rule is ancient, and most of the exceptions are modern; and we may anticipate that the future course of legal development will show further derogations from the early principle. There are two conflicting interests in the matter. The older rule is devised for the security of established titles. Under its protection he who succeeds in obtaining a perfect title may sit down in peace and keep his property against all the world. The exceptions, on the contrary, are established in the interests of those who seek to *acquire* property, not of those who seek to *keep* it. The easier it is to acquire a title with safety, the more difficult it is to keep one in safety; and the law must make a compromise between these two adverse interests. The modern tendency is more and more to sacrifice the security of tenure given by the older rule, to the facilities for safe and speedy acquisition and disposition given by the exceptions to it.

These exceptions are of two kinds: (1) those due to the separation of legal from equitable ownership, and (2) those due to the separation of ownership from possession. We have seen already that when the legal ownership is in one man and the equitable in another, the legal owner is a trustee for the equitable. He holds the property on behalf of that other, and not for himself; and the obligation of this trusteeship is an encumbrance upon his title. Yet he may, none the less, give an unencumbered title to a third person, provided that that person gives value for what he gets, and has at the time no knowledge of the existence of the trust. This rule is known as the equitable doctrine of purchase for value without notice. No man who ignorantly and honestly purchases a defective legal title can, in general, be affected by any adverse equitable title vested in any one else. To this extent a legal owner can transfer to another more than he has himself, notwithstanding the maxim, *Nemo dat qui non habet*.

(*s*) See further on *traditio*, Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 110 *et seq*.

The second class of exceptions to the general principle includes the cases in which the possession of a thing is in one person and the ownership of it in another. Partly by the common law, and partly by various modern statutes, the possessor is in certain cases enabled to give a good title to one who deals with him in good faith believing him to be the owner. The law allows men in these cases to act on the presumption that the possessor of a thing is the owner of it; and he who honestly acts on this presumption will acquire a valid title in all events. The most notable example is the case of negotiable instruments The possessor of a bank-note may have no title to it; he may have found it or stolen it; but he can give a good title to any one who takes it from him for value and in good faith. Similarly, mercantile agents, in possession of goods belonging to their principals, can effectively transfer the ownership of them (*t*) whether they are authorised thereto or not (*u*).

120. Inheritance

The fourth and last mode of acquisition that we need consider is Inheritance. In respect of the death of their owners all rights are divisible into two classes, being either inheritable or uninheritable. A right is inheritable if it survives its owner; uninheritable if it dies with him. This division is to a large extent, though far from completely, coincident with that between proprietary and personal rights. The latter are in almost all cases so intimately connected with the personality of him in whom they are vested, that they are incapable of separate and continued existence. They are not merely *divested* by death (as are rights of every sort), but are wholly *extinguished*. In

(*t*) The Factors Act, 1889.

(*u*) Continental systems carry much further than our own the doctrine that the possessor of a chattel may confer a good title to it. Article 2279 of the French Civil Code lays down the general principle that *en fait de meubles la possession vaut titre*. In other words, the ownership of a chattel involves no *droit de suite* or *jus sequelae*, no right of following the thing into the hands of third persons who have obtained it in good faith. The rule, however, is subject to important exceptions, for it does not apply either to chattels stolen or to chattels lost. Speaking generally, therefore, it is applicable only where an owner has voluntarily entrusted the possession of the thing to some one else, as a pledgee, borrower, depositee, or agent, who has wrongfully disposed of it to some third person. Baudry-Lacantinerie, *De la Prescription*, ch. 20. See also, for very similar law, the German Civil Code, sects. 932–935, and the Italian Civil Code, sects. 707–708.

exceptional cases, however, this is not so. Some personal rights are inheritable, just as property is, an instance being the status of hereditary nobility and the political and other privileges accessory thereto.

Proprietary rights, on the other hand, are usually inheritable. In respect of them death is a divestitive, but not an extinctive fact. The exceptions, however, are numerous. A lease may be for the life of the lessee instead of for a fixed term of years. Joint ownership is such that the right of him who dies first is wholly destroyed, the survivor acquiring an exclusive title by the *jus accrescendi* or right of survivorship. In the great majority of cases, however, death destroys merely the ownership of a proprietary right, and not the right itself. Even rights of action now survive the death of both parties as a general rule (*a*).

The rights which a dead man thus leaves behind him vest in his *representative*. They pass to some person whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. This representative bears the person of the deceased, and therefore has vested in him all the inheritable rights, and has imposed upon him all the inheritable liabilities of the deceased. Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with him whom he represents. The rights which the dead man can no longer own or exercise *in propria persona*, and the obligations which he can no longer *in propria persona* fulfil, he owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality, until, his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for (*b*).

The representative of a dead man, though the property of the deceased is vested in him, is not necessarily the beneficial owner of it. He holds it on behalf of two classes of persons, among whom he himself may or may not be numbered. These are the creditors and the beneficiaries of the estate. Just as many of a man's rights survive him, so also do many of his liabilities; and

(*a*) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.
(*b*) Hereditas . . . personam . . . defuncti sustinet. D. 41. 1. 34 See Holmes, *Common Law*, 341–353. Maine, *Ancient Law*, 181–182.

these inheritable obligations pass to his representative, and must be satisfied by him. Being, however, merely the representative of another, he is not liable *in propria persona*, and his responsibility is limited by the amount of the property which he has acquired from the deceased (*c*). He possesses a double capacity, and that which is due from him in right of his executorship cannot be recovered from him in his own right.

The beneficiaries, who are entitled to the residue after satisfaction of the creditors, are of two classes: (1) those nominated by the last will of the deceased, and (2) those appointed by the law in default of any such nomination. The succession of the former is testamentary (*ex testamento*); that of the latter is intestate (*ab intestato*). As to the latter there is nothing that need here be said, save that the law is now chiefly guided by the presumed desires of the dead man (*d*), and confers the estate upon his relatives in order of proximity. In default of any known relatives the property of an intestate is claimed by the state itself, and goes as *bona vacantia* to the Crown.

Testamentary succession, on the other hand, demands further consideration. Although a dead man has no rights, a man while yet alive has the right, or speaking more exactly, the power, to determine the disposition after he is dead of the property which he leaves behind him. His last will, duly declared in the document which we significantly call by that name, is held inviolable (generally speaking) by the law. For half a century and more, the rights and responsibilities of living men may thus be determined by an instrument which was of no effect until the author of it was in his grave and had no longer any concern with the world or its affairs. This power of the dead hand (*mortua manus*) is so familiar a feature in the law that we accept it as a

(*c*) This rule was not originally recognised in Roman law, but was in substance introduced by Justinian. See Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 149 *et seq.*

(*d*) Before the succession rules in the Administration of Estates Act, 1925, were drafted, many wills were examined in Somerset House in order to determine the average testamentary provision made by those with small estates. (See Cherry, *The New Property Act: A Series of Lectures* (1926) 99.) The rules were modified by the Intestates' Estates Act, 1952, as a result of changes in the value of money since the war. In early times there was no such solicitude for the probable intention of the testator. Thus the rule of primogeniture for real property was created in the interest of the lord (Pollock and Maitland, *History of English Law before Edward I* (2nd ed. 1898) II. 262 *et seq.*). In earlier Roman law the intestacy rules were so peculiar as to create a strong dislike of intestacy (Buckland and McNair, *op. cit.*, 160, 191 *et seq.*).

matter of course, and have some difficulty in realising what a singular phenomenon it in reality is.

It is clear that some limitation must be imposed by the law upon this power of the dead over the living, and these restrictions are of three chief kinds:

(1) *Limitations of time.* It is only during a limited period after his death that the directions of a testator as to the disposition of his property are held valid. He must so order the destination of his estate that within this period the whole of it shall become vested absolutely in some one or more persons, free from all testamentary conditions and restrictions. Any attempt to retain the property *in manu mortua* beyond that limit makes the testamentary disposition of it void. In English law the period is determined by a set of elaborate rules which we need not here consider.

(2) *Limitations of amount.* A second limitation of testamentary power imposed by most legal systems is that a testator can deal with a certain proportion of his estate only, the residue being allotted by the law to those to whom he owes a duty of support, namely, his wife and children. In England this restriction upon testamentary power is found only in a very qualified form. By the Inheritance (Family Provision) Act, 1938, a dependant for whom a will does not make "reasonable provision" may apply to the court for maintenance out of part of the estate. The attitude of the courts is that this Act does not cast on testators a duty to make provision for their dependants, and that dispositions can be interfered with only if they are unreasonable (*e*).

(3) *Limitations of purpose.* The power of testamentary disposition is given to a man that he may use it for the benefit of other men who survive him; and to this end only can it be validly exercised. The dead hand will not be suffered to withdraw property from the uses of the living. No man can validly direct that his lands shall lie waste, or that his money shall be buried with him or thrown into the sea (*f*).

(*e*) *Per* Bennett J. in *Re Brownbridge* (1942) 193 L.T.J. 185. For historical and comparative discussions see Gold, Robson, Kahn-Freund, and Breslauer, "Freedom of Testation" (1938) 1 M.L.R. 296; Unger, "The Inheritance Act and the Family" (1943) 6 M.L.R. 215; and a valuable symposium in (1935) 20 Iowa L.R. 180 *et seq.* For Roman law see Buckland and McNair, *Roman Law and Common Law* (2nd ed.), 167–168.

(*f*) *Brown* v. *Burdett* (1882) 21 Ch.D. 667.

CHAPTER 14

THE LAW OF OBLIGATIONS

121. The nature of obligations

Obligation in its popular sense is merely a synonym for duty. Its legal sense, derived from Roman law, differs from this in several respects. In the first place, obligations are merely one class of duties, namely, those which are the correlatives of rights *in personam*. An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals (*a*). It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property, or reputation of others. Secondly, the term obligation is in law the name, not merely of the duty, but also of the correlative right. It denotes the legal relation or *vinculum juris* in its entirety, including the right of the one party, no less than the liability of the other. Looked at from the point of view of the person entitled, an obligation is a right; looked at from the point of view of the person bound, it is a duty. We may say either that the creditor acquires, owns, or transfers an obligation, or that the debtor has incurred or been released from one. Thirdly and lastly, all obligations pertain to the sphere of *proprietary* rights. They form part of the estate of him who is entitled to them. Rights which relate to a person's *status*, such as those created by marriage, are not obligations, even though they are rights *in personam*. An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right.

The person entitled to the benefit of an *obligatio* was in Roman law termed *creditor*, while he who was bound by it was called *debitor*. We may venture to use the corresponding

(*a*) Obligatio est juris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis jura. Inst. 3. 13, pr. For a comparison of Roman and English rules relating to obligations see Buckland and Mc Nair, *Roman Law and Common Law* (2nd ed.), 193 *et seq.*

English terms creditor and debtor in an equally wide sense. We shall speak of every obligation, of whatever nature, as vested in or belonging to a creditor, and availing against a debtor. There is, of course, a narrower sense, in which these terms are applicable only to those obligations which constitute *debts*; that is to say, obligations to pay a definite or liquidated sum of money.

A technical synonym for obligation is *chose in action* or *thing in action*. A chose in action means, in our modern use of it, a proprietary right *in personam*; for example, a debt, a share in a joint-stock company, money in the public funds, or a claim for damages for a tort. A non-proprietary right *in personam*, such as that which arises from a contract to marry, or from the contract of marriage, is no more a chose in action in English law than it is an *obligatio* in Roman law.

Choses in action are opposed to choses in possession, though the latter term has all but fallen out of use. The true nature of the distinction thus expressed has been the subject of much discussion. At the present day, if any logical validity at all is to be ascribed to it, it must be identified with that between real and personal rights, that is to say, with the Roman distinction between *dominium* and *obligatio*. A chose in action is a proprietary right *in personam*. All other proprietary rights (including such objects of rights as are identified with the rights themselves) are choses in possession. If we regard the matter historically, however, it becomes clear that this is not the original meaning of the distinction. In its origin a chose in possession was any thing or right which was accompanied by *possession*; while a chose in action was any thing or right of which the claimant had no possession, but which he must obtain, if need be, by way of an *action* at law. Money in a man's purse was a thing in possession; money due to him by a debtor was a thing in action. This distinction was largely, though not wholly, coincident with that between real and personal rights, for real rights are commonly possessed as well as owned, while personal rights are commonly owned but not possessed. This coincidence, however, was not complete. A chattel, for example, stolen from its owner was reduced, so far as he was concerned, to a thing in action; but his right of ownership was not thereby reduced to a mere *obligatio* (*b*).

(*b*) Jacob's *Law Dictionary*, cited by Sweet in (1894) 10 L.Q.R. at p. 308n.

The extraordinary importance attributed to the fact of possession was a characteristic feature of our early law. As this importance diminished, the original significance of the distinction between things in possession and things in action was lost sight of, and these terms gradually acquired a new meaning. Originally shares and annuities would probably have been classed as things in possession, but they are now things in action. Conversely lands and chattels are now things in possession, whether the owner retains possession of them or not. Obligations were always the most important species of things in action, and they are now the only species. Neither the old law nor the new gives any countenance to the suggestion made by some that immaterial property, such as patents, copyrights, and trade-marks, should be classed as choses in action (*c*).

122. Solidary obligations

The normal type of obligation is that in which there is one creditor and one debtor. It often happens, however, that there are two or more creditors entitled to the same obligation, or two or more debtors under the same liability. The case of two or more creditors gives rise to little difficulty, and requires no special consideration. It is, in most respects, merely a particular instance of co-ownership, the co-owners holding either jointly or in common, according to circumstances. The case of two or more debtors, however, is of some theoretical interest, and calls for special notice.

Examples of it are debts owing by a firm of partners, debts owing by a principal debtor and guaranteed by one or more sureties, and the liability of two or more persons who together commit a tort. In all such cases each debtor is liable for the whole amount due. The creditor is not obliged to divide his claim into as many different parts as there are debtors. He may exact the whole sum from one, and leave that one to recover from his co-debtors, if possible and permissible, a just proportion of the amount so paid. A debt of £100 owing by two partners,

(*c*) As to the nature of choses in action, see Blackstone, II. 396; *Colonial Bank* v. *Whinney* (1885) 30 Ch.D. 261 and (1886) 11 App.Cas. 426; and a series of articles by different writers in the L.Q.R.: IX. 311, by Sir Howard Elphinstone; X. 143, by T. C. Williams; X. 303, by C. Sweet; XI. 64, by S. Brodhurst; XI. 223, by T. C. Williams; XI. 238, by C. Sweet.

A and B, is not equivalent to one debt of £50 owing by A and another of the same amount owing by B. It is a single debt of £100 owing by each of them, in such fashion that each of them may be compelled to pay the whole of it, but that when it is once paid by either of them, both are discharged from it (*d*).

Obligations of this description may be called solidary, since in the language of Roman law, each of the debtors is bound *in solidum* instead of *pro parte*; that is to say, for the whole, and not for a proportionate part (*e*). A solidary obligation, therefore, may be defined as one in which two or more debtors owe the same thing to the same creditor. In English law they are of three distinct kinds, being either (1) several, (2) joint, or (3) joint and several.

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

2. Solidary obligations are joint, on the other hand, when, though there are two or more debtors, there is only one debt or other cause of action, as well as only one thing owed. The *vinculum juris* is single, though it binds several debtors to the same creditor. The chief effect of this unity of the obligation is that all the debtors are discharged by anything which discharges any one of them. When the *vinculum juris* has once been severed as to any of them, it is severed as to all. Where, on the contrary, solidary obligations are several and not joint, performance by one debtor will release the others, but in all other respects the different *vincula juris* are independent of each other.

3. The third species of solidary obligations consists of those which are both joint and several. As their name implies, they stand half-way between the two extreme types which we have

(*d*) As we shall see, the creditor is not always entitled to *sue* one alone of the debtors; but when he has obtained judgment against all, he can always, by way of execution, obtain payment of the whole from any one.

(*e*) For a further discussion of this terminology see Williams, *Joint Obligations*, 1, n. 1.

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

On what principle, then, does the law determine the class to which any solidary obligation belongs? Speaking generally, we may say that such obligations are several when, although they have the same subject-matter, they have different sources; they are several in their nature, if they are distinct in their origin. They are joint, on the other hand, when they have not merely the same subject-matter, but the same source. Joint and several obligations, in the third place, are those joint obligations which the law, for special reasons, chooses to treat in special respects as if they were several. Like those which are purely and simply joint, they have the same source as well as the same subject-matter; but the law does not regard them consistently as comprising a single *vinculum juris*.

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

(1) The liability of a principal debtor and that of his surety, provided that the contract of suretyship is subsequent to, or otherwise independent of, the creation of the debt so guaranteed. But if the two debts have the same origin, as where the principal debtor and the surety sign a joint bond, the case is one of joint obligation.

(2) The liability of two or more co-sureties who guarantee the same debt independently of each other (*f*). They may make themselves joint, or joint and several debtors, on the other hand, by joining in a single contract of guarantee.

(3) Separate judgments obtained in distinct actions against two or more persons liable for the same debt. Two persons, for example, jointly and severally liable on the same contract may be separately sued, and judgment may be obtained against each of them. In such a case they are no longer jointly liable at all; each is now severally liable for the amount of his own

(*f*) *Ward* v. *The National Bank* (1883) 8 App.Cas. 755.

judgment; but these two obligations are solidary, inasmuch as the satisfaction of one will discharge the other.

(4) The liability of independent wrongdoers whose acts cause the same damage. This is a somewhat rare case, but is perfectly possible. Two persons are not joint wrongdoers, simply because they both act wrongfully and their acts unite to cause a single mischievous result. They must have committed a joint act; that is to say, they must have acted together with some common purpose. If not, they may be liable *in solidum* and severally for the common harm to which their separate acts contribute; but they are not liable as joint wrongdoers. In *Thompson* v. *The London County Council* (*g*) the plaintiff's house was injured by the subsidence of its foundations, this subsidence resulting from excavations negligently made by A, taken in conjunction with the negligence of B, a water company, in leaving a water-main insufficiently stopped. It was held that A and B, inasmuch as their acts were quite independent of each other, were not joint wrongdoers, and could not be joined in the same action. It was said by Lord Justice Collins (*h*): "The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." The liability of the parties was solidary, but not joint. So also successive acts of wrongful conversion may be committed by two or more persons in respect of the same chattel. Each is liable in the action of trover to the owner of the chattel for its full value. But they are liable severally, and not jointly. The owner may sue each of them in different actions; though payment of the value by any one of them will discharge the others (*i*).

Examples of joint obligations are the debts of partners (*k*), and all other solidary obligations *ex contractu* which have not been expressly made joint and several by the agreement of the parties.

Examples of joint and several obligations are the liabilities of those who jointly commit a tort (*l*) or (perhaps) a breach of

(*g*) [1899] 1 Q.B. 840. *Cf.* Williams, *Joint Torts and Contributory Negligence* (1951), § 5.

(*h*) At p. 845.

(*i*) *Morris* v. *Robinson* (1824) 3 B. & C. 196.

(*k*) Partnership Act, 1890, s. 9; Lindley, *Partnership* (12th ed.), 236 *et seq.*, 265 *et seq.*

(*l*) But the meaning of this phrase as applied to torts differs somewhat from its meaning in contract. See Williams, *op. cit.*, 87, 68, n. 1.

trust (*m*), and also all contractual obligations which are expressly made joint and several by the agreement of the parties.

123. The sources of obligations

Classed in respect of their sources or modes of origin, the obligations recognised by English law are divisible into the following four classes:—

(1) Contractual—*Obligationes ex contractu.*

(2) Delictal—*Obligationes ex delicto.*

(3) Quasi-contractual—*Obligationes quasi ex contractu.*

(4) Innominate.

124. Obligations arising from contracts

The first and most important class of obligations consists of those which are created by contract. We have in a former chapter sufficiently considered the nature of a contract (*n*), and we there saw that it is, in general, that kind of agreement which creates rights *in personam* between the parties to it. Now of rights *in personam* obligations are the most numerous and important kind, and of those which are not obligations comparatively few have their source in the agreement of the parties. The law of contract, therefore, is almost wholly comprised within the law of obligations, and for the practical purposes of legal classification it may be placed there with sufficient accuracy. The coincidence, indeed, is not logically complete: a promise of marriage, for example, being a contract which falls within the law of status, and not within that of obligations. Neglecting, however, this small class of *personal* contracts, the general theory of contract is simply a combination of the general theory of agreement with that of obligation, and does not call for any further examination in this place (*o*).

(*m*) It is commonly said that the liability for breach of trust is joint and several (see, *e.g.*, Underhill, *Trusts* (11th ed.), Art. 89) but it may be questioned whether this means anything more than that the obligation is a solidary obligation that is several in its nature.

(*n*) *Supra*, § 78.

(*o*) It is advisable to point out that the obligation to pay damages for a breach of contract is itself to be classed as contractual, no less than the original obligation to perform the contract.

125. Obligations arising from torts

The second class of obligations consists of those which may be termed delictal, or in the language of Roman law *obligationes ex delicto*. By an obligation of this kind is meant the duty of making pecuniary satisfaction for that species of wrong which is known in English law as a *tort*. Etymologically this term is merely the French equivalent of the English wrong—tort (*tortum*), being that which is twisted, crooked, or wrong; just as right (*rectum*) is that which is straight. As a technical term of English law, however, tort has become specialised in meaning, and now includes merely one particular class of civil wrongs.

A tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely the breach of a contract or the breach of a trust or other merely equitable obligation. This definition contains four essential elements, there being four kinds of wrongs excluded by it from the sphere of tort.

1. A tort is a civil wrong; crimes are wrongs, but are not in themselves torts, though there is nothing to prevent the same act from belonging to both these classes at once.

2. Even a civil wrong is not a tort, unless the appropriate remedy for it is an action for damages. There are several other forms of civil remedy besides this; for example, injunctions, specific restitution of property, and the payment of liquidated sums of money by way of penalty or otherwise. Any civil injury which gives rise exclusively to one of these other forms of remedy stands outside the class of torts. The obstruction of a public highway, for example, is to be classed as a civil injury, inasmuch as it may give rise to civil proceedings instituted by the Attorney-General for an injunction; but although a civil injury, it is not a tort, save in those exceptional instances in which, by reason of special damage suffered by an individual, it gives rise to an action for damages at his suit.

3. No civil wrong is a tort, if it is exclusively the breach of a contract. The law of contracts stands by itself, as a separate department of our legal system, over against the law of torts; and to a large extent liability for breaches of contract and liability for torts are governed by different principles. It may well happen, however, that the same act is both a tort and a breach of contract, and this is so in at least two classes of cases.

(a) The first and simplest of these is that in which a man undertakes by contract the performance of a duty which lies on him already, independently of any contract. Thus he who refuses to return a borrowed chattel commits both a breach of contract and also the tort known as conversion: a breach of contract, because he promised expressly or impliedly to return the chattel; but not *merely* a breach of contract, and therefore also a tort, because he would have been equally liable for detaining another man's property, even if he had made no such contract at all.

(b) The second class of cases is one which involves considerable difficulty, and the law on this point cannot yet be said to have been thoroughly developed. In certain instances the breach of a contract made with one person creates liability towards another person, who is no party to the contract. It is a fundamental principle, indeed, that no person can sue on an *obligatio ex contractu*, except a party to the contract; nevertheless it sometimes happens that one person can sue *ex delicto* for the breach of a contract which was not made with him, but from the breach of which he has suffered unlawful damage. That is to say, a man may take upon himself, by a contract with A, a duty which does not already or otherwise rest upon him, but which, when it has once been undertaken, he cannot break without doing such damage to B, a third person, as the law deems actionable. Thus, if X lends his horse to Y, who delivers it to Z, a livery-stable keeper, to be looked after and fed, and the horse is injured or killed by insufficient feeding, presumably Z is liable for this, not only in contract to Y, but also in tort to X, the owner of the horse. It is true that, apart from his contract with Y, Z was under no obligation to feed the animal; apart from the contract, this was a mere omission to do an act which he was not bound to do. Yet having taken this duty upon himself, he has thereby put himself in such a situation that he cannot break the duty without inflicting on the owner of the horse damage of a kind which the law deems wrongful. The omission to feed the horse, therefore, although a breach of contract, is not exclusively such, and is therefore a tort, inasmuch as it can be sued on by a person who is no party to the contract. How far damage thus caused to one man by the breach of a duty undertaken by contract with another is actionable as a tort at the suit

of the former, is a question to be determined by the detailed rules of the concrete legal system, and need not be here considered (*p*).

4. The fourth and last class of wrongs which are not torts consists of breaches of trusts or other equitable obligations. The original reason for their exclusion and separate classification is the historical fact that the law of trusts and equitable obligations originated and developed in the Court of Chancery, and was wholly unknown to those courts of common law in which the law of torts grew up. But even now, although the same courts administer both law and equity, it is still necessary to treat breaches of trust as a form of wrong distinct from torts, and to deal with them along with the law of trusts itself, just as breaches of contract are dealt with along with the law of contract. Torts, contracts, and trusts developed separately, the principles of liability in each case are largely different, and they must be retained as distinct departments of the law.

By some writers a tort has been defined as the violation of a right *in rem*, giving rise to an obligation to pay damages. There is a tempting simplicity and neatness in this application of the distinction between rights *in rem* and *in personam*, but it may be gravely doubted whether it does in truth conform to the actual contents of the English law of torts. Most torts undoubtedly are violations of rights *in rem*, because most rights *in personam* are created by contract. But there are rights *in personam* which are not contractual, and the violation of which, if it gives rise to an action for damages, must be classed as a tort. Thus where a duty of care is created by contract, the breach of it is in some cases actionable as a tort; yet the duty is owed *in personam* (*q*). The refusal of an innkeeper to receive a traveller is perhaps

(*p*) A similar relation exists between breaches of contract and crimes. Breach of contract is not in itself a crime, any more than it is in itself a tort; yet by undertaking a contractual duty, a man may often put himself in such a position, that he cannot break the duty without causing such damage to third persons, as will create criminal liability. For example, a signalman's breach of his contractual duty to attend to the signals may amount to the crime of manslaughter if a fatal accident results from it.

(*q*) But it could be argued that a duty of care is owed (with some exceptions) to anyone who might be foreseen as likely to be injured by carelessness, that when a duty of care is undertaken by contract there may be additional persons who may be foreseen as likely to be injured by carelessness, and that accordingly all that has taken place is an extension of the ambit of applicability of a duty *in rem*.

a tort (*r*), yet it is merely the breach of a non-contractual right *in personam*. So with any actionable refusal or neglect on the part of a public official to perform his statutory duties on behalf of the plaintiff (*s*).

126. Obligations arising from quasi-contracts

Both in Roman and in English law there are certain obligations which are not in truth contractual in the sense of resting on agreement (*t*), but which the law treats as if they were. They are contractual in law, but not in fact, being the subject-matter of a fictitious extension of the sphere of contract to cover obligations which do not in reality fall within it. The Romans called them *obligationes quasi ex contractu*. English lawyers call them quasi-contracts or implied contracts, or often enough contract simply and without qualification. We are told, for example, that a judgment is a contract, and that a judgment debt is a contractual obligation (*u*). "Implied [contracts]", says Blackstone (*a*), "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." "Thus it is that every person is bound, and hath virtually agreed, to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law" (*b*). So the same author speaks, much too

(*r*) Blackstone (*Commentaries*, III. 165) classified this as a breach of quasi-contractual obligation. Street (*Foundations of Legal Liability*, II, 236–237) called it liability in quasi-assumpsit. Winfield (*Province of the Law of Tort*, 153, 238) regards it as a tort, and asserts that although the right of a traveller to be admitted is *in personam*, the duty of the innkeeper to admit is *in rem*; hence the case falls within his definition of a tort as a breach of a duty *in rem*. It is submitted with respect that this last is a false analysis. An innkeeper is not under a present duty to admit all travellers; he is under a duty to admit only such as ask for admittance. When the request for admittance is made the innkeeper's duty to admit is a duty *in personam* owed to the particular traveller who asks for admittance. In other words, there is no duty *in rem* to admit travellers; there is only a subjection (liability) *in rem* to be asked for admittance. Hence, if the innkeeper's refusal to admit be regarded as a tort, it follows that a tort is not necessarily the breach of a duty *in rem*.

(*s*) For a further discussion of the definition of tort see Winfield, *Province of the Law of Tort* (1931).

(*t*) It has been seen that in some cases even contracts proper may exist without agreement: *supra*, § 126. The line between contracts proper and quasi-contract is therefore somewhat arbitrary.

(*u*) *Grant* v. *Easton* (1883) 13 Q.B.D. 302.

(*a*) *Commentaries*, II. 443.

(*b*) *Ibid.* III. 159.

widely indeed, of the "general implication and intendment of the courts of judicature that every man hath engaged to perform what his duty or justice requires" (*c*).

From a quasi-contract, or contract implied in *law*, we must carefully distinguish a contract implied in *fact*. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. Thus when I enter an omnibus, I impliedly, yet actually, agree to pay the usual fare. A contract implied in law, on the contrary, is merely fictitious, for the parties to it have not agreed at all, either expressly or tacitly.

In what cases, then, does the law recognise this fiction of quasi-contract? What classes of obligations are regarded as contractual in law, though they are not so in fact? To this question it is not possible to give any complete answer here. We can, however, single out two classes of cases which include most, though not all, of the quasi-contractual obligations known to English law.

1. In the first place, we may say in general that in the theory of the common law all *debts* are deemed to be contractual in origin. A debt is an obligation to pay a liquidated sum of money, as opposed to an obligation to pay an unliquidated amount, and as opposed also to all non-pecuniary obligations. Most debts are *obligationes ex contractu* in truth and in fact, but there are many which have a different source. A judgment creates a debt which is non-contractual; so, also, does the receipt of money paid by mistake or obtained by fraud. Nevertheless, in the eye of the common law they all fall within the sphere of contract; for the law conclusively presumes that every person who owes a debt has promised to pay it. "Whatever, therefore", says Blackstone (*d*), "the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge."

Hence it is, that a judgment debtor is in legal theory liable *ex contractu* to satisfy the judgment. "The liability of the defendant", says Lord Esher (*e*), "arises upon the implied contract to pay the amount of the judgment." Similarly, all pecuniary obligations of restitution are in theory contractual,

(*c*) *Ibid.* III. 162.
(*d*) *Ibid.* III. 160.
(*e*) *Grant* v. *Easton* (1883) 13 Q.B.D. at p. 303.

as in the case of money paid by mistake, or obtained by fraud or duress. "If the defendant", says Lord Mansfield (*f*), "be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action founded on the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu*, as the Roman law expresses it)." So also with pecuniary obligations of indemnity; when, for example, the goods of a stranger are distrained and sold by a landlord for rent due by his tenant, the law implies a promise by the tenant to repay their value to the owner thus deprived of them (*g*). A similar fictitious promise is the ground on which the law bases obligations of contribution. If, for example, two persons acting independently of each other guarantee the same debt, and one of them is subsequently compelled to pay the whole, he can recover half of the amount from the other, as due to him under a contract implied in law, although there is clearly none in fact. A similar obligation of contribution is now imposed by statute as between joint tortfeasors and tortfeasors whose independent wrongs cause the same damage (*h*).

2. The second class of quasi-contracts includes all those cases in which a person injured by a tort is allowed by the law to waive the tort and sue in contract instead. That is to say, there are certain obligations which are in truth delictal, and not contractual, but which may, at the option of the plaintiff, be treated as contractual if he so pleases. Thus if one wrongfully takes away my goods and sells them, he is guilty of the tort known as trespass, and his obligation to pay damages for the loss suffered by me is in reality delictal. Nevertheless, I may, if I think it to my interest, waive the tort, and sue him on a fictitious contract, demanding from him the payment of the money so received by him as having rightly sold the goods as my agent, and therefore as being indebted to me in respect of the price received by him; and he will not be permitted to plead his own wrongdoing in bar of any such claim (*i*). So if a man obtains money from me by fraudulent misrepresentation, I may sue him either in tort for

(*f*) *Moses* v. *Macferlan* (1760) 2 Burr. 1005 at p. 1009.
(*g*) *Exall* v. *Partridge* (1799) 8 T.R. 308.
(*h*) Law Reform (Married Women and Tortfeasors) Act, 1935.
(*i*) *Smith* v. *Baker* (1873) L.R. 8 C.P. 350. See further as to the waiver of torts, *Lightly* v. *Clouston* (1808) 1 Taunt. 112; *Phillips* v. *Homfray* (1883) 24 Ch.D. at p. 461; Salmond, *Law of Torts* (14th ed.), § 228.

damages for the deceit, or on a fictitious contract for the return of the money.

The reasons which have induced the law to recognise the fiction of quasi-contractual obligations are various. The chief of them, however, are the three following: —

(1) The traditional classification of the various forms of personal actions, as being based either on contract or on tort. This classification could be rendered exhaustive and sufficient only by forcing all liquidated pecuniary obligations into the contractual class, regardless of their true nature and origin (*k*) until quite recently.

(2) The desire to supply a theoretical basis for new forms of obligation established by judicial decision. Here as elsewhere, legal fictions are of use in assisting the development of the law. It is easier for the courts to say that a man is bound to pay because he must be taken to have so promised, than to lay down for the first time the principle that he is bound to pay whether he has promised or not.

(3) The desire of plaintiffs to obtain the benefit of the superior efficiency of contractual remedies. In more than one respect, it was better in the old days of formalism to sue on contract than on any other ground. The contractual remedy of *assumpsit* was better than the action of debt, for it did not allow to the defendant the resource of wager of law. It was better than trespass and other delictal remedies, for it did not die with the person of the wrongdoer, but was available against his executors. Therefore plaintiffs were allowed to allege fictitious contracts, and to sue on them in *assumpsit*, whereas in truth their appropriate remedy was debt or some action *ex delicto*.

It seems clear that a rational system of law is free to get rid of the conception of quasi-contractual obligation altogether. No useful purpose is served by it at the present day. It still remains, however, part of the law of England, and requires recognition accordingly (*l*).

(*k*) This classification of actions is discussed by Maitland in an appendix to Pollock's *Law of Torts* and by Winfield, *The Province of the Law of Tort*. Its importance under the County Courts Acts has largely disappeared with the amendments made by the Act of 1955; but it may still give difficulty under s. 46 of the County Courts Act, 1959.

(*l*) For the history of quasi-contract see R. M. Jackson, *History of Quasi-Contract*. There is a monograph on the present law by Winfield (1952). See also Goff and Jones, *The Law of Restitution*, Part I.

127. Innominate obligations

The foregoing classification of obligations as either contractual, delictal, or quasi-contractual, is not exhaustive, for it is based on no logical scheme of division, but proceeds by simple enumeration only. Consequently, it is necessary to recognise a final and residuary class which we may term innominate, as having no comprehensive and distinctive title (*m*). Included in this class are the obligations of trustees towards their beneficiaries, a species, indeed, which would be sufficiently important and distinct to be classed separately as co-ordinate with the others which have been named, were it not for the fact that trusts are more appropriately treated in another branch of the law, namely, in that of property.

(*m*) Contracts which have no specific name are called by the civilians *contractus innominati*.

CHAPTER 15

THE LAW OF PROCEDURE

128. Substantive law and the law of procedure

It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure (*a*), and it will conduce to clearness if we first consider a plausible but erroneous explanation. In view of the fact that the administration of justice in its typical form consists in the application of remedies to the violations of rights, it may be suggested that substantive law is that which defines the *rights*, while procedural law determines the *remedies*. This application, however, of the distinction between *jus* and *remedium* is inadmissible. For, in the first place, there are many rights (in the wide sense) which belong to the sphere of procedure; for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on. In the second place, rules defining the remedy may be as much a part of the substantive law as are those which define the right itself. No one would call the abolition of capital punishment, for instance, a change in the law of criminal procedure. The substantive part of the criminal law deals, not with crimes alone, but with punishments also. So in the civil law, the rules as to the measure of damages pertain to the substantive law, no less than those declaring what damage is actionable; and rules determining the classes of agreements which will be specifically enforced are as clearly substantive as are those determining the agreements which will be enforced at all. To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available.

What, then, is the true nature of the distinction? The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quod ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, civil or criminal. All the

(*a*) For a fuller discussion of this topic see W. W. Cook, "'Substance' and 'Procedure' in the Conflicts of Laws" (1933) 42 Yale L.J. 333.

residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.

A glance at the actual contents of the law of procedure will enable us to judge of the accuracy of this explanation. Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions. What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure. For the first relates to the subject-matter of litigation, the second to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law, for the existence and measure of criminal liability are matters pertaining to the end and purpose of the administration of justice. But whether an offence is punishable summarily or only on indictment is a question of procedure. Finally, it may be observed that, whereas the abolition of capital punishment would be an alteration of the substantive law, the abolition of imprisonment for debt was merely an alteration in the law of procedure. For punishment is one of the ends of the administration of justice, while imprisonment for debt was merely an instrument for enforcing payment.

So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other.

Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such

cases the difference between these two branches of the law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issue. In legal history such transitions are frequent, and in legal theory they are not without interest and importance.

Of these equivalent procedural and substantive principles there are at least three classes sufficiently important to call for notice here.

1. An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing.

2. A conclusive evidential fact is equivalent to, and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law. That a child under the age of eight years is incapable of criminal intention is a rule of evidence, but differs only in form from the substantive rule that no child under that age is punishable for a crime. That the acts of a servant done about his master's business are done with his master's authority is a conclusive presumption of law, and pertains to procedure; but it is the forerunner and equivalent of our modern substantive law of employer's liability. A bond (that is to say, an admission of indebtedness under seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of substantive law.

3. The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect in English domestic law is the same, although their form is different (*d*).

(*d*) There is, however, an important difference in the English system of Conflict of Laws, for the limitation of actions is governed by the *lex fori*, while the prescription of rights is governed by the proper law of the transaction See Cheshire, *Private International Law* (7th ed.), 585 *et seq.*

The normal elements of judicial procedure are five in number, namely, Summons, Pleading, Proof, Judgment, and Execution. The object of the first is to secure for all parties interested an opportunity of presenting themselves before the court and making their case heard. Pleading formulates for the use of the court and of the parties those questions of fact or law which are in issue. Proof is the process by which the parties supply the court with the *data* necessary for the decision of those questions. Judgment is this decision itself, while execution, the last step in the proceeding, is the use of physical force in the maintenance of the judgment when voluntary submission is withheld. Of these five elements of judicial procedure one only, namely, proof, is of sufficient theoretical interest to repay such abstract consideration as is here in place. The residue of this chapter, therefore, will be devoted to an analysis of the essential nature of the law of evidence.

129. Evidence

One fact is evidence of another when it tends in any degree to render the existence of that other probable. The quality by virtue of which it has such an effect may be called its *probative force*, and evidence may therefore be defined as any fact which possesses such force. Probative force may be of any degree of intensity. When it is great enough to form a rational basis for the inference that the fact so evidenced really exists, the evidence possessing it is said to constitute *proof*.

It is convenient to be able to distinguish shortly between the fact which is evidence, and the fact of which it is evidence. The former may be termed the *evidential fact*, the latter the *principal fact*. Where, as is often the case, there is a chain of evidence, A being evidence of B, B of C, C of D, and so on, each intermediate fact is evidential in respect of all that follow it and principal in respect of all that precede it.

1. Evidence is of various kinds, being, in the first place, either *judicial* or *extrajudicial*. Judicial evidence is that which is produced to the court; it comprises all evidential facts that are actually brought to the personal knowledge and observation of the tribunals. Extrajudicial evidence is that which does not come directly under judicial cognisance, but nevertheless constitutes an intermediate link between judicial evidence and the fact

requiring proof. Judicial evidence includes all testimony given by witnesses in court, all documents produced to and read by the court, and all things personally examined by the court for the purposes of proof. Extrajudicial evidence includes all evidential facts which are known to the court only by way of inference from some form of judicial evidence. Testimony is extrajudicial when it is judicially known only through the relation of a witness who heard it. A confession of guilt, for example, is judicial evidence if made to the court itself, but extrajudicial if made elsewhere and proved to the court by some form of judicial evidence. Similarly, a document is judicial evidence if produced, extrajudicial if known to the court only through a copy, or through the report of a witness who has read it. So the *locus in quo* or the material subject-matter of a suit becomes judicial evidence when personally viewed by the court, but is extrajudicial when described by witnesses.

It is plain that in every process of proof some form of judicial evidence is an essential element. Extrajudicial evidence may or may not exist. When it is present, it forms an intermediate link or a series of intermediate links in a chain of proof. the terminal links of which are the principal fact at one end and the judicial evidence at the other. Judicial evidence requires production merely; extrajudicial evidence stands itself in need of proof.

2. In the second place, evidence is either *personal* or *real*. Personal evidence is otherwise termed *testimony*. It includes all kinds of statements regarded as possessed of probative force in respect of the facts stated. This is by far the most important form of evidence. There are few processes of proof that do not contain it—few facts that are capable of being proved in courts of justice otherwise than by the testimony of those who know them. Testimony is either oral or written, and either judicial or extrajudicial. There is a tendency to restrict the term to the judicial variety, but there is no good reason for this limitation. It is better to include under the head of testimony or personal evidence all statements, verbal or written, judicial or extrajudicial, so far as they are possessed of probative force. Real evidence, on the other hand, includes all the residue of evidential facts. Anything which is believed for any other reason than that someone has said so, is believed on real evidence. This,

too, is either judicial or extrajudicial, though here also there is a tendency to restrict the term to the former use.

3. Evidence is either *primary* or *secondary*. Other things being equal, the longer any chain of evidence the less its probative force, for with each successive inference the risk of error grows. In the interests of truth, therefore, it is expedient to shorten the process, to cut out as many as possible of the intermediate links of extrajudicial evidence, and to make evidence assume the judicial form at the earliest practicable point. Hence the importance of the distinction between primary and secondary evidence. Primary evidence is evidence viewed in comparison with any available and less immediate instrument of proof. Secondary evidence is that which is compared with any available and more immediate instrument of proof. Primary evidence of the contents of a written document is the production in court of the document itself; secondary evidence is the production of a copy or of oral testimony as to the contents of the original. Primary evidence that A assaulted B is the judicial testimony of C that he saw the assault; secondary evidence is the judicial testimony of D that C told him that he saw the assault. That secondary evidence should not be used when primary evidence is available is, in its general form, a mere counsel of prudence; but in particular cases, the most important of which are those just used as illustrations, this counsel has hardened into an obligatory rule of law. Subject to certain exceptions, the courts will receive no evidence of a written document save the document itself, and will listen to no hearsay testimony (*e*).

4. Evidence is either *direct* or *circumstantial*. This is a distinction important in popular opinion rather than in legal theory. Direct evidence is testimony relating immediately to the principal fact. All other evidence is circumstantial. In the former case the only inference required is one from testimony to the truth of it. In the latter the inference is of a different nature, and is generally not single but composed of successive steps. The testimony of A that he saw B commit the offence charged, or the confession of B that he is guilty, constitutes

(*e*) These and other rules of evidence here discussed are peculiar to English law. Continental systems admit opinions and secondary evidence much more freely. *Cf.* Mannheim, "Trial by Jury in Modern Continental Criminal Law" (1937) 53 L.Q.R. at 388–389.

direct evidence. If we believe the truth of the testimony or confession, the matter is concluded, and no further process of proof or inference is required. On the other hand, the testimony of A that B was seen by him leaving the place where the offence was committed, and having the instrument of the offence in his possession, is merely circumstantial evidence; for even if we believe this testimony, it does not follow without a further inference, and therefore a further risk of error, that B is guilty. Direct evidence is commonly considered to excel the other in probative force. This, however, is not necessarily the case, for it is usually more difficult to fabricate a convincing chain of circumstantial evidence than to utter a direct lie. Circumstantial evidence of innocence may well prevail over direct evidence of guilt; and circumstantial evidence of guilt may be indefinitely stronger than direct evidence of innocence.

130. The valuation of evidence

The law of evidence comprises two parts. The first of these consists of rules for the measurement or determination of the *probative force* of evidence. The second consists of rules determining the modes and conditions of the *production* of evidence. The first deals with the effect of evidence when produced, the second with the manner in which it is to be produced. The first is concerned with evidence in all its forms, whether judicial or extrajudicial; the second is concerned with judicial evidence alone. The two departments are intimately connected, for it is impossible to formulate rules for the production of evidence without reference and relation to the effect of it when produced. Nevertheless the two are distinct in theory, and for the most part distinguishable in practice. We shall deal with them in their order.

In judicial proceedings, as elsewhere, the accurate measurement of the evidential value of facts is a condition of the discovery of truth. Except in the administration of justice, however, this task is left to common sense and personal discretion. Rules and maxims, when recognised at all, are recognised as proper for the *guidance* of individual judgment, not for the *exclusion* of it. But in this, as in every other part of judicial procedure, law has been generated, and, in so far as it extends,

has made the estimation of probative force or the weighing of evidence a matter of inflexible rules excluding judicial discretion. These rules constitute the first and most characteristic portion of the law of evidence. They may be conveniently divided into five classes, declaring respectively that certain facts amount to:—

1. Conclusive proof—in other words, raise a conclusive presumption;

2. Presumptive proof—in other words, raise a conditional or rebuttable presumption;

3. Insufficient evidence—that is to say, do not amount to proof, and raise no presumption, conclusive or conditional;

4. Exclusive evidence—that is to say, are the only facts which in respect of the matter in issue possess any probative force at all;

5. No evidence—that is to say, are destitute of evidential value.

I. *Conclusive presumptions.*—By conclusive proof is meant a fact possessing probative force of such strength as not to admit of effective contradiction. In other words, this fact amounts to proof irrespective of the existence or non-existence of any other facts whatsoever which may possess probative force in the contrary direction. By a conclusive presumption is meant the acceptance or recognition of a fact by the law as conclusive proof.

Presumptive or conditional proof, on the other hand, is a fact which amounts to proof, only so long as there exists no other fact amounting to disproof. It is a provisional proof, valid until overthrown by contrary proof. A conditional or rebuttable presumption is the acceptance of a fact by the law as conditional proof (*f*).

One of the most singular features in early systems of procedure is the extent to which the process of proof is dominated by conclusive presumptions. The chief part of the early law of evidence consists of rules determining the species of proof which is

(*f*) A conclusive presumption is sometimes called a *presumptio juris et de jure*, while a rebuttable presumption is distinguished as a *presumptio juris*. I am not aware of the origin or ground of this nomenclature. The so-called *presumptio facti* is not a legal presumption at all, but a mere provisional inference drawn by the court in the exercise of its unfettered judgment from the evidence before it.

necessary and sufficient in different cases, and allotting the benefit or burden of such proof between the parties. He who would establish his case must maintain it, for example, by success in that judicial battle the issue of which was held to be the judgment of Heaven (*judicium Dei*); or he must go unscathed through the ordeal, and so make manifest his truth or innocence; or he must procure twelve men to swear in set form that they believe his testimony to be true; or it may be sufficient if he himself makes solemn oath that his cause is just. If he succeeds in performing the conditions so laid upon him, he will have judgment; if he fails even in the slightest point, he is defeated. His task is to satisfy the requirements of the law, not to convince the court of the truth of his case. What the court thinks of the matter is nothing to the point. The whole procedure seems designed to take away from the tribunals the responsibility of investigating the truth, and to cast this burden upon providence or fate. Only gradually and reluctantly did our law attain to the conclusion that there is no such royal road in the administration of justice, that the heavens are silent, that the battle goes to the strong, that oaths are naught and that there is no just substitute for the laborious investigation of the truth of things at the mouths of parties and witnesses (*g*).

The days are long since past in which conclusive presumptions played any great part in the administration of justice. They have not, however, altogether lost their early importance. They are indeed, almost necessarily more or less false, for it is seldom possible in the subject-matter of judicial procedure to lay down with truth a general principle that any one thing is conclusive proof of the existence of any other. Nevertheless such principles may be just and useful even though not wholly true. We have already seen how they are often merely the procedural equivalents of substantive rules which may have independent validity. They have also been of use in developing and modifying by way of legal fictions the narrow and perverted principles of the early law. As an illustration of their employment in modern law we may cite the maxim *Res judicata pro veritate accipitur*. A judgment is conclusive evidence as between the parties, and sometimes as against all the world, of the matters adjudicated upon. The

(*g*) For the development of the judicial functions of the jury see Holdsworth, *H.E.L.*, I. 317 *et seq.*, 332 *et seq.*

courts of justice may make mistakes, but no one will be heard to say so. For their function is to terminate disputes, and their decisions must be accepted as final and beyond question.

II. *Conditional presumptions.*—The second class of rules for the determination of probative force are those which establish rebuttable presumption. For example, a person shown not to have been heard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead. So also a negotiable instrument is presumed to have been given for value. So also a person accused of any offence is presumed to be innocent.

Many of these presumptions are based on no real estimate of probabilities, but are established for the purpose of placing the burden of proof upon the party who is best able to bear it, or who may most justly be made to bear it. Persons accused of crime are probably guilty, but the presumption of their innocence is in most cases and with certain limitations clearly expedient (*h*).

III. *Insufficient evidence.*—In the third place the law contains rules declaring that certain evidence is insufficient, that its probative force falls short of that required for proof, and that it is therefore not permissible for the courts to act upon it. An example is the rule that in certain kinds of treason the testimony of one witness is insufficient—almost the sole recognition by English law of the general principle, familiar in legal history, that two witnesses are necessary for proof.

IV. *Exclusive evidence* —In the fourth place there is an important class of rules declaring certain facts to be exclusive evidence, none other being admissible. The execution of a document which requires attestation can be proved in no other way than by the testimony of an attesting witness, unless owing to the death or some other circumstance his testimony is unavailable. A written contract can generally be proved in no other way than by the production of the writing itself, whenever its production is possible. Certain kinds of contracts, such as a contract of guarantee, cannot (in general) be proved except by writing, no verbal testimony being of virtue enough in the law to establish the existence of them.

(*h*) *Cf.* C. K. Allen, "The Presumption of Innocence", *Legal Duties* (1931) 253 *et seq.* For a further discussion of presumptions in general see Sir Alfred Denning, "Presumptions and Burdens" (1945) 61 L.Q.R. 379.

It is only in respect of very special kinds of contracts that written evidence can wisely be demanded by the law. In the case of all ordinary mercantile agreements such a requirement does more harm than good; and the law does well in accepting the principle that a man's word is as good as his bond.

V. *Facts which are not evidence.*—Fifthly and lastly there are rules declaring that certain facts are not evidence, that is to say, are destitute of any probative force at all. Such facts are not to be produced to the court, and if produced no weight is to be attributed to them, for no accumulation of them can amount to proof. For example, hearsay is (in general) no evidence, the bond of connection between it and the principal fact so reported at second hand being in the eye of the law too slight for any reliance to be justly placed upon it. Similarly the general bad character of an accused person is no evidence that he is guilty of any particular offence charged against him; although his good character is evidence of his innocence.

These rules of exclusion or irrelevancy assume two distinct forms, characteristic respectively of the earlier and later periods in the development of the law. At the present day they are almost wholly rules for the exclusion of *evidence*; in earlier times they were rules for the exclusion of *witnesses*. The law imposed testimonial incapacity upon certain classes of persons on the ground of their antecedent incredibility No party to a suit, no person possessing any pecuniary interest in the event of it, no person convicted of any infamous offence, was a competent witness. His testimony was deemed destitute of evidential value on account of the suspicious nature of its source. The law has now learned that it is not in this fashion that the truth is to be sought for and found. It has now more confidence in individual judgment and less in general rules. It no longer condemns witnesses unheard, but receives the testimony of all, placing the old grounds of exclusion at their proper level as reasons for suspicion but not for antecedent rejection.

131. The production of evidence

The second part of the law of evidence consists of rules regulating its production. It deals with the process of adducing evidence, and not with the effect of it when adduced. It comprises every rule relating to evidence, except those which amount

to legal determinations of probative force. It is concerned for example with the manner in which witnesses are to be examined and cross-examined, not with the weight to be attributed to their testimony. In particular it includes several important rules of exclusion based on grounds independent of any estimate of the probative force of the evidence so excluded. Considerations of expense, delay, vexation, and the public interest require much evidence to be excluded which is of undoubted evidential value. A witness may be able to testify to much that is relevant and important in respect of the matters in issue, and nevertheless may not be compelled or even permitted to give such testimony. A public official, for example, cannot be compelled to give evidence as to affairs of state, nor is a legal adviser permitted or compellable to disclose communications made to him by or on behalf of his client.

The most curious and interesting of all these rules of exclusion is the maxim, *Nemo tenetur se ipsum accusare*. No man, not even the accused himself, can be compelled to answer any question the answer to which may tend to prove him guilty of a crime. No one can be used as the unwilling instrument of his own conviction. He may confess, if he so pleases, and his confession will be received against him; but if tainted by any form of physical or moral compulsion, it will be rejected. The favour with which this rule has been received is probably due to the recoil of English law from the barbarities of the old Continental system of torture and inquisitorial process. Even as contrasted with the modern Continental procedure, in which the examination of the accused seems to English eyes too prominent and too hostile, the rule of English law is not without merits. It confers upon a criminal trial an aspect of dignity, humanity, and impartiality, which the contrasted inquisitorial process is too apt to lack. Nevertheless it seems impossible to resist Bentham's conclusion that the rule is destitute of any rational foundation, and that the compulsory examination of the accused is an essential feature of sound criminal procedure. Even its defenders admit that the English rule is extremely favourable to the guilty, and in a proceeding the aim of which is to convict the guilty, this would seem to be a sufficient condemnation. The innocent

have nothing to fear from compulsory examination, and everything to gain; the guilty have nothing to gain, and everything to fear. A criminal trial is not to be adequately conceived as a fight between the accused and his accuser; and there is no place in it for maxims whose sole foundation is a supposed duty of generous dealing with adversaries. Subject always to the important qualification that a good *prima facie* case must first be established by the prosecutor, every man should be compellable to answer with his own lips the charges that are made against him (*k*).

A matter deserving notice in connection with this part of the law of evidence is the importance still attached to the ceremony of the oath. One of the great difficulties involved in the process of proof is that of distinguishing between true testimony and false. By what test is the lying witness to be detected, and by what means is corrupt testimony to be prevented? Three methods commended themselves to the wisdom of our ancestors. These were the judicial combat, the ordeal, and the oath. The first two of these have long since been abandoned as ineffective, but the third is still retained as a characteristic feature of judicial procedure, though we may assume with some confidence that its rejection will come in due time, and will in no way injure the cause of truth and justice.

Trial by battle, so soon as it acquired a theory at all, became in reality a form of ordeal. In common with the ordeal commonly so called, it is the *judicium Dei;* it is an appeal to the God of battles to make manifest the right by giving the victory to him whose testimony is true. Successful might is the divinely appointed test of right. So in the ordeal, the party or witness whose testimony is impeached calls upon Heaven to bear witness

(*k*) See Bentham, *Works*, VII. 445–463, and Dumont, *Treatise on Judicial Evidence*, Book VII., Chap. 11: "If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? . . . One could be tempted to believe that those notions had been taken from the laws of honour which regulate private combats." If, however, the law were to compel a man to confess his crime or else to suffer conviction for refusing to answer, would this not be arrogating to the state authorities an altogether too godlike power? To punish a wrongdoer is one thing, to force him to confess his wrongdoing quite another. In these days, when it becomes easier to discover the thoughts of a man's mind, it may be well to consider whether human dignity does not demand that a man's mind should be left a private place. But for a further discussion see Williams, *The Proof of Guilt* (1955), Chap. 3.

to his truth by saving him harmless from the fire. The theory of the oath is generically the same. "An oath", says Hobbes (*l*), "is a form of speech added to a promise; by which he that promiseth, signifieth that unless he perform, he renounceth the mercy of his God, or calleth to him for vengeance on himself. Such was the heathen form, Let Jupiter kill me else, as I kill this beast. So is our form, I shall do thus and thus, so help me God". The definition is correct save that it is restricted to promissory, instead of including also declaratory, oaths. A man may swear not only that he will speak the truth, but that certain statements are the truth.

The idea of the oath, therefore, is that his testimony is true who is prepared to imprecate Divine vengeance on his own head in case of falsehood. Yet it needs but little experience of courts of justice to discover how ineffective is any such check on false witness and how little likely is the retention of it to increase respect either for religion or for the administration of justice. The true preventive of false testimony is an efficient law for its punishment as a crime (*m*).

(*l*) *Leviathan*, Chap. 14, *Eng. Works*, III. 129.

(*m*) On the history of oaths, see Lea, *Superstition and Force*, Part I. aps. 2–8; *Encyclopaedia Britannica*, *sub. voc.* Oath; Hirzel, *Der Eid* (1902); ...son, *Civilisation and the Growth of Law* (1935) 145–160. As to their utility, Bentham's *Works*, VI. 308–325.

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