BOOK VI

PRIVATE LAW

XVI

THE CONCEPT OF LEGAL PERSONALITY

84. Introduction

The orthodox approach is to divide private law into three parts: the law of persons, the law of obligations, and the law of property. There is, however, much debate as to what parts of the law should be treated within the law of persons, and it seems better to describe this division by the more specific heading, 'the concept of legal personality'.

§ 85. The Nature of Legal Personality

It has already been asserted[1] that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units—all entities recognized by the law as capable of being parties to a legal relationship. Salmond said: 'So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man.'[2]

And yet a little later Salmond said: '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 . . .'[3] Here are the seeds of confusion. In one passage *person* refers to anything recognized by the law as capable of bearing rights and duties whether

[1] § 61 (*supra*). [2] *Jurisprudence*, 12th ed., 299. [3] Op. cit. 305.

human or not, in the other human beings are *persons* with *personality* but non-human beings may be *legal persons*. The problems which this kind of confusion have caused will be discussed more fully when the nature of corporate personality is considered; but it is desirable to remove some of the confusion, arising out of the mere use of the word *person*, at the outset.

It is perhaps unfortunate that the same words, *person* and *personality*, have been used both in a legal and philosophical sense. The Latin *persona* was, it appears, the equivalent of the Greek *prosopon*, which originally referred to the mask worn by the actor to represent the god, the hero, etc. impersonated in a play. It came to mean the part played by the actor, and was extended to refer to the part played by a human being in legal proceedings, for example, as a *paterfamilias*.[1] It was not difficult to confuse the part played with the player playing it, especially as the use of the word was extended to cover all sorts of publicly recognized offices or capacities.

This is only part of the story, however. In classical times there was much to dissuade the adoption of a view which would confuse human beings and legal persons in one notion, for the law clearly contemplated human beings who were not legal persons—as in some systems of slavery or alienage.[2] The more lasting confusion grew from the attempts of the early Christian theologians to grapple with the doctrine of the Trinity in the light of Greek (principally Aristotelian) metaphysics, and later, in the dark ages, from the Christians' failure to enjoy or to understand that light. By the sixth century Boethius was able to define *persona* as the individuality of a rational being, and the primary use of the word referred to as the part played was obscured. The ambiguity and confusion produced is with us yet.

The concept of human personality is difficult to define and has become a storm centre of intellectual controversy; many of the matters in dispute have been transferred to the legal field. The first essential to any clearer understanding of the nature of legal personality

[1] It is not proposed to conduct an exhaustive inquiry into the use and development of these words, but to give an outline only: see C. C. J. Webb, *God and Personality*, Lecture II; P. W. Duff, *Personality in Roman Private Law*, ch. i; H. C. Dowdall, *Special Article and Correspondence on the Word 'Person'* (reprinted from *The Times Literary Supplement*), The Shenval Press (1948); F. Hallis, *Corporate Personality*, Introduction, xix–xxi; and A. Nékám, *The Personality Conception of the Legal Entity*, particularly ch. iii.

[2] Some light is thrown on the problem by attempting to answer the question—addressed to a man reduced to utter slavery—'when you lost your legal personality, what was it you lost?'

is to distinguish it sharply from personality in the sense which refers to the rational individuality of a human being.[1] Human beings do not necessarily possess legal personality; thus in early systems slaves were regarded as mere chattels and aliens were not permitted to bring suit in the courts. Many human beings may possess a restricted legal personality, such as infants and lunatics. Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol[2] may be regarded as a legal *persona* in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract; and, of necessity, the law recognizes certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal *persona* of the idol,[3] and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal *persona* of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities.

To argue whether such legal devices are artificial or real is a waste of time which we avoid when we are discussing the legal concepts of contract or of tort. The law says that such an agreement will be a contract and that from that fact certain legal consequences will flow. Similarly it says that certain things shall be units for the purposes of the law, and that such units shall possess the capacity of being parties to the claim-duty and power-liability relationships. It might be absurd, but not impossible, for the law to award legal personality to trees, sticks, or stones.[4] Hence, from the juristic angle,

[1] H. Kelsen, *Annales de l'Institu. de droit comparé* (1936), ii. 26–7; A. Nékám, *The Personality Conception of the Legal Entity*, 48–9.

[2] See *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*, [1925] L.R. 52 Ind. App. 245, discussed by P. W. Duff, 3 *Camb. L. J.* (1927), 42.

[3] As it was put in the Indian case cited *supra*: 'The will of the idol in regard to location must be respected.' Normally this will would be interpreted by the guardian, but the law would interfere if the guardian did not act in the interests of the idol, that is, presumably, after consulting the interests of the worshippers.

[4] Animals have been regarded as legal personalities in some systems. In Germany, during the Middle Ages, a cock was tried for contumacious crowing, and in 1508 in Provence, the caterpillars of Contes were condemned for ravaging the fields: G. W. Keeton, *The Elementary Principles of Jurisprudence* (2nd ed.), 149.

the legal personality awarded to John Smith is of the same essential nature as that awarded to a corporation, an idol, or a fund.

All legal systems no doubt are concerned with the control and organization of relations between human beings by means of general rules. So soon as there is any system, any organization, with a logic of its own, just so soon must there be some constants, some reference points given, on which to base the logic of the system. Just as the concept 'one' in arithmetic is essential to the logical system developed and yet is not one something (e.g. one apple, or one orange, etc.), so a legal system must be provided with a basic unit before full legal relationships can be devised which will serve the primary purpose of organizing the social facts. The legal person is the unit or entity adopted. For the logic of the system it is just as much a pure concept as 'one' is in arithmetic. It is just as independent from a human being as 'one' is from an apple. It is unfortunate perhaps that we use the same word 'personality' to indicate that an entity is recognized by the law as a legal person and also to indicate the differences in the capacities of legal persons. It might have been better to speak of legal entities[1] to indicate that something has been recognized as what we refer to as a legal person, and to reserve the phrase 'legal personality' to indicate differences in capacities between legal entities.[2]

Although various changes in terminology have been suggested from time to time, none has been adopted universally. It is therefore necessary to be careful to distinguish between those occasions when we use the words 'legal personality' to refer to the fact that some entity has been recognized as a legal person from those occasions when we are really talking about the differing legal personalities of entities whose recognition as legal persons is assumed. But that of course does not mean that the problems, philosophical or otherwise, about human personality which have been so much in dispute in the past are irrelevant so far as the law is concerned. The entities which receive recognition as legal persons differ greatly. John Smith is a human being with certain physical and mental powers, a corporation is a product of rules which recognize a group of human beings

[1] A. Nékám would abolish the term 'legal personality' altogether and speak of the legal entity. He attempts to show that there are no essential characteristics of corporations as such and that no single criterion is in any sense typical of corporate existence (p. 110).

[2] A. Kocourek makes the distinction clear by referring to mere existence as a legal person as 'personateness': *Jural Relations* (2nd ed.), 291–2.

or perhaps a succession of human beings as an entity for legal purposes and it can act only through agents; an idol or a fund are entities with no life and no physical powers of decision or action, and their interests can be protected only by agents set up for that purpose. The law must of course take account of such differences by adapting its rules to the nature of the entities concerned, and by making special rules to meet special cases.

Where human beings are concerned, the nature of human personality may be vital, not merely to the question of whether or not humans should be recognized as legal persons, but for questions as to the rules which shall govern their legal rights, duties, liabilities, powers, capacities, etc. They may be vital to other questions also. As Professor Hart has pointed out: 'In all legal systems we have occasion not only to pick out units but to *re-identify* a given unit over stretches of time. Is this man who is sued the same person as he who smashed the plaintiff's windows? Is this company the same company as guaranteed the tenant's rent ten years ago? To answer the second we use criteria of identity which have no use apart from law.'[1] To answer the first, of course, we draw upon notions about human beings which do not depend on the law for their value. The mere recognition of legal persons, as such, remains a basic juristic device by which the organizing of rights and duties is made possible.

§ 86. Natural Persons

In ancient systems not all human beings were granted legal personality. The case of the slave is too well known to need stressing. A monk who enters a monastery is regarded in some systems as being 'civilly dead' and his property is distributed just as if death had in fact taken place.[2] In modern times it is normal to grant legal personality to all living within the territory of the State.

Most systems lay down the rule that, in cases where legal personality is granted to human beings, personality begins at birth and ends with death.

In the case of birth most systems require complete extrusion from the mother's body—the child in the womb is not a legal personality and can have no rights. For some purposes, however, the maxim

[1] (1959–60) 5 & 6 *Aust. J. of Politics and History*, 246.

[2] In New York a person imprisoned for life is by statute regarded as civilly dead: *Brooklyn L. R.* (1949), 70.

nasciturus pro iam nato habetur takes effect. In the civil law the fiction was invented that in all matters affecting its interests the unborn child *in utero* should be regarded as already born, but English law applies this fiction only for the purpose of enabling the child if it is born to take a benefit.[1] It is thought reasonable that a child who has lost his father should not be further penalized by losing any interest which he would have secured had he been alive at his father's death.

In English law it is still doubtful whether an infant born alive can recover for injuries inflicted before birth.[2] To prove in fact a causal link between the negligence and the particular injury may well be difficult, but, if this hurdle can be surmounted, there seems to be no conclusive reason why recovery should be denied.[3] The law relating to child killing is too intricate for survey in short terms.[4] A child must be completely born alive before the rules of murder will protect it, for murder is the killing of a reasonable person in being. If, however, the prisoner intentionally inflicts serious injury on a child in the womb, and the child is born alive and then dies from the injuries, this is murder.[5] But these rules, even when coupled with the prohibition of abortion, left too many opportunities for child destruction.[6] For example, if a child was killed during the process of birth it was not murder at common law,[7] since the whole body of the child must be extruded before it becomes a person.

If birth is necessary to create rights, so death, in general, ends rights. In English law to 'libel the dead is not an offence known to our law: the dead have no rights and can suffer no wrongs'.[8] It is, however, a misdemeanour to publish defamatory words of a deceased person, if it be done with intent to bring scandal on his family and to

[1] *Elliot* v. *Joicey (Lord)*, [1935] A.C. 209 at 238 et seq.

[2] Salmond, *Torts* (14th ed.), 622, and 4 *Univ. of Toronto L. J.* (1942), 278. Recovery was denied in the Irish case, *Walker* v. *G. N. Rly. of Ireland* (1890), 28 L.R. (Ir.) 69: and many American cases deny a remedy. See *Smith* v. *Luckhardt* (1939), 19 N.E. (2d) 446, discussed 87 *Univ. of Pa. L. R.* (1939), 1016; contra *Stemmer* v. *Kline* (1940), 17 A. (2d) 58; 45 *Dickinson L. R.* (1941), 238, and *Williams* v. *The Marion Rapid Transit Co.* (1949), 87 N.E. (2d) 334. Recovery has been allowed in Canada: *Montreal Tramways* v. *Leveille*, [1933] 4 D.L.R. 337; and since 1949 an increasing number of courts in the United States of America have allowed recovery; see Prosser, *Torts* (2nd ed.), 174–5. In Victoria, recovery is allowed: *Watt* v. *Rama* (1971, as yet unreported).

[3] Salmond, *Torts* (14th ed.), 622.

[4] S. C. Atkinson, 20 *L.Q.R.* (1904), 134; D. Seaborne Davies, 1 *Mod. L. R.* (1937), 203, 269.

[5] D. S. Davies, op. cit. 209.

[6] Ibid. 218.

[7] But now see the Infant Life (Preservation) Act, 1929, 19 & 20 Geo. V, c. 34.

[8] Per Stephen J., *R.* v. *Ensor* (1887), 3 T.L.R. 366. For America see *Rose* v. *Daily Mirror Inc.* (1940), 20 N.Y.S. (2d) 315; 40 *Col. L. R.* (1940), 1267. In N.S. Wales a plaintiff can sue in respect of any imputations on any members of his family, living or dead, if they affect his reputation or livelihood: Defamation Act, 1958, s. 5.

provoke them to a breach of the peace.[1] The law must tread warily, for, as Lord Kincairney has cynically remarked, 'about the half of history consists of what might be called defamation of the dead'.[2] In Roman law an heir could sue for *iniuria* if an insult was offered to the body of the deceased at the funeral. But this was in some ways a direct insult to the heir himself.[3] French law grants a civil remedy to relatives, even when there is no specific intent to attack them, if they can prove either material or moral damages resulting from untrue statements concerning the dead.[4] The problem which every system must face is to protect serious studies in history while striking at the salacious gossip written only to pander to lower tastes.

The effect of death on causes of action already subsisting in tort represents a very confused chapter of English law. The maxim *actio personalis moritur cum persona* has darkened counsel, and 'like some other Latin maxims which have been invented or adopted by our law, we should have missed nothing if it had never found its way there'.[5] The common law rule was that if I commit a tort against you and either of us dies, the liability is extinguished. This doctrine was made tolerable only by a series of exceptions, and it was largely swept away in England in 1934.[6] French law, in general, allows both the claim of the deceased and his liability to pass to his legal successors,[7] but there are difficulties when the claim is based on injury to the person or to the reputation of the deceased.

Another question is whether the infliction of death is a cause of action in tort. A master may sue for loss of the services of a domestic because Jones has, intentionally or negligently, so injured the servant that she cannot perform her work, but at common law[8] it was cheaper for Jones, instead of maiming, to kill, for in that case no action lay.[9] Thus loss resulting to third parties by the infliction of death is not a tort, nor is the infliction of death a tort against the person killed. The Fatal Accidents Act, 1846, provides a remedy for certain dependants in cases where the breadwinner has been killed. French law has no need of any specific statute, since the

[1] Hawkins P.C. 1, 542; F. P. Walton, 9 *J. Comp. Leg.* (1927), 1.
[2] *Broom* v. *Ritchie* (1905), 6 Fraser 942, cited F. P. Walton, op. cit. 2.
[3] Cf. Paul, *Dig.* 47, 10. 27: an action for *iniuria* lies if the statue of one's father is stoned.
[4] See F. P. Walton, 9 *J. Comp. Leg.* (1927), 1 at 10–11.
[5] P. H. Winfield, *Textbook of the Law of Tort* (8th ed.), 605.
[6] Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. V, c. 41.
[7] F. P. Walton, 18 *J. Comp. Leg.* (1936), 40 at 51.
[8] Leaving aside the possibility of criminal liability.
[9] The rule in *Baker* v. *Bolton* (1808), 1 Camp. 493.

general principles of the code are wide enough to cover loss to A arising from the negligent killing of B by the defendant.[1] The English rule that the infliction of death is not a tort to the person killed has been partially evaded by the grant of an action for loss of expectation of life which can be brought by the representative.[2] In French law many writers support the view that there is a transmissible action for instantaneous death, but this is still a matter of dispute.[3]

Kocourek suggests that if the infliction of death is regarded as a tort to the person killed (as it is in some American states), then we can explain this only by postulating that the legal *persona* survives death, for, since the wrongful act is that of causing *death*, the act is not complete until the victim is no longer living and, if at that moment legal personality ceases, no wrong has been done to any *persona*.[4] This is reminiscent of the famous argument in *Hales's Case* that a man who committed suicide did not commit a felony during his life, for the felony was completed only when death resulted, and then of course he no longer existed.[5] It may possibly be that in some systems a man's estate is liable for defamatory matter in his will, although it was published only after he was no longer in being.[6] If a child may recover compensation for injuries negligently inflicted before birth, should we say that the legal *persona* precedes the physical birth?[7] If it is convenient to do so, there is no conclusive theoretical reason why the law should not adopt some such theory as Kocourek suggests. But it is the express theory of most systems that legal personality begins at birth and ends at death, however difficult it may be to reconcile this with some of the actual rules in force.

§ 87. Status

Status is a word which has no very precise connotation. Salmond[8] gives four meanings:

(*a*) legal condition of any kind, whether personal or proprietary;

[1] F. P. Walton, op. cit. 53.
[2] *Rose* v. *Ford*, [1937] A.C. 826; cf. *Benham* v. *Gambling*, [1941] A.C. 157.
[3] F. P. Walton, op. cit. 53. [4] *Jural Relations*, 296.
[5] *Hales* v. *Petit*, 1 Plowden 253. An American case allowed recovery for nervous shock against deceased's estate when suicide was committed in a friend's kitchen: *Blakeley* v. *Shortal's Estate* (Iowa, 1945), 20 N.W. (2d) 28; 32 *Cornell L. Q.* (1946), 297. [6] 53 *Scot. L. R.* (1937), 145; *contra* 97 *Univ. of Pa. L. R.* (1948), 289.
[7] A. Kocourek, op. cit. 298. Legal personality could not be held to continue indefinitely after death without upsetting many rules of law, e.g. that the dead have no rights. Indeed, Kocourek's theory would raise more difficulties than it solves.
[8] *Jurisprudence* (12th ed.), 240.

(*b*) personal legal condition, excluding proprietary relations;
(*c*) personal capacities and incapacities as opposed to other elements of personal status;[1]
(*d*) compulsory as opposed to conventional legal position.

Austin[2] agrees that the term cannot be used with exactness, but thinks that when for ease of exposition it is useful to separate a complex of rights and duties, of capacities and incapacities which specifically affect a narrow class, it is convenient to designate that complex by the term *status*.

Very many factors may lead to the creation of a status. Thus sex, minority, and marriage are bound up with the problem of the family; illegitimacy shows the lack of proper family ties; mental or bodily defect may lead to special treatment by the law. Caste, official position, or profession may create certain privileges or disabilities. Criminality may destroy liberty, or bankruptcy may divest of property. Foreign nationality, race, or colour may cause the law to distinguish a group.[3]

One of the best analyses is that of Allen.[4] Status may be described as the fact or condition of membership of a group of which the powers are determined extrinsically by law, status affecting not merely one particular relationship, but being a condition affecting generally though in varying degree a member's claims and powers. The nature of this definition will be clearer as the various points involved are discussed. Status is not merely a basis for classification, but a matter of great political, legal, and social importance.

Firstly, status arises from membership of a class and the powers of that class are determined extrinsically by law, not by agreement between the parties.[5] There is no power for a member to vary the conditions imposed by law, for example, the rules relating to the status of marriage are conclusively fixed.

Secondly, while an infant has no choice whether he will enter the status of infancy or not, it is not always the case that members of a status are compulsorily placed within that group by law. Thus

[1] 'Status is in the main a matter of personal capacity': per Scott L.J., *Re Luck's Settlement Trusts*, [1940] Ch. 864 at 889.
[2] *Jurisprudence*, ii. 687.
[3] Other possibilities are civil death, heresy, slavery. But the latter hardly creates a status, for the slave is not really a *persona* at all. Prodigality may create a status, but some regard the prodigal as only another instance of the feeble-minded.
[4] *Legal Duties*, 28. And see R. H. Graveson, *Status in the Common Law* (1953).
[5] 'Status is in every case the creature of substantive law': per Scott L.J. in *Re Luck's Settlement Trusts*, [1940] Ch. at 890.

Phyllis cannot be forced into the status of a married woman against her will, but if she does marry, the law attaches to that status certain incidents which cannot be varied by the consent of the parties. Thus she became at common law immune from actions in tort brought against her by her husband: she has a claim to support from her husband, and in cases of necessity a power to pledge his credit. The status of marriage cannot be ended merely by the wish of the parties. Graveson suggests that the will of the party may affect the beginning or the end of status, but never both.[1] Marriage illustrates freedom at the beginning, and the control of law at the dissolution, of the status. An ambassador can be made such only by act of the State, but presumably he can destroy his status by resignation.

Thirdly, Maine emphasizes that status normally arises today because of a defect in judgment of the members of the class in question.[2] This statement is not universally true. Historically, status is due not to a desire to protect the weak, but rather to exploit them, as has already been seen in discussing the evolution of the law of guardianship.[3] Today many typical cases of status do reflect a desire to protect certain classes against their own weaknesses,[4] but this is not the only cause for the singling out of a certain class for special treatment. Ambassadors may suffer from occasional defects of judgment, but that is not the reason why the law places them in a special status.

Fourthly, membership of a status does not always result in restricted power. In the case of an infant or a lunatic, legal power is restricted, but an ambassador has increased privileges because he belongs to that particular class. It should not be thought that status creates only incapacities.

Fifthly, not all groups give rise to a status. Clearly membership of the group must affect a person's legal relations, or at least his power to enter legal relations. There is no status of the blue-eyed or of bridge-players, for although both of these groups may be regarded as forming a class, that class has no precise legal significance.[5] It is not enough even to confine the term to groups based on a classification of legal relations; thus it is inaccurate to speak of the status of trustees or of bankers. The test is that status is a condition which affects generally, although in varying degree, a person's claims,

[1] 10 *Mod. L. R.* (1947), 80 at 81.
[2] *Ancient Law* (ed. F. Pollock), 173.
[3] *Supra*, § 72.
[4] L. Josserand, *Évolutions et Actualités*, 159.
[5] C. K. Allen, *Legal Duties*, 43.

liberties, powers, and immunities. In the case of a trustee, there are particular powers relating to the trust property and particular duties owed to the beneficiary of the trust. But the fact that a man is a trustee does not affect his general powers. The particular rights and duties of a trustee spring from one particular title (the trust) and extend no farther. But an infant suffers from a lack of contractual power which affected at common law not only one contract or relationship but all his contracts save those which relate to necessaries. Holland asks: 'does the peculiarity of the personality arise from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence?'[1] I am a mortgagee because of one particular transaction and that does not affect my other legal relations. If Smith is a lunatic so found, his power entirely disappears and thus he can perform no juristic acts. It is easy to draw the line between these two extremes, but it is not easy to determine the exact limits of the requirement that membership must affect *generally* a person's claims and powers. Does a decree of judicial separation affect status?[2]

Allen distinguishes between status which is a condition, capacity which is a power to acquire and exercise rights, and the rights themselves which are acquired by the exercise of that capacity.[3] Using the terminology of Hohfeld, we would say that status is the condition of being a member of a particular group, which membership affects generally claims, liberties, power, and immunities. In private international law it is only reasonable for English law to recognize a status which may be imposed by French law on a Frenchman, but English courts may refuse to recognize as effective in England some of the claims or powers which arise from that status. As Scott L.J. puts it: 'The general principle of status is that, when created by the law of one country, it is or ought to be judicially recognized as being the case everywhere, all the world over',[5] and only for imperative reasons of public policy should the law refuse to allow in England the normal results that flow from a foreign status. Thus if a child is legitimate by his personal law, he should be

[1] *Jurisprudence* (10th ed.), 136.

[2] The majority of the High Court of Australia held that such a decree did not affect the status of the parties, but only the incidents thereof: *Ford* v. *Ford*, [1947] A.L.R. 181.

[3] *Legal Duties*, 47.

[4] Cf. *Re Selot's Trust*, [1902] 1 Ch. 488, where the court refused to recognize the incapacity which in French law flowed from the status of a prodigal.

[5] *Re Luck's Settlement Trusts*, [1940] 1 Ch. 864 at 891; see also *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C. 641.

regarded as legitimate the world over,[1] but English law may refuse to recognize the status of slavery, or the status of a wife where the marriage is incestuous by English law, although valid by the law of the country where the marriage took place.

One of Maine's most famous epigrams is that 'the movement of the progressive societies has hitherto been a movement from status to contract'.[2] When we contrast the difficulty in early communities of rising above the level which birth imposed and the comparative freedom of social movement in the modern world, there seems much historical justification for Maine's thesis. The law has abolished many of the lower grades of society, and the tendency is to confine the creation of status to those cases where there is special justification. What were once the lower ranks begin to enjoy many of the privileges of their 'betters'.[3] The evolution of the rules relating to married women represents an increasing power to contract, and the long-continued *patria potestas* of Roman law is now, for most systems, merely an historical curiosity.

But there are grave dangers involved in treating Maine's epigrammatic generalization as a universal law of legal history. Some neo-Hegelians regard contract as *the* legal category in which the free will of the individual has full play, and hence urge that its scope not only is increasing, but ought to be increased in the interests of human liberty.[4] Yet it may be necessary to restrict freedom of contract in order to give real freedom and protection to economically weaker classes,[5] and interference with freedom of contract has been so general that it is sometimes suggested that the conception of status is winning back some of its ancient importance.[6] In some countries the details of employment for particular industries are so fixed by law that

[1] But according to the decision of the C.A. cited in the preceding note, there are exceptions to this rule. The dissenting judgment of Scott L.J. seems more reasonable: G. C. Cheshire, *Private International Law* (8th ed.), 442.

[2] *Ancient Law* (ed. Pollock), 174.

[3] Once the age of majority varied according to the class of the person concerned. Thus the mercantile community required only ability to count and weigh, the sokeman must achieve the age of fifteen years and the knight twenty-one: Pollock and Maitland, *History of English Law*, ii. 436. Again the rules evolved by equity to protect the property of wealthy wives were gradually extended by statute for the protection of all.

[4] R. Pound, *Interpretations of Legal History*, 54–61. R. H. Graveson, 4 *Mod. L. R.* (1941), 261, suggests that the dictum is not readily applicable to the common law—the foundation of feudalism was agreement.

[5] *Infra*, § 99.

[6] Cf. P. Vinogradoff, *Collected Papers*, ii. 230 et seq. L. Josserand, *Évolutions et Actualités*, 167, speaks of *les nouveaux faibles*. It should be pointed out that Maine expressly guarded himself, for he stated that the progress has *hitherto* been from status to contract.

there is little scope for free discussion by the parties. But, even where wages, hours, and conditions of labour are rigidly laid down by arbitration courts, is it accurate to say that the workman enjoys a status? Is it not rather a legal determination of the conditions of one particular contract than a condition which affects capacity generally? Apart from the labour contract, does the fact that a person is a workman in a regulated industry affect generally his claims or powers? In one sense, marriage is a contract the terms of which are fixed by law, but the powers of a wife[1] may be affected generally—that is, not only in relation to her husband, but in relation to third parties as well. On the other hand, the wage contract affects only the relationship of employer and employed. It is, of course, a question of degree and it is not inconceivable that marriage may cease to create a status, whereas in a Socialist state the worker may enjoy particular powers merely because he is such. The ambiguity of the term 'status' is such that dogmatic assumptions are unwarranted, and, even on Allen's test, it is a question of degree whether the modification of powers and claims is sufficiently general to justify an assumption that a status has been created.

§ 88. Evolution of the Notion of Corporate Personality

In mature systems of law the doctrine of corporate personality is fully developed and a clear-cut distinction is made between the individuals who compose a corporation and the corporation itself. This can be illustrated by contrasting a company having limited liability with a partnership. A shareholder may retain his millions while his company goes bankrupt, but a partner must answer to his last penny for the debts of the firm. A man may become in effect his own preferred creditor by taking debentures from a company of which he holds all the shares but six; and as a result creditors of the firm can recover only after the debentures have been satisfied.[2] If we postulate that the company has a legal *persona* distinct from that of the shareholders or directors, it is difficult to attack the logic of this distinction, whatever may be said of its practical effects. Conversely,

[1] In modern communities the powers of a husband are not 'affected generally' because he is married. Yet it is common to speak of a married man (or even a bachelor) or a woman as enjoying a particular status. This illustrates the wider use of the term, which really deprives it of all significance for jurisprudence.

[2] *Salomon* v. *Salomon and Co.*, [1897] A.C. 22.

the acts of two separate departments of a company are in law the act of the same person.[1] If a group of miners wish to co-operate in order to secure cheap delivery of coal from the colliery at which they work, they must be careful as to the legal forms they use. If they create an incorporated company to organize the transport, a carrier's licence must be secured, since the company is carrying goods for hire or reward; but if they merely form an association, then each member is regarded as part owner of the vehicles and co-owners do not carry their own goods for hire or reward merely because they contribute to the running expenses. The formation of a company introduces a new legal *persona* which owns vehicles and receives money for carrying coal that does not belong to it.[2] In modern law there is thus a clear-cut distinction between the personality of the company and the personalities of its members. The company may engage in juristic acts, sue, and be sued. Though all the members change overnight, indeed, even if they all die, the company remains the same legal *persona*. But this conception of corporate personality is achieved but slowly.

The first group to evolve is based on the family, but no doctrine of group personality is necessary. At Rome the family retained a very strong organization, but no theoretical difficulty arose as its powers were centred in a human *paterfamilias*. Religious and ecclesiastical grouping provides another unifying element, and we also have the manifold agencies of government such as the counties, hundreds, and boroughs of English law.[3] Economic associations such as the merchant guilds create another organization of the community. But it is futile to expect to find answers to problems phrased in modern language concerning corporate personality, for they were not asked by the early lawyer. We have already seen that the State in England reached a high degree of organization on the very inadequate theory that the State was the king and the king a corporation sole.[4] Duff's analysis of the rules of Roman law reveals how long is the road to a fully developed conception of human personality.[5] *Persona* was not always used in the sense of legal personality, and there are 'hundreds of passages where *homo* could be substituted for *persona* without any apparent change in the sense'.[6] If we find a lack of analysis where

[1] *Harrod's Ltd.* v. *Lemon*, [1931] 2 K.B. 157; *Dunlop Rubber Co. Ltd.* v. *W. B. Haigh and Son*, [1937] 1 K.B. 347. [2] *Wurzel* v. *Houghton*, [1937] 1 K.B. 380.

[3] Pollock and Maitland, *History of English Law*, i. 469. The delictual responsibility of medieval corporations is discussed by W. Ullmann, 64 *L.Q.R.* (1948), 77.

[4] *Supra*, § 77. [5] *Personality in Roman Private Law*. [6] Ibid. 5.

the individual is concerned, it is not surprising that 'the Republican lawyers did not get beyond the first rudiments of that very abstract and artificial conception, corporate personality'.[1] *Collegia, societates publicanorum*, the *hereditas iacens*, municipalities, and charities raised awkward questions, but, although a practical solution was reached, there was a 'very slender foundation of abstract legal theory'.[2] Thus Paul thought that 'municipes per se nihil possidere possunt, quia universi consentire non possunt'.[3] Who owned the property donated to *collegia*?[4] These questions cannot be answered —indeed it 'is highly improbable that (the lawyers) ever asked, or were asked the question'.[5] Gradually, by means of representatives, 'colleges' can perform many juristic acts, but the jurists give no clear analysis.

In English law there were in the thirteenth and fourteenth centuries numerous active groups such as countries, boroughs, hundreds, manors, merchant guilds, trading guilds, chantries, deans and chapters, monasteries, and societies of lawyers.[6] Some of these groups were 'dissolved into their component parts'[6] before they became corporations, others followed a gradual development to legal personality. When Bracton wrote, the notion of corporate personality was not clearly understood, and the evolution was comparatively slow.[7] The inimitable touch of Maitland has enlivened the story of the corporation sole, and we see there the great difficulty that exists in securing a clear distinction between the rights of the natural man and the rights of the corporation sole which he represents.[8] The corporation sole was a useful device for the holding of title to Church land, but, although logic would require us to recognize that the artificial corporation sole can survive the death of the natural man, medieval lawyers thought that the freehold was in abeyance if the benefice was vacant. A Statute of Limitations speaks of a corporation sole or his predecessor.[9] A parson cannot make a lease to the corporation sole, for he cannot be both lessor and lessee. 'The ecclesiastical corporation sole is no "juristic person"; he or it is either natural man or juristic abortion.'[10] The same confusion is seen in the law relating to corporations aggregate. Even when theoretical ideas are accepted,

[1] Op. cit. 129. [2] Op. cit. 236. [3] *Dig.* 41. 2. 1. 22.
[4] Op. cit. 133. [5] Op. cit. 134.
[6] Holdsworth, *History of English Law*, iii. 469.
[7] Op. cit. 482.
[8] *Collected Papers*, iii. 210; G. W. Keeton, *Elementary Principles of Jurisprudence* (2nd ed.), 152.
[9] 3 & 4 Will. IV, c. 27, § 29; F. W. Maitland, op. cit. 240. [10] Op. cit. 243.

there is naturally great difficulty in applying them to particular cases. In the fifteenth century it was felt that a corporation could not sue one of its members, for this was really a case of a man suing himself.[1]

By the time of Coke it was laid down that a corporation could be created either by the common law, by authority of Parliament, by royal charter, or by prescription—but some 'lawful authority of incorporation' there must be.[2] Corporations played a large part in the development of the British Empire, but the 'South Sea Bubble' of 1720 caused a general feeling of mistrust, and it was not until the nineteenth century that incorporation could be easily secured by trading bodies.[3] Modern commerce would be impossible without the convenient device of the limited liability company. By 1914 there were 65,000 registered companies in England, but within forty years the number increased to 331,000.[4]

§ 89. Types of Incorporation

In English law there are two main types, the corporation aggregate and the *corporation sole*. The former 'is an incorporated *group* of co-existing persons, and a *corporation sole* is an incorporated *series* of successive persons'.[5] The joint-stock company illustrates the first, the ecclesiastical *corporation sole* (the parson) the second.[6] But the courts have not treated a *corporation sole* as a conception akin to that of the corporation aggregate, and have restricted its powers considerably.[7]

Continental law does not recognize the *corporation sole*, although property may be assigned to the successive holders of a particular office, but the device of *separatio bonorum* is regarded as sufficient.[8] There are two forms of juristic persons which are recognized by continental law but unknown to English law. Firstly there is the *hereditas iacens* which in Roman law was said not to be, but to resemble, a person.[9] Between the death of the *paterfamilias* and the entry of the heir there might be a long gap. In English law the institution of the personal representative ensures that there will be someone immediately responsible for the administration of the estate, but in

[1] Holdsworth, op. cit. v. 280–1.
[2] Op. cit. ix. 46.
[3] B. C. Hunt, *Development of the Business Corporation in England, 1800–1867*.
[4] L. C. B. Gower, *Law and Opinion in England in the 20th Century* (ed. M. Ginsberg), 144–5.
[5] J. W. Salmond, *Jurisprudence* (12th ed.), 308.
[6] *Supra*, § 77, for a discussion of the Crown as a *corporation sole*.
[7] G. W. Keeton, op. cit. 162.
[8] M. Wolff, 54 *L.Q.R.* (1938), 494.
[9] *Dig.* 46. 1. 22. P. W. Duff discusses many of these texts, op. cit. 19, 162.

Roman law the heir was the administrator, and until he had 'entered' on the inheritance there was no legal person who could give validity to the acts of slaves belonging to the inheritance. How was this problem to be solved? The first Roman view was that the *hereditas iacens* represented the person of the deceased; but a second view held that it was supported by the *persona* of the heir, his entry having a retrospective effect; a third view was that there was no owner and that the *hereditas* itself must 'own itself'. This last theory can be made intelligible only by treating the *hereditas* as a legal *persona*. The second form of juristic person is the incorporated foundation which in English law is usually based on a trust, but which in the absence of this device can satisfactorily function only if it is personified. In French law the *fondation* has been defined as *l'affectation perpétuelle d'un fonds à un but déterminé*.[1] Legal personality may be acquired by presidential decree if the purpose is one which is in the public interest. In some systems the personification of a fund may be obtained with a minimum of formalities.

§ 90. Theories of the Nature of Corporate Personality

In this part of jurisprudence we see an interesting conflict between philosophic theories as to the nature of corporate personality and the insurgent demand of economic forces for a further recognition of those forms of organization which seem so essential to modern life. The grant of legal personality is clearly within the gift of the State, for it may be refused to natural persons. In the case of the natural person, however, it is clear that the law grants legal personality to a physical entity existing in space and possessing what (for lack of a better term) we describe as human personality. While philosophy may find difficulty in analysing or describing the real nature of human personality, few of us doubt that we exist, and we compensate for our defective analysis by an intuitive understanding of our own nature which, however inadequate it may be, at least gives a substratum on which to build.

We have already seen that, so far as legal personality is concerned, there is no very significant difference between that granted to human beings and that granted to non-human beings such as groups or

[1] L. Michoud, *Théorie de la personnalité morale* (3rd ed.), 1, § 76, cited M. S. Amos and F. P. Walton, *Introduction to French Law*, 50. For analogous provisions of German law, see *BGB.* 80.

other entities.[1] There are vital differences, however, between a human being on the one hand and a group of human beings or an idol or some other entity on the other. A question which has often been asked is: 'When the law grants legal personality to a group, what is the nature of the entity which is thus recognized?' as though the answer to that question will resolve the problems relating to the nature of legal personality and, in particular, to the nature of corporate personality. If for no other reason, it will not resolve those problems because it is impossible to discover a common *essence* which unifies all the entities on which legal personality is conferred.

For that and for other reasons it may seem outside the range of jurisprudence to discuss that question. It is desirable to do so, however, for the following reasons: Firstly, philosophic (or what are alleged to be philosophic) views as to the nature of groups have not remained in the rare air of the universities, but have been put forward as justifications for working rules of law. Thus the fiction theory was used by some to restrict the power of corporations, and the realist theory as a basis for the argument that the road to legal personality should be made as easy as possible and that the widest powers should be given. In countries where incorporation was difficult and the device of trustees was not available[2] many philosophical arguments were introduced into jurisprudence. The doctrine of natural rights was that a human being possessed certain inherent rights by virtue of his personality as an individual.[3] When it was desired to protect the interests of groups, it seemed an obvious approach to prove that a group possessed a real personality from which sprang certain inherent rights. Some of the realist theories might be paraphrased as the doctrine of 'natural rights for groups'. A second reason for the study of the theories that have been developed to answer the question posed is that many of the purely legal problems arising in connection with groups and associations cannot be fully understood without some acquaintance with the nature of the entities which have enjoyed legal personality. A third is that to do so provides an opportunity to

[1] Cf. A. Kocourek, *Jural Relations* (2nd ed.), 57.

[2] Cf. Maitland, introduction to Gierke's *Political Theories of the Middle Age*, xxx–xxxi. The fiction theory gave the prince the right to keep the corporate form 'under lock and key . . . but . . . what for the civilians was a question of life and death was often in England a question of mere convenience and expense, so wide was that blessed back-stair. The trust deed might be long; the lawyer's bill might be longer . . . but the organized group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric'. The law of France after the Revolution settlement has been parodied as a command by the State: 'Thou shalt have no other associations but me': J. Bonnecase, *La Pensée juridique française*, i. 272.

[3] *Supra*, § 33.

illustrate the kind of thinking[1] attributed in outline to Oxford lawyers in the early part of this work[2] and to suggest that some of the most puzzling problems for the legal theorist may be elucidated by it.

At the outset a warning is necessary. Jurisprudence has been much confused by amateurish excursions into the closely defended realms of philosophy. Moreover, there have been so many theories[3] and so many variations even in doctrines that fight under the same banner, that we must beware of exaggerating the role that theory has played. With a little skill (and a lack of scruple) we can reach almost any practical result from any particular theory, so complicated are the issues that arise. Both the fiction and the realist theories have been upheld for the same purpose and each for opposed ends.[4] Thus some regard the doctrine of *ultra vires* as a deduction from the fiction theory;[5] Pollock thinks it a rule of constitutional limitations based on convenience.[6] Duff suggests that 'like most English cases and most Roman texts, *Salomon* v. *Salomon & Co.*[7] can be reconciled with any theory, but is authority for none'.[8] Any penetrating analysis shows that, while theories have provided shells for the attack, the decision as to where the ammunition was to be fired has been the result of the economic and social desires of those who used the artillery.

Most of the theories which have received support suffer from the common defect that they have attempted to answer the question posed above. It has already been pointed out that many legal words are not names for things but are 'systematic' words[9] in that their meaning can only be elucidated by looking to see how they are in fact used and then by looking to the rules by which it is possible to say whether their use is part of a valid proposition of law or not. Thus it should be clear that if we take three statements such as 'Smith is a legal person', 'Krupps is a legal person for the purposes of the law of Massachusetts', and 'Corporations are legal persons', there is little profit in taking 'Smith', 'Krupps', and 'Corporations', to search them for the common essence which will identify them as legal persons. The only common factor may be that they are all, within some existing

[1] Not yet adopted by the courts, it is true.
[2] *Supra*, § 4.
[3] There are said to be sixteen: M. Wolff, 54 *L.Q.R.* (1938), 496.
[4] E. R. Latty, 34 *Mich. L. R.* (1936), 597 at 621: A. Nékám, *The Personality Conception of the Legal Entity*, 60.
[5] F. Hallis, *Corporate Personality*, xlv–xlvi.
[6] *Essays in the Law*, 156–7.
[7] [1897] A.C. 22.
[8] *Personality in Roman Private Law*, 215.
[9] See § 4, *supra*.

legal system, treated in accordance with the rules of that system as units for that system's method. The term 'legal person' in each of the statements cannot be elucidated by examining the natures of Smith, Krupps, etc., but only by referring to the legal system, and its rules which enable the statement to be true or untrue and thereby give the term meaning.[1] The best-known theories which have been debated in the past either attempted the infinitely difficult task of searching the entities concerned for a common essence or, assuming there was none, attributed the transposition, by an act of authority, of personality from the human model to the non-human entity by a fictional process. What are those theories?

The Fiction Theory. This theory has appeared in many forms and has been put to many uses. Some of its exponents have sought to trace it to Ulpian or at the latest to Pope Innocent IV. In its modern form it owes more to the work of Savigny than to any other jurist. Briefly, his theory started from a proposition like this: 'Besides men or "natural persons" the law knows as "subjects" of proprietary rights certain fictitious, artificial or juristic persons; as one species of this class it knows the corporation. We must carefully sunder this ideal person from those natural persons who are called its members.'[2] Long before, of course, Coke had referred to corporations as 'invisible, immortal, and resting only in intendment and consideration of the law',[3] and Blackstone was careful to describe corporations as 'artificial persons'.[4] In 1819 Marshall C.J. defined a corporation as 'an artificial being, invisible, intangible, and existing only in contemplation of law'.[5] In contrast, of course, a human being is real, tangible, existing quite apart from the contemplation of the law, and possessed of 'personality'.

Salmond said that the group has 'reality' or existence, but that it has no real personality in the philosophic sense. When the law grants legal personality to John Smith it is granting legal power to a real

[1] This approach is fully explained by Professor H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 *L.Q.R.* (1954), 37.

[2] F. W. Maitland, in the introduction to his translation of Gierke's *Political Theories of the Middle Age*, xx.

[3] Sutton's Hospital Case, 10 Co. Rep. 1 (*a*) 32.

[4] 1 Bl. Com. 467–8.

[5] *Dartmouth College* v. *Woodward*, 4 Wheat. 518 at p. 636. In *Rolloswin Investments Ltd.* v. *Chromolit Portugal*, [1970] 1 W.L.R. 912, it was held that a corporation was not a person within the meaning of the Sunday Observance Act, 1677, as limited liability companies were then unknown, and anyway, a corporation could not attend divine service. But surely the persons who signed the contract on behalf of the corporation could have attended church?

will: when it does so to Sunshine Limited, it is granting legal personality to an entity that has no mind and no will—in short, no real personality.[1] When Lord Shaw said of an idol which had legal personality that its will had to be realized, 'it is hard to doubt that there is fiction in the air'.[2] In such a case the law imagined that the idol was capable of exercising its will and performing acts, and imputed to it the acts of certain agents. Salmond's argument was that the same analysis applies to the group.

The chief interest of the fiction theory, however, is the series of deductions drawn from it. Not being a 'real' person, the corporation cannot have any 'personality' of its own; it has no will, no mind, no ability to act. It can have only so much as the law imputes to it by a fiction—as though it were a real person. But most rules of law were expressed with human beings in mind and they contain words like 'wilfully', 'intentionally', 'doing', 'acting', 'fraudulently', etc. all too frequently. One deduction drawn from the fictional nature of a corporation was that, as a corporation has only a fictional will imputed by the law, it could only will lawful things. By definition therefore it could not make itself liable for certain kinds of legal wrongs—certainly it could not commit a crime involving any mental element. Other deductions can be imagined easily and many were accepted or at least argued. The practical effects often shock the conscience and the reason, and many of them which were at one time accepted have been avoided by various devices. Some illustrations of the practical effects of these doctrines are discussed below.[3]

The Concession Theory is bound up with and sometimes confused with the fiction theory. So far as it maintains that the law is the only source from which legal personality may flow, it states a truism. Whatever we may think the law should do, few would maintain that legal personality can be secured otherwise than by compliance with

[1] *Jurisprudence* (9th ed.), 417–18, 433. This discussion does not appear in later editions.

[2] P. W. Duff, *Personality in Roman Private Law*, 212. The reference is to *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*, [1925], L.R. 52 Ind. App. 245.

[3] See § 91. There is great diversity among the different adherents of the fiction theory as to its precise formulation and the practical deductions that should be drawn from it. M. Wolff, 54 *L.Q.R.* (1938), 505 et seq., discusses some of the suggested defects of the fiction theory: it has been accused (*a*) of being incompatible with the conception of subjective rights; (*b*) of leading to dangerous political results, e.g. confiscation of the property of these *personae fictae*; (*c*) of being opposed to the doctrine of free association. Wolff himself supports a fairly broad view of the fiction theory. These notes do scant justice to Savigny's theories and arguments, which were developed with great skill and detail, but for present purposes it is sufficient to indicate some of the difficulties which flowed from theories such as this.

the conditions laid down by the legal order.[1] If we regard this theory as laying down the sociological truth that all group *life* (as apart from the mere grant of *legal* personality) is created by the State, then it is clearly both mischievous and erroneous. The main cause of complaint is that the reader is so often uncertain which form of the theory is meant.

The Bracket Theory[2] rests on the proposition that only human beings can have interests and rights, and that a corporation is only a legal device or formula which will enable very complex jural relations to be comprehended more simply.[3] A, B, and C form a company, and, as it is inconvenient to refer always to all of them, a bracket is placed around them to which a name is given—but, in order to understand the real position, we must remove the bracket. One value of this theory is that it emphasizes that it may be necessary to look behind the entity recognized by the law to discover the real state of affairs if that is desired.[4] It is true that most (though not all)[5] groups exist to further the interests of individual men—if the entity is an economic one, its aim is to promote the interests of members, if it is a philanthropic or charitable one, the interests of others. But while, as objective observers from outside a legal system we may regard legal personality as merely a device of the law, it is to deny the law itself to say that the only legal relations which are fixed and certain are those which are discovered by removing 'the brackets' of the corporation, for example, and analysing the relations of all the human beings involved. New and separate entities are recognized as units in the legal system by that system itself and such recognition makes possible a clear distinction between the property, rights, and duties of the legal person, on the one hand, and of the individual human beings which may be involved in the make-up of that legal person, on the other.

[1] The right to associate should be distinguished from the question of the grant of legal personality to such associations as exist. (*a*) The law may prohibit all associations or the forming of organized groups, for any purpose or for particular purposes which are specified. (*b*) The law may give a wide liberty of association for lawful ends, but refuse legal personality. (*c*) The law may grant liberty of association and grant legal personality to some groups and not to others. (*d*) Legal personality may be regarded as a matter of fact to be achieved by a certain degree of inner unity and organization. Even in this sense, however, it is granted by the law, since the law lays down the conditions which create legal personality.

[2] Otherwise the Symbolist Theory of Ihering.

[3] R. Ihering, *Geist des römischen Rechts*, i. 202.

[4] M. Wolff, 54 *L.Q.R.* (1938), 497.

[5] A group might be set up to prevent cruelty to animals. In a broad sense the cultivation of humanitarianism is a human interest, but it might be argued that the protection of the interests of the individual members was not the real purpose of the group.

One can hardly make a contract with a bracket.[1] It is socially and economically false, as well as legally untrue, to say that only individual men can be the bearers of legal rights. Further, the deductions that may be drawn from this theory have been rejected repeatedly by courts in common law jurisdictions on both sides of the Atlantic. The academic puzzle of generalizing the conditions under which a court may 'pierce the veil of incorporation' would not have presented itself had they not been so rejected.[2]

The 'group concept' has led to many difficulties. A typical organization is a finance company which raises the capital, a holding company which determines policy, and finally a host of subsidiary companies, some wholly owned by the holding company and some partly owned. Sometimes there is a tendency to treat the whole 'empire' as one unit and to transfer money from one company to another, just as a man might transfer his change from a waistcoat to a trouser pocket. Thus the finance company may lend money to a subsidiary in difficulties, without taking security. This ignores the fact that each unit is a legal entity, with its own shareholders and creditors. It is unfair to those who invest in the finance company to have its assets dissipated to help another unit. Where there are overlapping boards of directors, public policy demands that each director considers the interest of the company on the board of which he is sitting at the moment. The 'group' has no legal personality, and while it may have a broad financial policy and have a certain unity from the business angle, the rights and obligations of each incorporated company must be kept distinct so far as the law is concerned. The publication of consolidated accounts sometimes makes it difficult for the shareholder in a subsidiary to understand the true position. There were two spectacular crashes in Victoria in the 1960s which underlined the importance of not allowing the group concept to overshadow the legal position which must treat each incorporated company as a separate legal personality.[3]

Kelsen[4] adopts the purely formal approach, which is adopted as the basis for the present discussion, and argues that there is in essence no difference between the *legal* personality of a company and that

[1] Unless that bracket has been recognized by the legal system as a legal person.
[2] See e.g. I. M. Wormser, *The Disregard of the Corporate Fiction and Allied Corporation Problems* (1927).
[3] The reference is to the collapse of the Korman and Reid Murray groups; see e.g. Parliamentary Papers—Victoria 7859/66.
[4] *Annales de l'Institut de droit comparé* (1936), ii. 26–7.

of an individual. Personality, in the legal sense, is only a technical personification of a complex of norms, a focal point of imputation which gives a unity to certain complexes of rights and duties. More or less arbitrarily, the law individualizes certain parts of the legal order and establishes a certain unity in the rights and obligations pertaining to it, but this is only a technical means of securing facility of procedure, for all that is real consists of the rights of human individuals. This (he submits) is the only approach for a pure science of law and has the advantage of ending the tiresome and futile arguments concerning the psychological and philosophical nature of group personality. The analysis is sound and essential to the understanding of the legal problems that arise, but it goes too far to argue that jurisprudence must be limited to an understanding of the legal logic involved once the recognition of legal personality is accepted for what it is. If light is to be thrown on the actual problems which arise for solution, students of jurisprudence must have some understanding of the nature of the facts and hence of the different kinds of entities which may be made the subject of claims that they be recognized as legal persons.[1] It is, however, essential not to confuse the two matters for study—the logic of the law once recognition is achieved, and the legislative problem of when and why recognition should be granted.

The Realist Theory. It has long been common to apply the analogy of the organism to a group. John of Salisbury in the twelfth century designated the prince as the head, the senate as the heart, the praesides and the judges as the ears, eyes, and tongue, the tax collectors as the intestines, and the workers as the feet.[2] But it is hardly necessary to emphasize the rather fanciful extravagance of these physical comparisons. The modern realist theory builds on an analysis of human personality, and regards group personality as in essence possessing the same characteristics. Gierke speaks of the group as having a real mind, a real will, and a real power of action.[3] What then is the essence of human personality? 'By a person we mean a rational individual, or if we prefer to put it so, a concrete individual mind.'[4] There are two elements in personality, a rational element and what (for lack of a better term) may be described as individuality.

[1] See *Legal Personality and Political Pluralism*, L. C. Webb (ed.), 1958.
[2] Cited M. Wolff, 54 *L.Q.R.* (1938), 498–9.
[3] F. W. Maitland's introduction to Gierke's *Political Theories of the Middle Age*; F. Hallis, *Corporate Personality*, 137, 146; Sobie Mogi, *Otto von Gierke*; W. M. Geldart, 27 *L.Q.R.* (1911), 90.
[4] C. C. J. Webb, *God and Personality*, 89.

If the power of the reason to organize experience and to direct action is emphasized as the sole essential mark of personality, we may plausibly argue that a group is a person. The same reason, which (we flatter ourselves) directs our individual lives, may be seen in the life of the group working in the service of those ends which the group desires. In a very real sense we may speak of the honour of Great Britain or the purposes of her foreign policy. But there is also in human personality an 'irrational surd'[1]—a feeling of individuality, of self-consciousness, an 'experience centre' which organizes experience, not only on the basis of abstract reason, but on the foundation of personal experience. Each individual has a continuity of experience: when he wakes in the morning he has (or should have) no difficulty in knowing who he is or in picking up the threads of his individual life. Attempts have been made to discover a collective consciousness or experience centre for the group, but they have not been particularly successful. We do find in the group a sense of the warmth and intimacy which belong to self-consciousness; there is, as Hauriou maintains, a communion between the members of the group which directly affects their actions;[2] but all the bold and interesting metaphors of the institutionalists fail to demonstrate that the inner unity of the group exists otherwise than in the minds of the members who compose it. It is difficult to accept the arguments brought forward to prove that there is a psychological continuity in the group mind similar to that of the individual—stripped of their eloquent verbiage, many of the arguments seem rather threadbare.[3] However interesting this line of thought, it is impossible to do justice to it in a general textbook.

The realistic theory or the institutional doctrine may be more easily applied to certain groups than to others. There may be very real analogies to human personality in the life of a nation, a group, or a university, but a one-man company or a foundation seems worlds removed. 'It has often struck me that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock company is

[1] Ibid. 111. 'Thus to the generalizing reason . . . personality is, as it were, a surd: it can at best be represented by a series of characteristics which can never be completed, so as to constitute *that very person* and not merely *a person of just that kind*.'

[2] *Cahiers de la Nouvelle Journée* no. 4, p. 10; A. Desqueyrat, *L'Institution, le droit objectif et la technique positive*, 15.

[3] M. Hauriou considers that the dynamic will of the institution brings together past, present, and future in an indissoluble unity: J. T. Delos, *Archives de phil. du droit* (1931, 1–2), 97.

only a sort of machine into which he puts money and out of which he draws dividends.'[1] There is something rather ludicrous in treating joint-stock companies as bearers of 'natural rights' so that it is *contra bonos mores* for one company to agree to become a mere tool of another—yet so it has been decided in Germany, apparently in reliance on the realist theory.[2] Wolff asks whether a promise by a company to dissolve itself would be unenforceable as being a promise to commit *felo de se*.[3] Thurman Arnold has humorously shown the curious results that follow from the tendency to treat great industrial combines as real persons whose liberty and dignity must be defended. Constitutional provisions designed to protect the personal rights of the American citizen were pressed into service to protect the freedom of huge enterprises which tyrannized over the consumer.[4] Freedom of the great industries from restraint 'was dramatized as individual freedom. . . . So long as men instinctively thought of these great institutions as individuals, the emotional analogies of home and freedom and all the other trappings of "rugged individualism" became their most potent protection.'[5] The lesson is that, while analogies are useful servants, they warp our thought ruthlessly if they become masters of our intellectual processes and are applied without rigorous scrutiny.

Some have said that Maitland accepted the realist theory. It is true that he explained Gierke's theories to English readers and that he showed the difficulties in the fiction theory. It is not true, however, that he wholly accepted, or preached the total acceptance, of that theory.[6] It is much more true to say that Pollock and Dicey accepted the realist theory.[7] Maitland sums up Gierke's theories by saying: 'Our German fellowship is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth, and hand; it is a

[1] F. W. Maitland, *Collected Papers*, iii. 383.

[2] *Reichsgericht, Zivilsachen*, 82, 313, cited M. Wolff, 54 *L.Q.R.* (1938), 494 at 501. Lord Maugham shows a clear understanding of the absurdity of this approach, in dealing with clogs on the equity of redemption. There is less likelihood of a company being oppressed than there is in the case of the individual: *Knightsbridge Estates Trust Ltd.* v. *Byrne*, [1940] A.C. 613 at 623.

[3] Op. cit. 501.

[4] *The Folklore of Capitalism*, ch. viii.

[5] Ibid. 190.

[6] See H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 *L.Q.R.* (1954) at 51.

[7] P. W. Duff, *Personality in Roman Private Law*, 216.

gesamtperson, and its will is a *gesamtwille*; it is a group-person, and its will is a group will.'[1]

The Purpose Theory.[2] The name goes a long way to explain this theory. It rests on the same initial premiss as the symbolist theory: that really only human beings are persons. But the law protects certain purposes as well as the interests of individual beings. 'The property supposed to be owned by juristic persons does not belong to anybody: Gaius is strictly accurate in calling it *res nullius*. But it does "belong for" a purpose, and that is the essential fact about it.'[3] All juristic or artificial (or non-human) persons then, are merely legal devices for protecting or giving effect to some real purpose. There is much truth in this, of course, as an observation of social fact. The continuing real theme that seems to be of importance in many charitable corporations or in many associations which have been recognized as legal persons for some purpose or another, such as trade unions,[4] is the continuing fund concerned and the purposes for which it is established. An examination of the nature of such funds and their purposes, however, tells us nothing about the legal device and that is the main purpose of the present enquiry.

Conclusion. Some of the theories, when the proper modifications are made, approach very closely to each other. Thus Hallis's form of the realist theory is that the conception of corporate personality is neither more nor less than a juristic reality—which leaves aside awkward questions of psychology and philosophy.[5] Wolff would modify the fiction theory: 'if all juristic persons are treated as if they have wills of their own and are capable of acting it makes no material difference whether you say "they *are* real animate beings with wills of their own, and so on" or whether you say "some of them may be and some certainly are not, but the law treats them all as if they were".'[6] The English lawyer often flatters himself that abstract speculation has not played an undue part in the decision of cases, but the same claim has been made for continental law.[7] As has already been suggested,

[1] In his introduction to his translation of Gierke's *Political Theories of the Middle Age*, xxvi.

[2] This theory has been developed recently as the 'kitty' theory by S. Stoljar, 'The Corporate Theories of Frederick William Maitland', in *Legal Personality and Political Pluralism*, and as the 'fund' theory by H. A. J. Ford in *Unincorporated Non-profit Associations* (1959).

[3] Duff, ibid., 220.

[4] See *Bonsor* v. *Musicians' Union*, [1956] A.C. 104; *Williams* v. *Hursey* (1960), 103 C.L.R. 30; R. M. Martin, 'Legal Personality and the Trade Union', in *Legal Personality and Political Pluralism*.

[5] *Corporate Personality*, 240.

[6] 54 *L.Q.R.* (1938) at 510–11.

[7] M. Wolff, ibid. 521. Cf. the summary by M. S. Amos and F. P. Walton, *Introduction to French Law*, 45, of the theory of M. Planiol and G. Ripert.

any one theory may lead to absurd results if not wisely applied. The practical object which the realist theory seeks to achieve is to secure freedom for the group and a just recognition of its claims. But this may be more easily achieved by an appeal to social necessities than by buttressing a theory with rather questionable philosophical arguments. The law is wise to treat corporations as far as possible as if they were natural men.[1] But it can hardly be claimed that legal personality should be automatically achieved as soon as a group develops a certain stage of organization—if only for convenience, the law demands compliance with certain formalities as a condition of the grant of legal personality. It would be burdensome if the law had to investigate the real development of each group before it could determine whether it possessed legal personality.[2]

It should be pointed out that the phrase, 'a realist approach', has two different meanings. Firstly, there is the theory of Gierke that the group has a real mind and a real will; secondly, the doctrine of realism that practical considerations and convenience, rather than any theory, determine the solution of practical problems. A realist approach in the second sense may call for refusal to apply Gierke's theory, say, to a one-man company.

It has been suggested that, while the first task of a jurist is to understand analytically the role played by the notion of legal personality in the logic of the law, he cannot stop there. Because of the ambiguities of the word 'person' and the confusion inherent in the various theories of legal personality, the wrong questions have been asked in the process of resolving many problems concerning legal personality. The jurist must seek to ask the right questions and to distinguish between those which go to the formal logic of a legal system and those which go to the assimilation and evaluation of facts which the legal

[1] 'If the law allows men to form permanently organised groups, those groups will be for common opinion right-and-duty bearing units; and if the lawgiver will not openly treat them as such he will misrepresent, or, as the French say, he will "denature" the facts: in other words, he will make a mess and call it law': F. W. Maitland, *Collected Papers*, iii. 341.

[2] Some legal systems have recognized that legal personality may exist without direct grant from the State. Roman-Dutch law has recognized the personality of a building society formed before the Companies Acts were passed, even although the company had never been expressly incorporated; see *Morison* v. *Standard Building Society*, [1932] A.D. 229, discussed by D. Lloyd, *Law of Unincorporated Associations* (1938), 11–14. In some American states there is a doctrine of *de facto* corporations, but it has a fairly narrow application. French law recognizes *la demi-personnalité* in some cases: D. Lloyd, op. cit. 222. H. J. Laski, 29 *Harv. L. R.* (1916), 404 at 424, argues that the distinction between corporations and voluntary associations should be abolished, but this would lead to uncertainty whether the group was so developed that it should be treated as a legal person.

system seems to organize. The jurist cuts himself off from life itself and from communication with other workers in the field if he limits himself to the first task. It is suggested therefore that he should seek to separate the questions which ask whether or not an entity *has been* or *is* recognized by the rules of a particular legal system as a legal person for the purposes of legal reasoning[1] and, if so, just what kind of legal personality the rules of that legal system establish for it, from questions which ask whether or not a given entity *should be* recognized as a legal person within a legal system whose rules do not clearly answer the question and, if yes, then just what kind of personality *should be* accorded to that entity within that legal system.[2] Questions of the former kind are proper for courts to decide and are commonly undertaken by courts whereas questions of the latter kind are, within the traditions of common law courts, properly for legislatures to decide and in this modern day are usually decided by legislatures. Courts, however, from time to time, must face such questions and they do so with an uneasiness which reveals their reluctance to tread within the legislative field.[3]

§ 91. Some Practical Problems

If we examine English writing we find the utmost diversity as to which theory best explains decided cases. Some advocates say English law has adopted the fiction theory,[4] others the realist,[5] while Holdsworth considers that no theory has been adopted save that the corporation should be treated as far as possible like a natural man—practical considerations, rather than the logic of theory, being the guiding force.[6] This clash of views represents the real difficulties that arise in translating any general theory into practical rules of law.

English law makes a clear-cut distinction between a company and the individuals who happen to compose it.[7] To take an example: a particular company had only two shareholders, who were also the directors. By the articles the directors' fees were to be determined by

[1] i.e. is to have the capacity to enter legal relations.

[2] See D. P. Derham, 'Theories of Legal Personality', in *Legal Personality and Political Pluralism* (1958).

[3] Contrast *Salomon* v. *Salomon & Co.*, [1897] A.C. 22 and *Lee* v. *Lee's Air Farming Ltd.*, [1961] A.C. 12; [1960] 3 All E.R. 420, with *Bonsor* v. *Musicians' Union*, [1956] A.C. 104; and see the discussion by Fullagar J. in *Williams* v. *Hursey* (1960), 103 C.L.R. 30, 52–70.

[4] e.g. F. Hallis, *Corporate Personality*, xli.

[5] e.g. Lord Wright in *The Future of the Common Law* (Harvard Tercentenary), 74. Cf. F. Pollock, *Essays in the Law*, 179.

[6] *History of English Law*, ix. 52.

[7] Ibid. 71.

a meeting of shareholders and the two men (as shareholders) voted to the directors practically all the profits, the object being to secure a lower rate of income tax, since directors' fees are (in legal theory) the result of personal exertion. It was held that the validity of this procedure could not be attacked in liquidation proceedings, however unreal the distinction between the powers of the directors and the shareholders might be on the facts of the particular case.[1]

The problem becomes more involved when a parent corporation begins to create subsidiaries controlled by the parent body. If a railway company is prohibited from carrying goods manufactured by itself, can it transport goods manufactured by a subsidiary which has been set up to evade the law? If a company promises not to engage in a certain business within a particular town can it legally set up a subsidiary to carry on that business? In America the problem has been hotly debated whether the court is entitled to 'pierce the veil of the corporate entity' and examine the reality beneath.[2] Where a corporation has been created to escape an obligation in contract or tort, to perpetrate a fraud, to evade a statute, to hinder or delay creditors, or to obtain property free of equities, some courts will treat the corporation as a mere agent either of the shareholders or of the parent corporation, as the case may be. The solution of this problem when to 'pierce the veil' is dictated by practical needs, and the only theory which can be usefully applied is a realism which holds, not that corporations are real persons, but that they should be treated as such save where there are imperative reasons to the contrary.[3]

Early English cases, even if the fiction theory was not expressly

[1] *In re Eutrope*, [1932] V.L.R. 453.

[2] G. F. Canfield, 17 *Col. L. R.* (1917), 128; I. M. Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* (1927); E. R. Latty 34 *Mich. L. R.* (1936), 597; 21 *Iowa L. R.* (1936), 630. For an English discussion see *Smith, Stone & Knight Ltd.* v. *Birmingham Corp.*, [1939] 4 All E.R. 116; O. Kahn-Freund, 7 *Mod. L. R.* (1944), 54; L. C. B. Gower, *Modern Company Law* (2nd ed.), ch. x. In 1926 Cardozo J. said: 'The whole problem of the relation between parent and subsidiary corporations is one that is still involved in the mists of metaphor. Metaphors in law are to be carefully watched, for starting as devices to liberate thought, they often end by enslaving it': *Berkey* v. *Third Avenue Railway*, 244 N.Y. 84 at p. 94—cited by B. F. Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations* (1953), 18 *Law and Contemporary Problems*, 472 at 498.

[3] Realism in the sense that the actual facts must be examined and the decision based on a shrewd appreciation of the substance of the matter. But such an approach does tend to lead to inconsistency in the decisions. The law must also balance the advantages of a definite, if rather narrow theory, with the rather too great fluidity that is achieved by an approach governed by expediency. Section 35 of the Transport Act, 1947, 10 & 11 Geo. VI, c. 49, is realistic enough to take account of, and define, a 'holding company'.

adopted, show a tendency to regard a corporation as possessing only a fictitious will. Thus it was argued that a will which was imputed by law could not be directed to criminal activities, for the fictitious will was imputed only for the pursuit of lawful ends. The development of case law shows an increasing tendency to overcome the theoretical difficulties involved, and to hold corporations liable for certain crimes, but how far this evolution will go is still uncertain.[1] The first difficulty is that of punishment.[2] If the only possible sentence is imprisonment or death, then it is futile to indict a corporation. In Tasmania the Criminal Code lays down maximum penalties only and leaves the court free to impose a lower sentence of imprisonment or a fine if it desires. Under such a code, no difficulty arises about punishment. The second difficulty is that a corporation can act only through agents and that there is a presumption against imputing the *mens rea* of the agent to the principal. One escape from this doctrine is to treat acts of the primary representatives of the company as the act of the company itself.[3] This is the approach of German law. Where common employment was concerned, English law did not treat the directors as being fellow servants with an inferior employee.[4] In *D.P.P.* v. *Kent & Sussex Contractors Ltd.*,[5] the charge was that returns, known to be false, were sent in by the transport manager for the purpose of obtaining petrol. Lord Caldecote held that the company 'by the only people who could act or think for it' had committed the offence.[6] *Moore* v. *Bresler Ltd.*[7] goes beyond this doctrine. Here the acts were not authorized by the directors but by the secretary of the company who was also a branch manager, and the branch sales manager. Moreover, these officers intended to defraud the company itself. Lord Caldecote thought it sufficient that the men were important officials of the company acting within their authority. This increases greatly the area of criminal liability of corporations and seems to blur the distinction between the primary representatives and mere servants: in the case of the latter, the

[1] R. S. Welsh, 62 *L.Q.R.* (1946), 345—an authoritative survey; L. H. Leigh, *The Criminal Responsibility of Corporations in English Law* (1969).

[2] Procedural difficulties concerning indictment of corporations were overcome by § 38 of Criminal Justice Act, 1925.

[3] C. R. N. Winn, 3 *Camb. L. J.* (1929), 398.

[4] *Fanton* v. *Denville*, [1932] 2 K.B. 309 at 329.

[5] [1944] K.B. 146.

[6] Approved by C.C.A. *R.* v. *I.C.R. Haulage Ltd.*, [1944] K.B. 551. See also *Tesco Supermarkets Ltd.* v. *Nattrass*, [1971] 2 All E.R. 127. Lord Reid points out at 132 that the person who acts for the company is not its *alter ego*, but is the company itself. Other servants are the agents of the company.

[7] [1944] 2 All E.R. 515.

corporation should not be vicariously liable in crime (in the absence of statutory direction), whatever may be the position in tort. The conclusion of Welsh[1] is that a corporation can be indicted and that whether the criminal act of an agent can be regarded as the act of the company itself must depend upon 'the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case'.[2]

In the law of contract there was a curious distinction between common law and statutory corporations. The former may bind themselves in the same way as a natural person, though if the provisions of the charter are not observed, the Crown may proceed by *scire facias*: the latter may make contracts only within the limits of the memorandum of association.[3] This last rule seems to have some affinities with the fiction theory, since the power of the company is limited by the terms of the grant of personality. But we do not argue that because an infant's powers are restricted, therefore a special theory of personality should be applied to him. Moreover, the doctrine of *ultra vires* was not fully developed until the nineteenth century and in the leading case five judges were on the losing side:[4] the dispute concerned the detailed provisions of the Companies Act of 1862 and not the general theory of corporation law. In England there has been recent criticism of the *ultra vires* rule, and foreign observers regard it as strange that the company should be able to evade the performance of an agreement by the plea that it acted beyond its powers. In fact, however, the rule is becoming of less practical importance because the memorandum and articles are now drafted so widely that it is difficult to bring the doctrine of *ultra vires* into play.[5] Where it can be relied upon, however, it should be noted that it works to prevent a company binding itself by contract beyond its powers; it does not work to prevent a company receiving due

[1] Op. cit.

[2] Cited from *R.* v. *I.C.R. Haulage Ltd.*, *supra* at 559. In *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Company Ltd.*, [1915] A.C. 705 at 713, Lord Haldane points out that the active and directing will of the company must be sought in the person of somebody who is really the directing mind and will of the corporation, 'the very ego and centre of the personality of the corporation'.

[3] W. S. Holdsworth, *History of English Law*, ix. 59–61.

[4] Including the astute Blackburn J.: *Ashbury Rai way Carriage and Iron Co.* v. *Riche*, L.R. (1875), 7 H.L. 653. In the Court of Exchequer two out of three judges found for the plaintiff; in the Exchequer Chamber the six judges were equally divided; the House of Lords unanimously found for the defendants.

[5] The Cohen Committee on Company Law Amendment advised in 1945 that the *ultra vires* rule should be abolished. Australia has modified the rule in the Uniform Companies Acts passed by the several states.

consideration for performance of a contract which went beyond its powers—at least that seems the better view.[1]

In the law of tort, after some hesitation, metaphysical difficulties were avoided by adopting the simple principle that a corporation was liable for the acts of its servants in the course of employment. As late as 1886, however, Lord Bramwell thought that a corporation was not liable for any tort in which proof of malice was an essential element,[2] but the tide was too strong.[3] Once the doctrine of master and servant is applied, there is no reason why the malice of the servant (if it be in the course of employment) should not be imputed to the master. The old problem, however, has raised its head with regard to torts committed during the carrying out of an undertaking which is *ultra vires* of the corporation. The strict view is that if a tram company has no power to run buses, then any bus drivers engaged are not in law the servants of the company and therefore the company is not liable for their torts.[4] Even approval of all the shareholders and directors of the company's entrance into the field of bus transport is of no avail, since the question is one of lack of legal power. But although logically unassailable,[5] this doctrine has been rejected by the overwhelming weight of American authority.[6] English law is still uncertain, but there is support for a practical approach which emphasizes the injustice to the victim if he is denied a remedy. In effect, the acts of the directors in their official capacity should be regarded as the acts of the company—at least so far as liability in tort is concerned.[7]

[1] *In the Matter of K.L. Tractors Ltd.* (1961), 34 Aust. L.J.R. 481 (in the High Court of Australia); and see L. C. B. Gower, *Modern Company Law* (3rd ed.) at 95.

[2] *Abrath* v. *N.E. Rly.* (1886), 11 A.C. 247. Sometimes the judgment is called a dissenting one. Strictly there was unanimity in dismissing the appeal, but Lord Bramwell was the only one to make this specific point.

[3] See *Citizens Life Assurance* v. *Brown*, [1904] A.C. 423.

[4] A. L. Goodhart, *Essays in Jurisprudence and the Common Law*, 91.

[5] P. H. Winfield's argument in *Text-Book of the Law of Tort* (4th ed.), 107, does not touch Goodhart's main point, which is that the company cannot act beyond its power. At the most, an order of the directors would make them personally liable, ratification by the shareholders might make them jointly responsible, but no act can give power to a company to engage a servant when that power is refused by law. In the 6th ed. of Winfield's *Text-Book*, the editor (T. Ellis Lewis) argues that questions of power are irrelevant when a company expressly authorizes a tort. He asserts that a company is also liable for the torts of a servant acting within the scope of his employment but not otherwise, and that the whole ground is covered by those two propositions.

[6] F. V. Harper, *Law of Torts*, 654. See also the Cohen Committee Report, 1945, Cmd. 6659 and the Jenkins Committee Report, 1962, Cmd. 1749.

[7] J. W. Salmond, *Torts* (15th ed.), 571; *Campbell* v. *Paddington Corp.*, [1911] 1 K.B. 869; L. C. B. Gower, op. cit. 95.

The recognition of foreign corporations raises several interesting questions. If we apply the concession theory logically, then a French company has no legal personality in England, unless it is specifically granted personality by English law—and strictly there would be two legal persons, one governed by French and one by English law. But common sense and convenience have dictated the recognition of the personality of foreign companies.[1] In this respect a corporation has indeed been treated as far as possible like a natural man, but this has been due to the practical needs of business—not to deductions from any particular theory. Since a Russian company trades in England as a *persona* created by Russian law, it follows that if the company be dissolved in Russia, this is equivalent to laying an axe at the roots, and the English branches fall with the Russian tree.[2] How the English branches are to be wound up has provided an interesting problem, but apparently a section of the Companies' Act[3] allows the company to be brought to life in order that it may die a second time, secure in the knowledge that justice has been done.[4] There were great logical difficulties involved in such a view,[5] but the practical viewpoint of English law may be seen in Lord Macmillan's quip that a legal system which allowed John Doe and Richard Roe (who never existed at all) to sue could suffer with equanimity 'the apparition, at the bidding of the Legislature, of a dissolved company as a plaintiff'.[6]

If we rail at English law for its easy worship of convenience, we can see in American law the effects of the worship of an obsolete theory. Taney C.J. laid down that a company had no existence outside the boundaries of the state which had incorporated it.[7]

[1] E. H. Young, 22 *L.Q.R.* (1906), 178; A. Farnsworth, *The Residence and Domicil of Corporations.*

[2] *Russian and English Bank* v. *Baring Bros.*, [1932] 1 Ch. 435 at 440; *Lazard Bros. & Co.* v. *Midland Bank*, [1933] A.C. 289 at 297.

[3] § 338 of the Companies' Act, 1929.

[4] *Russian and English Bank* v. *Baring Bros.*, [1936] A.C. 405; the question of what effect the revival of the company has upon acts done during the interregnum creates problems—see *Re Banque des Marchands de Moscou*, [1958] Ch. 182; and see the interesting note on the practical difficulties arising out of the revivification of a dissolved foreign corporation by M. Mann, 15 *Mod. L. R.* (1952), 479.

[5] See the dissenting judgment of Lord Russell. Lord Maugham states that, if there is a legal entity bearing the name of the Russian and English Bank, 'it must be a different corporation existing by English law . . . possessing assets, if any, only within the British jurisdiction, and apparently it must be a quasi-trading corporation without statutes, or charter or articles of association . . .' (same case at 442).

[6] Same case at 438.

[7] *Bank of Augusta* v. *Earle* (1839), 13 Pet. 519; G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law*, 48.

Theoretically, therefore, a company could neither sue nor be sued in a foreign state. The practical evils which resulted have been largely remedied by fictions, but to the English lawyer the chief impression left by American writing is the complexity of American law and the simplicity of the English doctrine of recognition. Facts exact a penalty when the theory of the law is too rigid.

The residence of corporations raises many interesting problems. In determining liability for income tax, English law uses a realist test—where are the head and brains of the company situated?[1] For the purpose of determining enemy character the court looks to the actual control, and not the place of registration.[2] So far as domicil is concerned, the law adopts the analogy of birth in the case of the individual and asks where the company is registered. But, unlike the individual, the company has no power to change its domicil:[3] if it dissolves and is incorporated in another country, it is technically a new person.

The purpose of this cursory survey is to illustrate the practical problems that arise and to show how impossible it is to regard any one theory as affording an easy answer. Two more illustrations may complete the story. If land is bound by a restrictive covenant that title shall not be transferred to a coloured person or persons, is it a breach of covenant to convey the land to a corporation consisting entirely of negroes?[4] In many continental systems a donor can revoke a gift for ingratitude. Can a company be guilty of this graceless trait?[5] How far is the law to go in allowing to corporations the emotions and characteristics of *homo sapiens*? Can one company deal oppressively with another?[6] It is submitted that the tendency will be increasingly to impute to the company the acts and mental states of those who in effect control it.

[1] *De Beers Consol. Mines Ltd.* v. *Howe*, [1906] A.C. 455; but a company may apparently have two residences—*Swedish Centra Rly. Co.* v. *Thompson*, [1925] A.C. 495; A. Farnsworth, *The Residence and Domicil of Corporations*; and see *Union Corporation Ltd.* v. *Inland Revenue Commissioners*, [1953] A.C. 482 and *Unit Construction Co. Ltd.* v. *Bullock*, [1960] A.C. 351.

[2] *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. Ltd.*, [1916] 2 A.C. 307; R. E. L. Vaughan Williams and M. Chrussachi, 49 *L.Q.R.* (1933), 334; *Sovfrachi V/o* v. *Van Udens Scheepvaart*, [1943] A.C. 203.

[3] *Gasque* v. *Commissioners of Inland Revenue*, [1940] 2 K.B. 80.

[4] *People's Pleasure Park Co.* v. *Rohleder*, [1909] 61 S.E. 794.

[5] M. Wolff, 54 *L.Q.R.* (1938) at 515.

[6] *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*, [1958] 3 All E.R. 66.

§ 92. Associations

In English law, although there is no doctrine of 'semi-personality', many of the advantages of corporate life may be secure even without the gift of legal personality by the State.[1] The law of contract, of agency, and of co-ownership allow the members' club to flourish by the skilful use of legal devices that have been developed for other purposes. Thus if a subscription be paid, and the parties intend to enter into legal relations, the rules of the club become the terms of a contract between them.[2] If a member is wrongfully expelled, then, since the expulsion is void, it is doubtful whether damages can be recovered at common law;[3] but if a right of property is involved, equity will grant an injunction restraining members of the committee, or officers of the club, from taking any steps to prevent the member from enjoying the amenities of club life.[4] It is very difficult to define clearly what is meant by that right of property which must exist before equity will lend its aid. If the members hold the property of the club in co-ownership, then the case is clear. (But it may be noted in passing that it is a very special form of co-ownership, for the co-owners are a changing body of persons, a member's share is not alienable, neither can it be seized by his creditors nor transmitted on death—it is merely the right to enjoy the club property so long as he is a member and to share in the distribution of the property if the club be dissolved during his membership.[5] On resignation all rights disappear, and there is no power for a member to demand a

[1] D. Lloyd, *Law of Unincorporated Associations.*

[2] But the High Court of Australia has held that the payment of a subscription to the Australian Labour Party did not create a contract, since the parties did not intend to enter into legal relations: *Cameron* v. *Hogan* (1934), 51 C.L.R. 358.

[3] Halsbury, *Laws of England* (2nd ed.), iv. 494; *Cameron* v. *Hogan supra* at 372; *Edgar and Walker* v. *Meade* (1916), 23 C.L.R. 29 at 43; in *Wood* v. *Woad* (1874) L.R. 9 Ex. 190, the majority considered that an award of damages should not be made.

[4] An expulsion is wrongful if the rules of the club have not been observed, or if there is a violation of the principles of natural justice: *Maclean* v. *Workers' Union*, [1929] 1 Ch. 602 at 625; or if the committee has wrongly interpreted their powers: *Lee* v. *Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329.

[5] The New Zealand Supreme Court held that a plaintiff had a remedy for wrongful expulsion although the golf club concerned had no beneficial interest in land or chattels. The plaintiff's property right was said to be his right to compete in golfing fixtures. North J. held that the refusal to accept his entry for golf fixtures was nearly enough related to a right of property. *Millar* v. *Smith* (1953), N.Z. L. R. 1049; and see H. A. J. Ford, *Expulsion from Associations*, 1 Sydney L. R. (1954), 186: 'the property and contract concepts appear from recent English decisions to be fictions behind which the courts have looked to real problems'; and see the same author and the cases he has collected in *Unincorporated Non-profit Associations* (1959)—a most valuable monograph on the problems of associations generally.

dissolution.) Another example of a right of property would be that of a clergyman not to be expelled from a church community;[1] but it is doubtful if an ordinary member of a church could sue for wrongful expulsion—in whatever way the Church property was held, it would probably be regarded as impressed with a religious trust, and not as being held beneficially by the members.

Sometimes, instead of holding the property in co-ownership, members may prefer to vest the property in trustees on such terms as seem suitable. Hence the 'hedge of trustees' has been a convenient protection behind which the corporate life may flourish. In British communities great use is made of these devices, and powerful churches, trade unions, clubs, and stock exchanges may be only voluntary associations in the eyes of the law. Sometimes the rules of the club may be so drawn as to make amendment (e.g. raising of the subscription) impossible;[2] sometimes the trust deed may be so narrowly drawn that the will of the majority of the members of a church is made impotent. Thus one result of the *Free Church Case*[3] was that twenty-six congregations were granted 1,104 churches, and an immediate Act of Parliament was necessary to remove the anomaly. Severe strictures have been cast on the law for its treatment of a living organism as being rigidly bound by the original contract or trust deed. 'The moment the religious body begins to act as though it had any inherent life, it is liable to be hauled up in the courts and to be condemned as having acted *ultra vires*.'[4] 'The dead hand of the law fell with a resounding slap upon the living body of the church.'[5] Was the Free Church a dead branch and not a living tree?[6] But is not the criticism misdirected? Founders may draw the contract or the trust deed as narrowly or as widely as they please: if they choose to identify the trust with a certain theological doctrine,

[1] The reference, of course, is to a church which is not incorporated: *Macqueen* v. *Frackelton* (1909), 8 C.L.R. 673. A member's club which bought liquor and sold it to members was not caught by the older Licensing Acts, since the liquor was already held by the members and the transaction was not in reality a sale: *Graff* v. *Evans* (1882), 8 Q.B.D. 373.

[2] *Harington* v. *Sendall*, [1903] 1 Ch. 921. But see *Re Conveyances dated June 13*, (C.A.) [1969] 3 All E.R. 1175. By a majority the members of a club agreed to transfer the property to a newly-constituted body. There was no power given in the Rules for amendment. The Court of Appeal upheld the transactions, holding that since the majority vote, there had been no opposition and therefore there was implied unanimity (*sed quaere*).

[3] *General Assembly of the Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515.

[4] J. N. Figgis, *Churches in the Modern State*, 43.

[5] Maitland, cited F. Hallis, *Corporate Personality*, lvii.

[6] Per Lord Macnaghten [1904] A.C. at 631. See also F. Hallis, op. cit. lvii.

are the courts to have liberty to impose new conditions?[1] Many powerful bodies in England have, at one time or another, been content to exist as voluntary groups, and if group life were as harshly treated by the law as some suggest, the easy method of incorporation would have been adopted.[2] If properly drawn, either the form of contract or of the trust deed may supply reasonable opportunity for growth and development in the life of the group.

Indeed, it might be suggested that associations are the spoilt darlings of English law, especially when we consider the difficulties that beset the path of the hardy adventurer who would seek to make the funds of the association liable in contract or in tort. This protection of associations is not the result of any conscious policy but rather an accidental result of the application of ordinary well-known principles which work well in other fields. It is trite law that an association cannot be sued in its own name, for it has no legal personality. Hence an action lies in contract only against members who have bound themselves personally or who can be treated as principals under the ordinary rules of agency. And the law assumes that, in the case of the ordinary club, there is no implied authority in the committee to pledge the credit of members.[3] If a contract is expressed to be made between two football clubs (both being not incorporated), does the contract bind only the members at the time the contract was made? If so, in a contract intended to operate for twenty years, there may be few of the original members left, when a breach takes place.[4] If the contract was meant to bind the members of the club from time to time, no such contractual obligation can be created. Trustees who sign a lease on behalf of a club must take care, for, while they have a lien on any existing club property for reimbursement of any expenses properly incurred, there is no right of recourse against the individual members.[5] It is difficult to show that the members are liable in tort for the acts of a secretary or a servant,

[1] The fact that the powers of the Methodist Conference were drafted widely allowed Megarry J. to give a flexible operation to the power of the Church to enter into union: *Barker* v. *O'Gorman*, [1970] 3 All E.R. 314.

[2] Lloyd's was not incorporated till 1871. The Inns of Court are not incorporated. Many churches prefer to be voluntary associations or to create a corporation only for the purpose of holding trust moneys and property.

[3] J. Wertheimer, *Law Relating to Clubs*, ch. iii; D. Lloyd, 12 *Mod. L. R.* (1949), 409.

[4] See the interesting discussion by Gowans J. in two Victorian cases relating to football clubs: *Banfield* v. *Wells-Eicke*, [1970] V.R. 481 and *Carlton Cricket and Football Social Club* v. *Joseph*, [1970] V.R. 487.

[5] *Wise* v. *Perpetual Trustee*, [1903] A.C. 139, criticized T. C. Williams, 19 *L.Q.R.* (1903), 386.

though members of the committee may be, of course, made personally liable for torts committed by them as committee members.[1] It is not easy to generalize in simple terms, however. A representative action has been allowed against all members of a club (not only the committee) to enable a cleaner injured in the club to recover[2] and yet members of an association have been held not liable for the tortious acts of officials of the association unless they have authorized those acts.[3]

Cases decided concerning trade unions at one time gave rise to the notion that a representative action could be readily used against associations. Although the various statutes which legalized the trade union expressly stopped short of endowing it with legal personality, the *Taff Vale Case*[4] nevertheless held that a union could be sued in a representative action and its funds made liable in tort; but recent cases have emphasized that this decision depends rather on the particular statutes concerned than on any general principles relating to associations. In most cases it is difficult to show that all the members have a 'common interest' within the meaning of Order XVI, r. 9. Thus in *Barker* v. *Allanson*,[5] the plaintiff wished to recover for goods supplied to an association, but at the time the action was brought only 19 members out of a present membership of 841 had belonged to the association when the goods were supplied. Thus the majority could claim that they neither authorized nor ratified the contract in question. 'Judgment against representative defendants means judgment against each individual person covered by the representation',[6] and it is clear that it is only rarely that an action lies against every member of a club. Hence liability is normally confined either to the person who made the contract or to the committee if they can be proved to be principals: if a third party makes a contract with the association, without appreciating that it has no legal personality, then the committee or directors are liable in person.[7]

[1] *Brown* v. *Lewis* (1896), 12 T.L.R. 455; *Bradley Egg Farm Ltd.* v. *Clifford*, [1943] 2 All E.R. 378; *Poole* v. *Allen*, [1950] 1 All E.R. 476.

[2] *Campbell* v. *Thompson*, [1953] 1 Q.B. 445.

[3] *Baker* v. *Jones*, [1954] 2 All E.R. 553; and see H. A. J. Ford, *Unincorporated Non-profit Associations*, for a full discussion of the relations involved in circumstances like these.

[4] *Taff Vale Rly.* v. *Amal. Soc. of Rly. Servants*, [1901] A.C. 426.

[5] [1937] 1 K.B. 463.

[6] Same case at 475 per Scott L.J.; *Ideal Films* v. *Richards*, [1927] 1 K.B. 374; *Walker* v. *Sur*, [1914] 2 K.B. 930; *Hardie & Lane Ltd.* v. *Chiltern*, [1928] 1 K.B. 663 and at 696, 698, 701. Megarry J. allowed a wider theory of representation, where the action was brought to determine who the office-bearers were, on the ground that all members were interested in determining the legal position, although their views differed on the question of who the officers were: *John* v. *Rees*, [1969] 2 All E.R. 274.

[7] *Bradley Egg Farm* v. *Clifford*, [1943] 2 All E.R. 378.

Some suggest that, to avoid these difficulties, legal personality should be awarded to groups which reach a certain state of inner unity, but the resulting doubt whether a particular group possessed legal personality or not might well make the position worse instead of better. Associations may, in English law, obtain the gift of personality fairly easily, and third parties who wish to contract with a group can protect themselves by making the contract bind individual members of substance. There is no easy way, however, of guaranteeing satisfaction to those who sue in tort. To overcome difficulties of litigation French law at one stage recognized what has been termed *la demi-personnalité*.[1] An action could be brought by representation, in the English sense, but this was apparently confined to institutions formed in the public interest which possessed *une individualité véritable*.[2] Doubts naturally arose as to what privileges this 'half-personality' conferred,[3] and also as to what groups had achieved it, and the experiment cannot be regarded as having justified itself. In England a statute can create a *tertium quid*—an entity that is not a corporation and yet can sue and be sued.[4]

In *Bonsor* v. *Musicians' Union*[5] the question presented to the House of Lords was whether or not a member of a trade union could obtain damages for wrongful expulsion from the union. In the *Taff Vale Case*[6] their Lordships had held that a trade union could be sued in its own name, by non-members, to prevent a tortious act. But that decision had not clearly established the trade union as a legal person. In *Kelly* v. *National Society of Operative Printers' Assistants*[7] the Court of Appeal had held that a member of a trade union could not sue the union or its officers for wrongful expulsion, for the union had no independent legal existence and the officers were the agents of all the members including the plaintiff. In *Bonsor's Case* the House of Lords held that the plaintiff could sue the union and could recover

[1] G. Baudry-Lacantinerie, *Traité de droit civil* (3rd ed.), i. 354. In 1901 the acquisition of legal personality was made easier in France and the *société non-déclaree* was expressly deprived of legal personality.

[2] See appendix to D. Lloyd, *The Law of Unincorporated Associations*, 219.

[3] In English law the Minister of Health may be a corporation for the purpose of holding land, but not for the purpose of being sued. Cf. *Gilleghan* v. *Minister of Health*, [1932] 1 Ch. 86.

[4] *National Union of General and Municipal Workers* v. *Gillian and Others*, [1946] K.B. 81. Scott L.J. admitted that the trade union was not a corporation, but treated it as a *persona juridica*, which must mean a 'semi-personality'. In *Chaff and Hay Acquisition Committee* v. *Hemphill & Sons Pty. Ltd.* (1947), 74 C.L.R. 375, the High Court held that a statutory committee could be sued, though the statute had not created it a corporation.

[5] [1956] A.C. 104. [6] *Supra.* [7] (1915), 84 L.J.K.B. 2236.

damages out of the union's funds. The union was not 'incorporated' under any statute. A minority of their Lordships faced the question squarely and held that the union was a legal person ('a distinct legal entity') which had broken its contract and could be sued. The remainder of their Lordships approached the matter more indirectly. They took the view that the union was an unincorporated association (which it clearly was in one sense of those words) and had no independent juristic existence.[1] The whole House, none the less, achieved the result that the union could be sued in its own name and that judgment could be satisfied out of the union's assets.[2]

It is clear that there may be groups of people which look like mere voluntary associations at first glance, which none the less are recognized as legal entities by the law for some purposes. In the English common law tradition, however, the question whether or not they have been recognized as legal entities by the law (or quasi-corporations, as they are sometimes called) will usually be treated as one of statutory interpretation, on the assumption that it is the legislature alone that can create such entities.[3] It is submitted that the questions outlined in Section 90 above are the proper jurisprudential ones to ask when problems like these are encountered, however, for it is clear that courts cannot always avoid playing a substantive part in the creation or initial recognition of entities as legal persons.

REFERENCES

ALLEN, C. K., *Legal Duties*, 28.
DUFF, P. W., *Personality in Roman Private Law.*
FARNSWORTH, A., *The Residence and Domicil of Corporations.*
FORD, H. A. J., *Unincorporated Non-profit Associations* (1959).
GOODHART, A. L., *Essays in Jurisprudence*, 91.
GRAVESON, R. H., *Status in the Common Law* (1953).
HALLIS, F., *Corporate Personality.*
HENDERSON, G. C., *The Position of Foreign Corporations in American Constitutional Law.*
LLOYD, D., *Law of Unincorporated Associations.*
MAINE, H., *Ancient Law* (ed. Pollock, 1924), Note L.

[1] Lord Keith, it is true, was somewhat doubtful and at one point said it would not be wrong to call the union a legal entity—the House of five, therefore, could be said to have been equally divided on that point.

[2] And see the case of *Williams* v. *Hursey*, in the High Court of Australia (1960), 103 C.L.R. 30; and in particular the judgment of Fullagar J. in that case.

[3] See *Williams* v. *Hursey* (*supra*). Incorporation may, of course, be also created by a royal charter. See also K. W. Wedderburn, 28 *Mod. L. R.* (1965), 62.

MAITLAND, F. W., *Collected Papers*, iii. 210, 321.
NÉKÁM, A., *The Personality Conception of the Legal Entity*.
POLLOCK, F., *Essays in the Law*, 151.
POUND, R., *Interpretations of Legal History*, 54–61.
WALTON, F. P., 9 *J. Comp. Leg.* (1927), 1.
WEBB, L. C. (ed.), *Legal Personality and Political Pluralism* (1958).
WELSH, R. S., 62 *L.Q.R.* (1946), 345.
WOLFF, M., 54 *L.Q.R.* (1938), 494.

XVII

RIGHTS CREATED BY A JURISTIC ACT

§ 93. Introduction

The nature of a juristic act has already been discussed.[1] Rights are created either by consent or by the direct gift of the law. In this chapter we are concerned with the manner in which parties may themselves create rights.

A juristic act may be the expression of the will of one party alone—a unilateral act, as it is frequently called. An example is the testament, where the will of one party alone is operative. Or the juristic act may be the result of agreement between two or more parties, as in the case of a contract. It is convenient to discuss first the notion of agreement.

§ 94. Rights created by Agreement

Agreement has been defined as the expression by two or more persons communicated each to the other (or others) of a common intention to affect the legal relations between them.

Anson finds five essential elements in an agreement.[2]

(*a*) There must be at least two parties.

(*b*) All the parties must have a distinct common intention.

(*c*) Each must communicate his intention to the others concerned.

(*d*) The common intention must be to affect legal relations. The legal sense of agreement is much narrower than the popular usage. If I agree to play bridge with the Browns, this is assumed not to be an agreement which will be recognized by the law, since I would not ordinarily be intending to enter into legal relations. Such a promise belongs to the social and not to the legal sphere.

(*e*) The legal relations intended to be affected must be those of the parties. An appellate court of three judges may affect the legal

[1] *Supra*, § 69.

[2] *Law of Contract* (16th ed.), 2 (this passage does not appear in the 23rd ed.); see also G. H. Trietel, *The Law of Contract* (3rd ed.), ch. ii.

relations of an appellant when the court 'agrees' to reverse the judgment of a lower court, but this is not an agreement in the sense in which the word is used in jurisprudence.

Agreement is thus the result of a bilateral juristic act, and the analysis already given of a juristic act can be applied—there must be a free expression of the will, by parties who have capacity, concerning an object which is not illegal.[1]

Agreement is a generic term which includes the species contract. All contracts are agreements, but not all agreements are contracts. Salmond divides agreements into four broad classes:

1. Contracts: creating rights *in personam.*
2. Grants: creating rights of any other kind.
3. Assignments: transferring rights.
4. Releases: extinguishing rights.[2]

The orthodox definition of a contract is that it is an agreement the express purpose of which is the creation and definition of rights *in personam* between the parties.[3] The emphasis is that a contract creates rights which are valid only as between the parties, and that these rights are brought into being by the agreement itself. The Romans distinguished very clearly between a conveyance, a transfer of *dominium* with its attendant rights *in rem*, and a contract which created only rights *in personam.* Hence a contract of sale did not pass the property and a separate transaction was necessary for this purpose. If the vendor wished to limit the use to which the land sold could be put, he could bind the purchaser by a contract, but this would not create rights which could be enforced against a subsequent purchaser. Contract creating *obligatio* was one thing, *dominium* creating rights which bound persons generally was another. In English law, the contract for sale of chattels may itself transfer the property and hence our categories are not so clear cut.[4] Also covenants may be made to 'run with the land', i.e. given an effect *in rem.*

Salmond confines contracts to those which *create* rights: there is no *a priori* reason why a contract, in addition to creating rights, should not also assign or release them. Indeed a normal way of transferring rights is by novation which originally is the substitution of a new contract for the old one. I can release my rights by contract, just as I can thereby create new rights.

[1] *Supra*, § 69.
[2] *Jurisprudence* (12th ed.), 339.
[3] Ibid. 338; J. W. Salmond and J. Williams, *Contracts*, 10.
[4] *Infra*, § 98.

An even more fundamental point has been stressed, that it is better not to define contract in terms of agreement.[1] The law will sometimes enforce a contract even although there may be no real subjective agreement.[2] English law holds a person to the inferences which a reasonable man is likely to draw from his behaviour, and if Brown's conduct presents all the external phenomena of agreement, then the law may declare that a contract is created, even although it is later proved that Brown had no subjective desire to contract. It is argued that it is somewhat clumsy to begin by defining contract in terms of agreement and then to point out that the law will sometimes impute to a man an intention which he does not possess, if the other contracting party was reasonably entitled to infer the intention from his acts.[3] These critics prefer to regard a contract as an actionable promise.[4] Thus the American Restatement defines a contract as 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which it in some way recognizes as a duty'.[5]

But does this carry us very much farther? In the ordinary sense of the word, a promise is just as subjective as an agreement. In a court of ethics, a man is held to a promise only if he intended to promise and only in the sense in which the promise was honourably meant.[6] Whatever definition of contract be used, the jurist must face the difficulty that, in order to protect others, the law will sometimes infer either an agreement or a promise, even although the party did not subjectively intend to bind himself. Moreover, all systems do not go as far as English law in adopting an external approach, and for jurisprudence a definition of contract in terms of agreement seems to be the most suitable.

In such a contract as barter with its simultaneous exchange of one product for another, there is no need for any theory of enforceable agreement, for nothing remains to be done by either party. Once, however, the law begins to recognize that a promise may create an obligation, it must face the problem of the terms on which it will force parties to fulfil their engagements. The English analysis of contract explains it as the acceptance by one party of an offer made

[1] R. M. Jackson, 53 *L.Q.R.* (1937), 525.
[2] See the discussion of the rules concerning mistake, *infra*, §§ 97, 100.
[3] R. M. Jackson, op. cit. 535.
[4] W. R. Anson, *Contracts* (23rd ed.), 23.
[5] F. Pollock, *Contracts* (13th ed.), 1: 'a promise or set of promises which the law will enforce'.
[6] R. M. Jackson, 53 *L.Q.R.* (1937) at 535, states that promise suggests an objective aspect, agreement a subjective. But is this so?

by the other.[1] The offer which becomes the basis of the contract may take various forms:

(*a*) I may offer a promise in return for your promise. (This is sometimes called a bilateral contract since both parties are bound to do something in the future, but this use of the word must be distinguished from the other sense which defines a bilateral juristic act as one which is the result of agreement between two parties. In this latter sense all contracts are bilateral.) Example: I promise to pay £5 in return for your promise to transfer to me your golf-clubs.

(*b*) I may offer a promise in return for your act. (This is sometimes called a unilateral contract, as only one party is bound to perform a duty in the future. In the sense referred to earlier no contract can be unilateral, since it is the result of agreement.) Example: You accept my offer to pay £5 next month by handing over your clubs now.

(*c*) Sometimes it is suggested that in a cash sale—threepence for your newspaper—there is really no promise, but only an offer of an act for an act. Once the coins and the newspaper have changed hands, neither party is bound by any outstanding duty and hence it is argued that this transaction falls outside the definition of contract as actionable promise.[2] The orthodox analysis, however, is that this is a case of an offer of a *promise* to pay threepence for delivery of the newspaper—although the promise is quickly discharged.

Another difficulty is to distinguish between those agreements which are true contracts and those which lead to the creation of a status. Salmond and Winfield[3] find the test of a contract in the freedom of the parties not only to create the relationship but also to define it by the terms of the agreement between them—if they are merely limited to entering into a relationship, the terms of which are compulsorily determined by the law, then it is a case of status. But this test is far too broad. If the law compulsorily fixes all the terms on which electric light can be supplied to a consumer, that does not mean that the consumer has a particular status—the agreement between the supplier and the consumer remains a contract even although neither can vary the terms. The test of status is that membership must affect generally a person's claims and powers and not only one particular relationship.[4] This seems the only possible way of distinguishing between contract and status. On this test, marriage creates a status, for the

[1] P. H. Winfield, 55 *L.Q.R.* (1939), 499.
[2] M. Ferson, 31 *Cornell L. Q.* (1945), 105 at 113.
[3] *Contracts*, 8. [4] *Supra*, § 87.

claims and powers of husband and wife are generally affected by their entry into the marriage relation—whereas the legal results which flow from signing a contract with an electricity supply company are limited to the particular legal relationship in question.

There are several minor points of confusion in terminology. Frequently contract is used both for the actual agreement and also for the obligations to which it gives rise. Strictly contract should be used only in the first sense and we should not speak of assigning a contract, but rather of the rights and duties which arise out of it. Again contract is frequently regarded as an enforceable agreement, yet the term void contract is not unknown. If we adopt the test suggested, a void contract is a contradiction in terms—yet it is a useful phrase, especially if we remember that a void contract is not entirely devoid of legal result.[1]

Taking all these points into consideration, we may define a contract as an agreement which will be recognized by the law as effective in creating, transferring, or extinguishing rights *in personam*.

§ 95. Evolution of the Concept of Contract

Theories of the origin of contract are sometimes bound up with economic doctrines that society has passed through the three stages of barter, money, and credit. Credit depends essentially on ability to rely on the promises of others and thus can flourish only where there is a fully developed law of contract.[2] It is, as yet, too early to attempt to show a universal law of evolution, for not all societies have passed through the same order of progress.[3] But it may be regarded as established that each group tends to develop contracts suited to its own particular economic organization, and, while any attempt at premature generalization must be deprecated, it is useful to contrast the nature of contract at various stages, since this throws into relief the real nature of our modern agreements.

The great advantage of contract in modern law is that the law will enforce certain agreements and thus men may rely on others carrying out their engagements. Probably the first step in the evolution of contract is ceremonial exchange—tradition demands that a gift be reciprocated in due course.[4] In barter or the sale of a slave for cash

[1] *Supra*, § 69. W. R. Anson, op. cit. 7.
[2] H. Cairns, *Law and the Social Sciences*, 82.
[3] Cairns, op. cit. 83. A. S. Diamond, *Primitive Law*, chs. xxiii–xxiv.
[4] D. F. Thomson, *Economic Structure and Ceremonial Exchange in Arnhem Land.*

there is no need for any theory, since, the agreement being fully executed, there are no outstanding obligations to be performed in the future—indeed in primitive law the rights of the parties arise from the transfer of the possession of the chattels rather than from any doctrine of the effect of agreement.

'Credit barter' or loan takes us a little farther—a *res* is delivered to another in return for a promise that another *res* of greater value shall be restored at some time in the future. In some communities the sole sanction for these agreements is the fear of ostracism. Apart from the community, primitive man is helpless, and if a native does not fulfil his obligations, he knows that in the future no other man will help him.[1] But parties soon desire a more effective sanction than the mere fear of economic boycott. A hostage may be demanded as security for the performance of what is promised.[2] But the emphasis is not on any notion of legal duty, but rather on the physical liability of the hostage who will be punished if the obligation is not fulfilled. It is the physical possession of the hostage that creates rights in the creditor, rather than the promise of the debtor. Perhaps the germ of contract arises when a person may make his own body liable in the event of default—but the penalty at first is physical slavery and not execution against any goods that the debtor may possess.[3] The loan of money is of such frequent occurrence that it is soon surrounded with special rules. Indeed, there is a tendency to novate other agreements into fictitious loans in order to secure the advantage of the effective process that has been developed.[4] Many arrangements on credit must have been necessary where wergild was concerned. The Franks first required hostages to be given—later a wand could be delivered to the creditor who would hand it to the person who was willing to stand as surety. Finally, the debtor could make himself his own pledge by accepting the wand.[5] Even today we can speak of 'pledging our faith'. In the thirteenth century in England, in order to save the trouble of suing for debt, a vigilant creditor got his judgment first and then lent the money.[6]

When certain transactions are recognized as binding, the early

[1] B. Malinowski, *Crime and Custom*, 58.

[2] Where money is borrowed, we may perhaps regard the hostage as being exchanged for the money.

[3] For the controversy concerning *nexum* see H. F. Jolowicz, *Hist. Introd. to Roman Law*, 166.

[4] Cf. the Roman contract *literis*.

[5] Pollock and Maitland, *History of English Law*, ii. 185.

[6] Op. cit. 201–2.

emphasis on the formal nature[1] of the contract leads to the following results: firstly, obligation can be created only by the observance of certain forms, since there is no theory that mere agreement may create rights and duties; secondly, the real question is whether the particular form was carried out, and hence questions of good faith and fraud, or even duress, are sometimes treated as irrelevant. Moreover, these contracts are unilateral in the sense that there are duties to be performed by one party alone.

Roman law later developed certain 'consensual' contracts that depended, not on any particular form, but merely on the agreement of the parties. The notion of good faith was emphasized and it was clearly recognized that the contract was bilateral, not only in the sense that it arose out of the agreement of two or more minds, but also in the sense that it might impose executory obligations on two or more parties. Roman law, however, stopped short of any general theory of contract, for the number of 'consensual' contracts was strictly limited. In modern times some systems adopt a broad theory that all agreements are actionable where the parties intend to enter into legal relations. But the exact limits of such a doctrine are discussed in the next section.

§96. Causa and Consideration

The law is naturally hesitant about enforcing all agreements. Is it to compel Jones to keep his promise to play bridge with the Browns whom he detests or to grant damages to Mrs. Robinson because her husband failed to buy the exclusive model which he promised in a rash moment? Roman law had no difficulty, since only a limited number of agreements were enforceable. But in modern systems, since the theory of contract is wider, we must ask: are agreements enforceable because they are agreements, or must there be some additional factor?[2] There are three possible courses. The law may either (*a*) enforce all agreements; (*b*) enforce all agreements where the parties intend to enter into legal relations and the agreement is not contrary to law; or (*c*) require some additional element such as form or consideration.

[1] It cannot be proved that all formal contracts arose first: Pollock and Maitland, op. cit. 182–4.

[2] Lord Wright, *Legal Essays and Addresses*, 289. A series of articles on the problem of consideration will be found in vols. 41 and 42 of the *Col. L. R.* (1941–2).

Nearly all systems require particular types of contract to be in a set form, either because they are of special importance or because experience has shown that, to prevent fraud, clear evidence of the terms is necessary. English law requires some contracts to be by deed, others to be in writing, while yet others may be verbal. Contrary to the widespread notion that 'it's not binding because there is nothing in writing', in many cases a verbal agreement is enough. But if the contract be not by deed, English law differs from other modern systems in requiring consideration which may be defined as something done, forborne, or suffered, or promised to be done, forborne or suffered by the promisee in respect of the promise of the other party.[1] Unless there is this *quid pro quo* for the promise, there is no consideration. Several studies have pointed out the narrowing effect that this doctrine has on English law. A promise to keep an offer open is not enforceable unless there be consideration which moves from the promisee.[2] Such a common business arrangement as a banker's commercial credit can only with difficulty (if at all) be fitted into the narrow doctrine of consideration.[3] If I promise to accept £800 in full settlement of a debt of £1,000, the promise to forgo £200 is not binding, since there is no consideration for it—but if I accept £800 and a box of matches, the latter may be consideration for a promise to forgo £200, for, while consideration must be of some value, it need not be adequate.[4] Lord Wright refers to the English emphasis on consideration as a 'mere encumbrance',[5] and the Law Revision Committee confesses that 'there is much to be said for its abolition',[6] for it allows 'the most cynical disregard of promises solemnly undertaken'.[7]

[1] Anson, op. cit. 80 et seq.

[2] *Sixth Interim Report of the Law Revision Committee* (1937), Cmd. 5449.

[3] A. G. Davis, 52 *L.Q.R.* (1936), 225. Cheshire and Fifoot, *Law of Contract* (7th ed.), 408.

[4] *Sibree* v. *Tripp* (1846), 15 M. & W. 23, lays down that the giving of a negotiable instrument for a lesser sum is consideration for a promise to forgo the balance; and see *Hirachand Punamchand* v. *Temple*, [1911] 2 K.B. 330.

[5] *Legal Essays and Addresses*, 323. Elsewhere Lord Wright refers to it as 'riddled with illogicality, fiction and anomaly': 55 *L.Q.R.* (1939), 189 at 202. Denning L.J. (1952), 15 *Mod. L.R.* 1, and F. Bennion (1953), 16 *Mod. L.R.* 441.

[6] But the Committee did not recommend its abolition, but contented themselves with proposals which would remove the most striking injustices. This report has not been implemented by legislation. See the valuable critical contributions by C. T. Hamson, *The Reform of Consideration* (1938), 54 L.Q.R. 233; and K. O. Shatwell, *The Doctrine of Consideration in Modern Law*, 1 *Sydney L. R.* (1955), 289.

[7] 1 *Mod. L. R.* (1937), 97 at 100, referring to *Dunlop* v. *Selfridge*, [1915] A.C. 847; and see G. W. Paton, in 25 *Can. B. R.* (1947), 123, and Denning L.J. (dissenting) in *Candler* v. *Crane Christmas & Co. Ltd.*, [1951] 2 K.B. 164.

Moreover, consideration will not serve as a universal test, for deeds are enforceable where there is no consideration and some agreements, where there is consideration, are not enforceable because the parties did not intend to enter into legal relations. A husband's promise to buy his wife a new hat does not create legal relations, even if a consideration could be spelled out, nor does the acceptance of an invitation to dinner.[1] Collective contracts (agreements between unions and employers) have been held not to be legally enforceable, as there was no intention to create legal obligations.[2]

Denning J. (as he then was), although he admitted that the courts would not allow an action for breach of promise without consideration, thought that such a promise, made with intent that the other party should rely upon it, could operate as a defence.[3] 'The logical consequence no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better.'[4] This is a courageous view.[5]

French and Roman-Dutch law have adopted the theory of *causa*. But the doctrine has become so broad that it is almost true to say that any agreement for a lawful object is valid, if the parties seriously intend to enter into legal relations.[6] The meaning of *causa* appears 'from Grotius' expression of "reasonable cause". There must be a reason for a contract, a rational motive for it, whether that motive is benevolence, friendship, or other proper feeling, or, on the other hand, of a commercial or business nature. In other words, the agreement

[1] Per Atkin L.J., *Balfour* v. *Balfour*, [1919] 2 K.B. 571 at 578; aliter if the parties are about to separate: *Merritt* v. *Merritt*, [1970] 2 All E.R. 760; cf. mother and daughter, *Jones* v. *Padavatton*, [1969] 2 All E.R. 616; agreements where the parties state that no legal obligation is to be incurred, *Jones* v. *Vernon's Pools Ltd.*, [1938] 2 All E.R. 626. An intent to enter into legal relations may, however, be inferred from conduct: *Upton* v. *Powell*, [1942] 1 All E.R. 220; R. Tuck, 21 *Can. B. R.* (1943), 123, discusses this case, arguing that there is no need for an intention to contract; and see Cheshire and Fifoot, *Law of Contract* (6th ed.), ch. iii, where the view that intention to create legal relations is an independent element in the common law of contract is reasserted.

[2] *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers*, [1969] 2 All E.R. 481. See B. A. Hepple, 28 *Camb. L. J.* (1970), 122; N. Selwyn, 32 *Mod. L. R.* (1969), 377.

[3] *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] 1 K.B. 130.

[4] Same case at 135; Cheshire and Fifoot, 63 *L.Q.R.* (1947), 283.

[5] But now see *Combe* v. *Combe*, [1951] 2 K.B. 215, and *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*, [1955] 2 All E.R. 657; Cheshire and Fifoot, *Law of Contract* (7th ed.), 83–7; L. A. Sheridan, *High Trees in New Zealand* (1958), 21 *Mod. L.R.* 185–6. It seems clear that the doctrine of the *High Trees* case is confined to defences in the nature of 'equitable estoppel'. See Ld. Hodson, *Emmanuel Ayodeji Ajayi* v. *B. T. Briscoe (Nigeria) Ltd.*, [1964] 3 All E.R. 556.

[6] R. W. Lee suggests that in Roman-Dutch law *causa* means little more than that contracts must be seriously made: *Introduction to Roman-Dutch Law*, 232, 429.

must be a deliberate, serious act, not one that is irrational or motiveless.'[1] But great battles still rage as to the true definition of *causa*[2] and some definitions are so broad that they would include all agreements seriously made, for no one but a lunatic would make a contract that is entirely irrational and motiveless. The orthodox theory of French law is that the cause of an obligation is the immediate end which the party has in view.[3] In this sense cause should be distinguished both from the object of the contract and the motive which moves each of the parties. The object is what is owed (money, golf-clubs), the cause tells us why it is owed (gift, sale, legacy). The cause, which is objective, must also be distinguished from the motive which is subjective—thus in sale each purchaser shares the common desire to acquire the goods which are the subject-matter of the contract, but the reason for the purchase varies from one individual to another. In reaching agreement neither party is directly concerned with the motive of the other.

But in making these distinctions difficulties arise. In a real contract the cause is said to be the delivery of the *res*. But here we are using the term not to express the immediate end of the party, but the element which makes the contract binding. The phrase means that a real contract legally comes into existence only when the *res* is actually delivered. The confusion between cause and motive is particularly marked. In *donatio* the cause is the intention to make a gift—it is possible to say that the motive (the reason why I intend to make a gift) is irrelevant, but it is natural for the two aspects to become intertwined. When we come to illegality of cause, the position is even more difficult. A lets a house to B for an agreed rent—here the cause is clear. But suppose B's motive is to use the house as a brothel and that A knows this. Logically the law may refuse to enforce the contract on grounds of policy, but there is no illegality of cause—cause is invariable and objective and there is a genuine hire. Yet the French courts treat the contract as void on the ground of illegality of cause, which naturally introduces much confusion between cause and motive. English law reaches the same result, but on the ground that the object of the contract is unlawful. Hiring a brougham or leasing a flat is a lawful transaction, but, if the hirer or lessor knows

[1] G. T. Morice, cited in *Jayawickreme* v. *Amarasuriya*, [1918] A.C. 869 at 876.

[2] Buckland and McNair, *Roman Law and Common Law*, 173 et seq.; S. G. Vesey-Fitzgerald, 14 *J. Comp. Leg.* (1932), 1 at 13; F. P. Walton, 41 *L.Q.R.* (1925), 306; Holdsworth, *History of English Law*, viii. 42 et seq.

[3] F. P. Walton, 41 *L.Q.R.* (1925), 306, to which this paragraph is indebted.

that the *res* is to be put to an immoral use, he cannot enforce the contract.[1] Further, the width of the notion of *causa* has led to the introduction of procedural safeguards, such as the requirement of a notarial deed where an agreement benefits one party at the expense of another and there is no obviously acceptable reason for the benefit. Sometimes the rigidity of such procedural safeguards can be just as irksome as any doctrine of consideration as found in English law.

It is significant, therefore, to find that many French lawyers attack the notion of cause as being confusing. The simpler doctrine is that *conventio* without more is *contractus*, provided that the agreement concerns a lawful subject-matter, and that the parties intend to enter into legal relations. Many modern codes have built an efficient theory of contract on such a basis, the doctrine of cause being rejected as an unnecessary complication.[2] The very variety of the uses of the term cause militates against clarity. The lesson of modern times is that society demands a wide theory of contract and the Law Revision Committee in England has recommended legislative change in order to avoid some of the worst results of the narrowing effect of the English theory of consideration.[3] Two of the Committee's suggestions illustrate this point of view—that an agreement should be enforceable if the offer or promise has been made in writing (even if there is no consideration), and that a promise should be actionable if the promisor knows or reasonably should know that it will be relied on by the promisee and the latter alters his position to his detriment in reliance upon it.[4] These and the other changes suggested would reduce consideration to being merely one of the methods by which the existence of a contract could be shown, and would bring English law somewhat nearer to the broader theories of the Continent.

The more radical changes, however, which would bring such a result about have not been adopted. This is not merely because inertia tends to make law reform difficult, but because there are good reasons for viewing the committee's recommendations for change with great caution. On the one hand the committee's reliance upon writing as a test for enforceability of a contract seems to be somewhat

[1] *Pearce* v. *Brooks* (1866) L.R. 1 Ex. 213; *Upfill* v. *Wright*, [1911] 1 K.B. 506.

[2] e.g. the German Civil Code. For a defence of 'cause', see H. Newman, 30 *Can. B. R.* (1952), 662.

[3] *Sixth Interim Report* (1937), Cmd. 5449.

[4] This view is supported by Denning J., *Central London Property Trusts Ltd.* v. *High Trees House Ltd.*, [1947] 1 K.B. at 135.

ingenuous in this day and age, and on the other, the committee's treatment of consideration as mere evidence of intention to enter legal relations tends to ignore the 'bargain' basis of much of the English law of contract. It may well be that other kinds of agreements than those seen to be 'bargains' ought to be enforced by the law, but this does not necessarily mean that consideration should be viewed as nothing more than evidence of an intention to enter legal relations.[1]

§ 97. Theories of the Nature of a Contract

(a) *The Will Theory*

This doctrine sees the reason for the enforcement of a contract in the fact that the wills of the two parties have reached agreement. The will is 'inherently worthy of respect',[2] and this is recognized by the law in its theory of contract. Some write legal history in a neo-Hegelian fashion which pictures the slow evolution of the Idea of Freedom—since contract is the legal category which gives the greatest means of self-expression, its sphere is not only increasing, but ought to be increased. The dictum 'status to contract' becomes not merely a convenient generalization of certain aspects of legal history but an eternal principle the onward march of which cannot and should not be stayed.[3]

Thus it is argued that, unless the real will of the parties is *ad idem*, no contract should be binding. A secret mental reservation should be a bar to enforcement, since the test is the real will and not the will as declared. Apparently the will theory was so popular in Germany that it was thought necessary to declare specifically in the code that a secret mental reservation should not affect the validity of a declaration of intention.[4]

It is impossible to apply strictly the theory that the law can take account only of the real will of the parties. Firstly, what is in a person's mind can be proved only from his own evidence, or by inferences from his conduct. To accept a person's word allows too easy a method of escape for perjurers, while, if the intent is inferred from conduct, there is a tendency to assume that a man intends the

[1] See C. J. Hamson, *The Reform of Consideration* (1938), 54 *L.Q.R.* 233; K. O. Shatwell, *The Doctrine of Consideration in Modern Law*, 1 *Sydney L. R.* (1955), 289; Sir Owen Dixon, *Concerning Judicial Method*, 29 *Aust. L. J.* (1956), 468.

[2] M. Cohen, *Law and the Social Order*, 92.

[3] The increasing tendency to restrict freedom of contract is discussed below, § 99.

[4] *BGB.* Art. 116; E. J. Schuster, *German Civil Law*, 93.

reasonable consequences of his act. Secondly, when it is a question of the interpretation of a contract, the most difficult problems arise when the parties did not direct their wills to some particular contingency, or when each interpreted the agreement in a different way. To avoid every contract where precise subjective agreement on every detail could not be shown would interfere too greatly with business demands. The courts give to an agreement the meaning it reasonably bears—not the view taken by one party of its interpretation.

Thirdly, for convenience, the law demands definite rules with regard to the time that an offer is accepted, if the parties are corresponding by post. In English law a contract is made when a letter of acceptance is posted, but an offer can be revoked only when the revocation is communicated to the offeree. It may happen that Jones reads an offer and posts his acceptance after Brown has sent a telegram revoking the offer, but, so long as Jones posts the letter before he receives the telegram, the contract is valid, although the real wills of the parties were not *ad idem* at any particular moment.[1] Actually there are many theories which the law might adopt. There is the declaration theory that the contract is formed at the moment the offeree declares his acceptance of the offer, whether the offeror knows of it or not; the expedition theory that the contract is made when the acceptor posts the acceptance; the reception theory, that the decisive moment is the receipt of the acceptance, whether it is read or not; and finally the information theory that the contract is binding only when the letter of acceptance is actually read.[2] But for any particular system it is more convenient to have fixed and definite rules than to rely too greatly on subjective tests. Further, it should be noted that convenience demands a high degree of certainty in this matter because the time of acceptance will usually fix also the place of acceptance and hence in many cases the law which governs the contract. Modern means of communication raise new problems in the application of old principles. Thus communications by telephones and teleprinters are assimilated to the rules governing negotiations

[1] It may be, in English law, that if I post an acceptance and then telegraph revoking it, so that the telegram reaches the offeror before he receives the letter, I am nevertheless bound; P. H. Winfield, 55 *L.Q.R.* (1939), 499 at 512; Cheshire and Fifoot, *The Law of Contract* (6th ed.), 42–3. There is no English decision which finally settles the point, but such persuasive decisions as there are go in the other direction: *Dunmore (Countess)* v. *Alexander* (1830), 9 Sh. (Ct. of Sess.) 190; *Wenkheim* v. *Arndt* (N.Z.), 1 J.R. 73; *Dick* v. *United States* (1949), 82 Fed. Supp. 326; and see C. L. Pannam, *Postal Regulation 289 and An Acceptance of an Offer by Post* (1960), 2 M.U.L.R. 388.

[2] Amos and Walton, *Introduction to French Law*, 153; P. H. Winfield, op. cit. at 506–7.

between two persons face to face and acceptance is incomplete until received by the offeror.[1]

Fourthly, the will theory leads to such a subjective view of mistake that the security of transactions is thereby imperilled. Where the mistake is due to A's carelessness and the other contracting party is unaware of A's error, the real wills of the parties cannot be regarded as *ad idem*, but to avoid the contract would frequently be very unjust. Modern law tends to take rather a narrow view of the kinds of mistake which will avoid a contract.[2] Even German law, which was strongly influenced by the will theory, has been compelled to modify it in practice.[3]

(*b*) *The Injurious Reliance Theory*

In sharp contrast to the will theory is what Pound has termed the 'injurious reliance theory' which puts the emphasis, not on the real will of the parties, but on the expectations reasonably aroused by the conduct of each.[4] The emphasis is on conduct rather than on states of mind, the reason for enforcement is security rather than any mystical union of wills. Ethics may require fulfilment of a promise only in the sense in which it was honestly meant, but the law does in certain cases hold men to their acts or representations even when these acts or representations do not faithfully represent their intention.[5]

It is not enough, when a claim for rectification is made, to show that the parties intended a different result—that would lead to uncertainty. Rectification can be claimed, however, where the parties show that the *agreement* was otherwise than as expressed.[6] In dealing with estoppel by conduct, the question may be how letters would be reasonably interpreted by those to whom they were addressed.[7]

[1] See *Entores Limited* v. *Miles Far East Corporation*, [1955] 2 Q.B. 327; but cf. the position in the United States of America where, although the Restatement assimilates acceptance by telephone to oral acceptance between parties in the presence of each other (Contracts, § 65), it has been held in several jurisdictions that the place where a contract made by telephone is completed is the place where the offeree speaks the words of acceptance into the telephone—see Corbin *On Contracts* (1963), vol. 1, § 79.

[2] *Infra*, § 100.

[3] E. J. Schuster, *German Civil Law*, 92.

[4] R. Pound, *Introduction to the Philosophy of Law*, 269; M. Cohen, 46 *Harv. L. R.* (1933), 533 at 578; T. E. Holland, *Jurisprudence* (10th ed.), 253.

[5] L. Duguit, in *Progress of Continental Law in the Nineteenth Century*, 104; F. Gény, *Science et Technique*, iii. 80.

[6] Russell L.J., *Joscelyne* v. *Nissen*, [1970] 1 All E.R. at 1221.

[7] *Woodhouse* v. *Nigerian Produce*, [1970] 2 All E.R. 124.

Such an approach has two practical results: firstly, there is an external attitude towards mistake a tendency to regard unilateral error as insufficient to avoid a contract at least if that mistake was neither known to, nor induced by, the other party;[1] secondly, there is an attack on any theory (such as that of consideration) which would defeat the expectations of the business man by rather technical rules.

But the injurious reliance theory is at best only an approach, for it has not been fully worked out. Firstly, the law of contracts is not created by deductions from a particular theory, but by the pressure of practical needs on the legal structure bequeathed by history. The views of lawyers change, and in every legal system we find legacies from the past that conflict with modern views. Hence, even if it be useful to study the theories that underlie the law of contract, we cannot expect to find a consistent approach in any one system of law. Thus no legal system regards mere reliance on the promise of another as sufficient. Both English and continental law require an intention to affect legal relations, and in England there is the further requirement that there must be either consideration or deed. Secondly, in most systems, if a contract is created, there is no need to prove injurious reliance. A promise by deed to give a donation is binding even although the recipient has not altered his position for the worse by relying upon it. Thirdly, the term 'security' has not been thoroughly analysed. Demogue, dealing with transfer of title, distinguishes between static and dynamic security.[2] Static security protects the rights of owners and prefers to sacrifice, if necessary, the rights of bona fide purchasers for value. Dynamic security results from the desire to facilitate transactions and to overrule some of the inconvenient consequences of the maxim, *nemo dat quod non habet*. With regard to the transfer of land, the traditional English approach has been to protect the interests of the owner even at the cost of rendering transactions slow and cumbersome, although legislation has lately somewhat simplified the problem. With regard to personal property, the intrusions of dynamic security were more far reaching. Rules concerning negotiable instruments, the Factors' Act of 1889, and certain provisions of the Sale of Goods Act may lead to the title of the true owner being defeated without his own consent. The security of which Pound speaks is somewhat analogous to dynamic security in that it facilitates the speed of transactions. But Demogue is analysing the problem from the angle of the owner of property, Pound from

[1] *Infra*, § 100. [2] In *Modern French Legal Philosophy*, 418.

the approach of a contracting party who wishes to know if he may rely on the conduct of another. Security, in terms of the injurious reliance theory, can mean only ability to rely on expectations reasonably aroused by the conduct of another.

There are many other theories suggested as bases for the law of contract. Thus it is argued that a promise has inherent moral force and should be recognized by the law, and that without the adoption of the maxim *pacta sunt servanda* society could not exist. Ethically, however, it is doubtful whether all promises should be kept (e.g. a promise to commit murder) and no legal system enforces all promises as such. Historically, however, the maxim *pacta custodiantur* was important, since it was laid down by the Church courts as a general principle to be followed, and provided a theoretical justification for the attempt to create a broad principle in place of the list of specific enforceable agreements which was provided by Roman law.[1]

§ 98. Sale and Hire-purchase

A contract of sale is one whereby the seller transfers, or agrees to transfer, the property in a *res* to the buyer for a money consideration called the price. Gift is a transfer, but there is no price. In barter, one *res* is exchanged for another—neither *res* can be regarded as the price and hence the transaction is not sale. The emphasis on price means that sale can arise only when money is in use, or when some commodity plays the part that money plays in modern life.[2]

There are two aspects of sale which must be kept distinct. Firstly, a sale results from a contract between the parties. Hence the modern conception of sale can arise only after the law of contract has reached maturity. It is familiar law that a contract creates rights only in the parties thereto. A contract between A and B, by which A agrees to sell a chattel to B on 2 January next, does not prevent A from

[1] For Holmes's 'risk theory', see *The Common Law*, 298; R. Pound, *Philosophy of Law*, ch. vi. But it has been held that an executor is not entitled to break a contract merely because it will be more advantageous to the estate to pay damages than to carry out the agreement: *Ahmed Angullia Bin Hadjee* v. *Estate and Trust Agencies (1927) Ltd.*, [1938] A.C. 624. A commentator in 55 *L.Q.R.* (1939), 1, suggests that this is additional proof that Holmes's view cannot be supported. W. W. Buckland, 3 *Camb. L. J.* (1944), 247, illustrates by telling examples the weaknesses of Holmes's theory, and concludes that it cannot be squared either with English or with Roman law. F. Pollock, *Holmes–Pollock Letters*, i. 80, asks, if it is not a wrong to break a contract, why it should be a tort to induce breach of contract. On the other hand, where performance is impossible, there is an increasing tendency to regard contract in terms of assumption of risk.

[2] A comparative survey is that of F. de Zulueta, *The Roman Law of Sale*.

conveying a good title to C by sale and delivery on 1 January. The only remedy of B at common law is an action for breach of contract. However, B's right may be protected firstly by equity, which regards the purchaser as the equitable owner, and secondly by legislation, e.g. with regard to land, it may be enacted that if the contract of sale is registered, it is effective against third parties. In such a case the agreement is more than a contract as it affects the right *in rem* to the land.

Secondly, there is involved in sale a delivery or conveyance. This is a transfer of the right *in rem*. In the law of real property a conveyance is necessary and perhaps registration with the Registrar of Titles. In the case of personal property, however, the title may pass by the contract, even before delivery to the purchaser has occurred. Hence in the English law of personal property the categories of contract and conveyance of title are to some extent fused: whereas in Roman law a sharp distinction was retained: title did not pass until the *emptio* was *perfecta*, delivery was made, and either the price was paid or credit specifically given.

In English law, *res perit domino*, i.e. the general principle is that if the *res* is destroyed without any fault on the part of anyone, it is the owner for the time being who must bear the loss. Hence in asking when the risk passes from vendor to purchaser, we must ask when title passed. From the practical point of view Roman law reached the same business result. The risk passed when the contract was perfect[1] but, as title did not pass till conveyance was made, the Romans could not base their theory of risk on the passing of the title.[2] It perhaps illustrates the necessities of commerce that the doctrine of the passing of the risk should be the same in systems theoretically divergent.

In early Roman law there was no need for any special rule to protect the seller's right to the price, for (as stated above) title did not pass till the price was paid. The seller, therefore, retained an action *in rem*.[3] In English law as title could pass by the contract, special rules were devised, e.g. the vendor's lien and the right of stoppage in transit. Whatever the theory of a legal system, the interests that demand protection have a root similarity.

[1] Paul, 18. 6. 8. pr. 'Sale is perfect if the identity, quality and quantity of the thing are ascertained and also the price and if the sale is absolute' (translation of F. de Zulueta, op. cit. 115).

[2] This was at least law in Justinian's time—see F. de Zulueta, op. cit. 33.

[3] In later Roman law, title could pass before payment, if credit was specifically given.

In English law the seller impliedly warrants that he has a title which he can convey. In Roman law, in the absence of fraud, I could lawfully sell a *res* belonging to another, e.g. if I thought I could secure title from him before delivery took place. As this provided an opportunity for fraud the following qualifications must be added: (*a*) as the contract of sale required good faith, one guilty of fraud had no remedy; (*b*) it was customary for the vendor to stipulate that he would pay damages if the purchaser was evicted; (*c*) later this *stipulatio* was held to be implied in the nature of sale itself.

Hire-purchase is a comparatively modern phenomenon. It was devised to protect the vendor in cases of sale where long-term credit was given. If title passes immediately to the purchaser, then the vendor suffers two disadvantages: (*a*) the *res* may be seized by the purchaser's creditors; (*b*) the purchaser has power to convey a good title on resale. In order to secure the advantages of retaining title, the vendor uses the device of hire-purchase whereby he delivers the goods to the hirer upon terms that the hirer is to pay a fixed periodical rental, but has in addition an option of purchasing the goods by paying the total amount of the agreed hire at any time or of returning them before the total amount is paid.[1] The hirer is not a person who has agreed to buy—otherwise the Factors Act may apply and allow a purchaser in good faith from the hirer to secure a good title. Analytically, a hire-purchase agreement creates a bailment plus an option to purchase—it is neither pure bailment nor pure contract. If it were pure bailment, any act by the bailee inconsistent with the terms of the bailment would terminate the bailment—but it has been held that, if the hire-purchaser wrongfully sells to X, and X is sued by the owner, the measure of damages is not the value of the *res* but the value of the unpaid instalments. Hence the hire-purchaser has an interest in the *res* which he can transfer.[2] However, it is difficult to give a precise name to the proprietary interest of the hire-purchaser. It is clearly not the legal title, for the whole object of hire-purchase is to prevent title passing till the instalments are paid: it is not an equitable interest.[3]

Hire-purchase is a very modern development in commercial life, and surely it is a commonplace in commercial law that if one finds commercial men inventing new methods of business and using documents which

[1] A. Dean. *Hire-purchase Law in Australia* (2nd ed.), 1.
[2] *Whiteley Ltd.* v. *Hilt*, [1918] 2 K.B. 808; *Beisize Motor Co.* v. *Cox*, [1914] 1 K.B. 244.
[3] Dean, op. cit. 5.

are, perhaps, unfamiliar at the time when they are first brought into use, but which are invented to meet the requirements of a particular time or peculiar circumstances, the law has to be moulded and developed to meet the commercial developments which are taking place.[1]

Another difficulty that arose in a transaction which combined elements both of hire and sale was that of the implied conditions—were the rules of sale or hire to be applied? The Court of Appeal held that the statutory warranties of sale were to be applied,[2] but the Victorian Supreme Court rejected that view as a contract of sale requires an agreement to buy, whereas the hirer has an option to reject.[3] Does the letter of the chattel imply that he is owner at the time the contract of hire-purchase is made, or is he bound only to show title when the hire-purchaser exercises the option to buy? Goddard J. adopted the first alternative, but the Legislature the second.[4]

In many cases of hire-purchase, the customer consults a car dealer, and finance is provided by a separate company. The customer thinks he has made a contract with the dealer, whereas the contract is really between the customer and the finance company. Hence there is difficulty in suing the finance company because of representations made by the dealer. Usually, there is a minimum payment which requires the customer, if he wishes to return the goods, to bring his payments to a certain total. The difficulty in applying the law can be seen by a consideration of *Bridge* v. *Campbell Discount Co. Ltd.*[5] One view is that if the finance company exercises an option to annul the contract because of breach of terms, then the minimum-payment clause may be held to be a penalty and no damages would be allowed beyond those actually suffered: however, if the customer exercises an option to return the goods, he is bound to the full extent by the minimum-payment clause. Lord Denning points out that this view penalizes the honest hirer who, realizing he cannot meet the monthly payments, immediately gives notice to the finance company. In

[1] Per Goddard J., *Karflex Ltd.* v. *Poole*, [1933] 2 K.B. 251 at 263–4.

[2] *Felston Tile Co. Ltd.* v. *Winget Ltd.*, [1936] 3 All E.R. 473. In *Warman* v. *Southern Counties Car Finance Corporation Ltd.*, [1949] 2 K.B. 576, a distinction was drawn between hire-purchase agreements and credit sale agreements which pass title before instalment payments are completed and to which therefore the Sale of Goods Act applies. The Hire-Purchase Acts of 1938 and 1954 apply to both types of transaction below certain stated prices. See also *R.* v. *R. W. Proffitt Ltd.*, [1954] 2 Q.B. 35.

[3] *Woods' Radio Exchange* v. *Marriott*, [1939] A.L.R. 409. And see *Rendell* v. *Associated Finance Pty. Ltd.*, [1957] V.R. 604.

[4] Hire-Purchase Act, 1938, c. 53, s. 8.

[5] [1962] 1 All E.R. 385.

view of the conflict of opinion in *Bridge's case* the law must be regarded as uncertain.

Inevitably when one party dictates the terms of the contract and the customer frequently signs a document which he does not really understand, it is not possible for the courts to remedy the injustices which are thereby caused. The magnitude of the problem is illustrated by the fact that in March 1970, £1,273,000,000 was owed under instalment credit transactions.[1] Accordingly the legislature, by a series of Acts, protected the position of the hire-purchaser.[2] However, it is difficult, even with careful drafting, to envisage all the cases of hardship which might ensue, and there is much to be said for a statutory provision in Victoria which gives power to reopen a transaction where it appears to the court to be harsh and unconscionable.[3]

§ 99. Modern Developments

In view of modern conditions we can no longer say that the sphere of individual self-assertion is increasing and ought to be increased. For various reasons the law has interfered seriously with contractual liberty sometimes in the interests of the economically weaker party, sometimes in the hope of regulating an industry in order to protect it from foreign competition. Apart from the law, we sometimes see that powerful suppliers may require a customer to contract on dictated terms or not at all; lastly, for reasons of convenience certain types of contract are standardized in the interests of all concerned.[4] The abstract legal theory of a contract as an agreement arrived at through discussion and negotiation must be supplemented by a realistic study of its actual operation in the world today.[5] Some French writers speak humorously of unilateral contracts or *contrats d'adhésion*, where the will of one party is confined to choosing whether or not to

[1] See 11 *J. Soc. Public Teachers of Law* (1970), 113.
[2] Notably in 1938, 1964, and 1965.
[3] Hire-Purchase Act, 1959, s. 24 (1).
[4] O. Prausnitz, *Standardisation of Commercial Contracts*, 52 *Harv. L. R.* (1939), 700.
[5] Cf. R. A. Eastwood and B. A. Wortley, *J. Soc. Public Teachers of Law* (1938), 23; L. Josserand, *Rec. Gény*, ii. 333; G. Ripert, *Rec. Gény*, ii. 347; L. Duguit, *Les Transformations générales du droit privé*. The *Columbia L. R.*, July 1943, is devoted to the problem of 'Compulsory Contracts in Theory and Practice'. Nearly every industry has worked out standard contracts which purchasers must accept. Some American writers have adopted the French terminology and write of 'adhesion contracts'; see e.g. A. E. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws* (1953), 53 *Col. L. R.* 1072; and many studies of such contracts in particular fields have been made, e.g. F. Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract* (1957), 66 *Yale L. J.* 1135.

sign on the dotted line a contract entirely dictated by the other.[1] Where one party is strong enough to dictate the terms, the State is frequently forced to intervene in order to prevent abuse of power. Thus the series of Hire-Purchase Acts introduced many compulsory conditions protecting the weaker party.

Is public law in its invasion of private law removing contract from its pedestal? It is significant that an article should discuss 'Administrative Law and the Teaching of the Law of Contract'.[2] The theory of the autonomy of the will may be saved by saying that after all a person has still a choice whether to enter into contractual relations or not, but, while legal freedom may exist, economic and social necessities are frequently all-compelling. Whether the increasing regulation of contract by the State is advisable or not is a question of economics and social philosophy; but, when writers attack modern tendencies on the ground that freedom of contract is an *a priori* principle deducible from the nature of man as a reasonable being, we may reply with Kelsen that this is politics masquerading as jurisprudence, the ideology of vested interests deemed useful as a weapon against collectivism.[3] Few today would deny that freedom in theory may be the reverse in practice, and what is at first sight an interference with the liberty of one may give greater freedom to many. Society is interested in the means of living rather than in abstract freedom of will. If modern social movements are a regression, then let us attack them after a real analysis of the problem, not by citing superficial generalizations wrapped in naïve philosophy. Whatever our attitude to modern developments, regulation of particular contracts is now becoming so usual that we must take it into account in considering the function of contract in the world today.[4] Indeed, the State not only regulates the terms of contracts not yet made, but occasionally interferes with vested rights resulting from contracts already in being. Thus a moratorium statute may suspend a creditor's rights: a Farmers' Debt Adjustment Act may reduce the liabilities of the man on the land. There is a great divorce between contract as it is taught in the classical textbooks and contract as it actually operates in the world today.[5]

[1] See the analysis by W. D. Slawson, 84 *Harv. L. R.* (1971). 529. He claims that 'standard form contracts' probably account for ninety-nine per cent of all the contracts now made. It is impossible to check this figure.

[2] R. A. Eastwood and B. A. Wortley. *J. Soc. Public Teachers of Law* (1938), 23.

[3] *Annales de l'Institut de droit comparé* (1936), ii. 30.

[4] e.g. Hire-Purchase Acts (*supra*); Rent Restriction Acts; Acts affecting employer-employee relations, such as Factory and Shops Acts and so on.

[5] For a suggested list of reforms in the law of contract, see G. Gardiner and A. Martin (eds.), *Law Reform Now*, ch. iv.

It is frequently stated that public law is the realm of political domination, while private law is that of co-ordination or co-operation between equals. Kelsen does not regard the distinction between public and private law as in any sense fundamental, and he emphatically states that contract may play as great a part in the realm of control as public law.[1] Private law is only the particular juridical form which corresponds to the economic order of that society. To Kelsen, law may be made either by a parliament, a judge, or a private citizen: a contract 'executes' a superior norm, and creates a binding obligation for the parties, and therefore, although he may not realize it, Brown in signing a contract is making law. The more usual view is that, instead of treating Brown as one of the law-making organs of the State, it is simpler to say that the formation of a contract is one of the facts to which the law attaches certain legal consequences. The social service State increasingly uses the private law conception of contract in the achievement of its ends. Thus the setting up of state instrumentalities means firstly an increasing number of contracts with private individuals, and also between the various public corporations themselves. The former raise interesting questions of administrative law[2] and in the latter questions of public policy may lead to interference with the economic relations between the two bodies. Contract is thus today nearly as important in public as it is in private law.

Another illustration of modern developments is the collective contract made between a union of workers and an employers' federation in order to regulate the general conditions of the industry. In practice, even if not in theory, such agreements frequently bring about a *modus vivendi* which affects not only the original contracting parties but also future employers or workers.[3] But, in the absence of legislation, it is difficult to enforce such agreements by judicial process.[4] In Australia the machinery of the Arbitration Court provides a method of formal recognition, and in the United States an Act of 1947 made such agreements specifically enforceable.

A further problem concerns the rights of third parties. The logic of the Roman and the common law was that only the parties to a contract could claim rights under it. Modern developments are

[1] *Annales de l'Institut de droit comparé* (1936), ii. 45.

[2] Cf. *Smith* v. *River Douglas Catchment Board*, [1949] 2 K.B. 500, with *East Suffolk Rivers Catchment Board* v. *Kent*, [1941] A.C. 74.

[3] J. Dickinson, 43 *Col. L. R.* (1943), 688.

[4] B. A. Hepple, 28 *Camb. L. J.* (1970), 122; *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers*, [1969] 2 All E.R. 481. See *supra*, § 37 (economic interests).

giving increasing importance to the *stipulation pour autrui*,[1] in which, illogical as it may seem, C may enforce a right given to him by an agreement between A and B. A clear and concise examination of the problem is made by the Law Revision Committee.[2] 'The Common Law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him.'[3] There are some statutory exceptions based on the needs of commerce and, in certain circumstances, the promisee may be regarded as a trustee for the third party. But the exact limits of this equitable exception are not very clear. In *Lloyd's* v. *Harper*[4] a father promised the committee at Lloyd's that he would guarantee the son's engagements. It was held that the committee could enforce this promise for the benefit of those with whom the son had entered into business relations. Lloyd's were treated as trustees for the benefit of all those with whom the son entered into contracts of insurance. On the other hand, if an insurance company promises B to cover the liability not only of B while he drives his car but also of any driver whom B allows to use the car, B is not a trustee of the benefit of the contract for the 'permitted driver'.[5] This decision created such difficulties that legislation was introduced to cover insurance of motor drivers.[6] The Law Revision Committee suggested that the law should be modified: 'Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee.' Denning L.J. approves of such an amendment: indeed, he thinks that the principle denying rights to a third party is not nearly as fundamental as it was supposed to be.[7] Thus modern law is more concerned in securing serviceable rules than in adhering closely to the logical analyses of the past. Lord Reid,[8] after approving of the amendment suggested by the Law Revision Committee, stated that if one had to

[1] The French Code forbids it in principle, but the courts have extended the limited exceptions allowed in the text: Art. 1119 et seq.; German law, *BGB.* Art. 328 (i).
[2] *Sixth Interim Report* (1937), Cmd. 5449; Glanville Williams, 7 *Mod. L. R.* (1944), 123; A. M. Finlay, *Contracts for the Benefit of Third Persons.*
[3] Op. cit. 25.
[4] (1880), 16 Ch. D. 290.
[5] *Vandepitte* v. *Preferred Accident Insur. Corp. of New York*, [1933] A.C. 70.
[6] Road Traffic Act, 1930, 20 & 21 Geo. V, c. 43, s. 36 (4).
[7] *Smith* v. *River Douglas Catchment Board*, [1949] 2 K.B. 500 at 514.
[8] *Beswick* v. *Beswick*, [1968] A.C. at 72 and *Olsson* v. *Dyson*, [1969] A.L.R. 443.

contemplate a further long period of Parliamentary procrastination, the House of Lords might find it necessary to deal with the matter. In the case in question, justice could be done without upsetting the old rule.

§ 100. Mistake, Misrepresentation, Duress

These 'vices of the will' have already been mentioned in the analysis of a juristic act,[1] but it is useful to discuss them at somewhat greater length, because the view which a legal system takes towards these questions reveals its unconscious theory of the nature of contract.

In a formal contract, mistake is sometimes regarded by primitive law as irrelevant. The binding element is sought in the sacred ritual and not in the intention of the parties.[2] In consensual contracts the will of the parties is all important, and the question naturally arises whether a person should be bound if his will has been influenced by mistake. The texts of Roman law are not easy to decipher, nor is it always possible to reconcile them.[3] We find rules which emphasize that mistake avoids a contract where the error is of such a kind as to exclude the hypothesis of real consent,[4] and by contrast Paul's dictum that mistake due to carelessness is of no avail.[5] But it is safe to say that Roman law gave a far wider operation to the doctrine of mistake than English law—in many cases a unilateral error, unknown to the other party, being sufficient to avoid the contract. German law also takes a fairly subjective view. It distinguishes clearly between a mistake by one party in the expression of his intention, and cases where relief is sought because the declarant was under a mistaken assumption as to certain facts and would not have made the declaration had the truth been known.[6] There are extensive powers of avoidance in each case.[7] A declaration of intention may be avoided by the declarant on the ground of a mistake in its tenor, if it may be assumed that he would not have made it had he known the true facts; an error as to such characteristics of the other party, or the subject-

[1] *Supra*, § 69.

[2] In later Roman law, the *exceptio doli* could be pleaded even in the case of formal contracts.

[3] J. B. Moyle, *Contract of Sale in the Civil Law*, ch. vi.

[4] Ibid. 51. In *Dig.* 18. 1. 9–11 presumably a unilateral mistake is enough. In 18. 1. 14 Ulpian asks what is the rule if *both* are mistaken. In a textbook this contrast would be decisive, but the method of compilation of the *Digest* renders such a contrast less effective.

[5] *Dig.* 18. 1. 15. 1.

[6] See E. J. Schuster, *Principles of German Law*, 94–5.

[7] *BGB.* Art. 119.

matter of a transaction, as are deemed essential in ordinary intercourse, has the same effect. But the party to whom the declaration was made may recover damages for loss suffered by reason of having acted on the faith of the validity of the declaration, if he was excusably ignorant of the ground of avoidance.[1] This last rule shows a recognition of the necessity to protect the rights of the other contracting party.

In English law the emphasis on *consensus ad idem* seems to suggest a subjective theory, but the development of the principle of estoppel has led to a more external theory in practice. Mistake may be classified as follows:

1. Real consensus, but error *in verbis*. No problem arises here, save the terms on which a court will rectify a written document so as to give expression to the real will of the parties.
2. Common mistake, i.e. where both parties make the same mistake.[2]
3. Where the parties mistake each other. Each is mistaken as to the other's intention though each is ignorant that a mistake exists. (This is sometimes called mutual mistake, but this term is likely to confuse.)
4. Unilateral mistake, i.e. where one of the parties alone is under a misapprehension. In such a case the mistake may have been caused by, or known to, or reasonably should have been known to, the other party.
5. Documents mistakenly signed as the result of fraud.

The doctrine of common mistake does not have a wide operation—indeed, Cheshire and Fifoot think that in practice no mistake will be regarded as sufficiently fundamental unless it affects the existence of the subject-matter of the contract.[3] Whatever is the precise effect of *Bell* v. *Lever Bros. Ltd.*,[4] the case at least shows a disinclination to avoid contracts, save in special circumstances. In a case of mutual

[1] *BGB.* Art. 122. 'Error is a cause of nullity of the agreement only when it is as to the substance itself of the thing which is the object of the agreement': C.C., Art. 1110. Amos and Walton, *Introduction to French Law*, 155–6.

[2] See Cheshire and Fifoot, *Law of Contract* (7th ed.), 193.

[3] But even where it does, it may not go to void the contract entirely. It may be possible to spell out a promise by one party that the subject matter of the contract in fact existed as in *McRae* v. *Commonwealth Disposals Commission* (1951), 84 C.L.R. 377.

[4] [1932] A.C. 161. See P. A. Landon, 51 *L.Q.R.* (1935), 650; 52 *L.Q.R.* (1936), 478; T. H. Tylor, 52 *L.Q.R.* (1936), 27; H. W. R. Wade, 7 *Camb. L. J.* (1941), 361; see also Denning L.J., *Solle* v. *Butcher*, [1949] 2 All E.R. 1107 at 1119, and in *Frederick E. Rose (London) Ltd.* v. *William H. Pim, Jnr., & Co. Ltd.*, [1953] 2 Q.B. 450 at 460.

mistake the contract is not necessarily void, for the test of intention is objective: 'the concern of the Court has been to implement, not the actual expectations of each party, for that indeed would be impossible, but the sense of the promise objectively considered'.[1]

The injurious reliance theory would ignore unilateral mistake unless it was known to, or should have been known to, the other party. A is not justified in relying on an agreement if he knows that the other party is labouring under a mistake. The doctrine of estoppel has the practical result that 'whatever a man's real intention may be [if] he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound, as if he had intended to agree to the other party's terms'.[2] Unilateral mistake is, in general, not sufficient,[3] for we must not 'open the door to perjury and destroy the security of contracts'.[4] Thus estoppel may 'intervene at various points to supplement the lack of consensus'.[5] On the other hand, the court may refuse to grant damages for breach of contract, if the plaintiff had snapped at an offer which he knew was made in error.[6] This is not unjust, for where the unilateral error is known to, or innocently caused by the other party, there is no sacrifice of security in avoiding the contract if the error is sufficiently important.[7] If Dick, thinking that the lady is Dorothy, proposes to Phyllis in the shadows, and Phyllis accepts, believing that she is the lady of his heart, presumably a valid contract is made if the lady was reasonable in thinking that the offer was meant for her, for the test is not what Dick meant, but what could reasonably be inferred from his conduct.[8] Mistake can affect the operation of a contract only if it concerns the terms of the contract: error affecting the motives leading to the contract is irrelevant.

[1] Cheshire and Fifoot (2nd ed.), 145; and see their 7th ed., 194; C. Grunfeld, 13 *Mod. L. R.* (1950), 50, provides a general analysis of the problem. See also *Magee* v. *Pennine Insurance Co. Ltd.* (C.A.), [1969] 2 Q.B. 507.

[2] Per Blackburn J., *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597 at 607.

[3] Unless *non est factum* can be pleaded.

[4] Per Kekewich J., *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266 at 272.

[5] J. D. I. Hughes, 54 *L.Q.R.* (1938), 370 at 371; see also 375.

[6] *Hartog* v. *Colin and Shields*, [1939] 3 All E.R. 566: Singleton J. held that there was no binding contract as the acceptor was aware of the offeror's mistake; *A. Roberts & Co. Ltd.* v. *Leicestershire County Council*, [1961] 2 All E.R. 545.

[7] Cf. *Scriven Bros. & Co.* v. *Hindley & Co.*, [1913] 3 K.B. 564.

[8] See J. D. I. Hughes, op. cit. 380; A. L. Goodhart, 57 *L.Q.R.* (1941), 228; *Ingram & Ors* v. *Little*, [1960] 3 All E.R. 332 and *Fawcett* v. *Star Car Sales Ltd.*, [1960] N.Z. L.R. 406.

There are thus evident marks in English law of an objective attitude towards the question of mistake.

> It is beyond question that when a court has a contract before it, it does not in general attempt to examine the state of mind of the parties. To do so would indeed be an impossible task wherever the interpretation of the contract was in dispute. . . . The law therefore is necessarily driven to proceed on the basis of the external manifestations of the parties, words, written or spoken, or other overt acts.[1]

But we must remember that the external method is not only more convenient, but also that in most cases it actually does give effect to the will of the parties. And we must not ride the objective theory to death, for it represents an approach rather than a theory which attempts to explain everything.

Although English law is fairly strict in defining the cases in which it will give relief on the ground of mistake, in those instances which have satisfied the test the contract is entirely avoided. This is wider than French law which confined the party labouring even under an error *in substantia* to an action for rescission—in other words, the contract is only voidable.[2] The English rule had the effect that, if the contract is avoided, a third party may not secure title to goods he has bought. As between two innocent parties, the person whose carelessness contributed to the mistake should suffer, rather than the careful buyer. The doctrine of estoppel by carelessness could have developed, but the courts have 'relegated the doctrine to the background and have condoned the negligence of the first party to the detriment of the innocent trader'.[3]

Now, however, the House of Lords in *Saunders* v. *Anglia Building Society*[4] has overruled the decision criticized above.[5] Their Lordships discussed in great detail the scope of the old doctrine of *non est factum*, which allowed the plea if the signer was mistaken as to the nature of the document, as opposed to its contents. The Court of Appeal[6] pointed out that the doctrine of *non est factum* was reasonable when many of the population were illiterate, but that today it was a dangerous anachronism. The House of Lords affirmed the actual decision of the Court of Appeal, but the speeches left somewhat more

[1] Lord Wright, 55 *L.Q.R.* (1939), 189 at 197. Cf. T. H. Tylor, 11 *Mod. L. R.* (1948), 257.
[2] C.C., Art. 1110 et seq.
[3] Cheshire and Fifoot, op. cit. (7th ed.), 220.
[4] [1970] 3 All E.R. 961.
[5] *Carlisle and Cumberland Banking Company* v. *Bragg*, [1911] 1 K.B. 489.
[6] Sub nom. *Gallie* v. *Lee*, [1969] 2 Ch. 17.

scope to the doctrine of *non est factum* than did the dicta of the Court of Appeal. The Lords rejected the old distinction between the character of the document and its contents. Lord Reid pointed out that the doctrine of *non est factum* must be kept within narrow limits 'if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity'.[1] However, the doctrine is still left standing: 'to eliminate it altogether would, in my opinion, deprive the courts of what may be, doubtless on sufficiently rare occasions, an instrument of justice'.[2] Perhaps what is left of *non est factum* relies on a subjective test,[3] but the person pleading the defence must show that he was not careless in signing.

Misrepresentation

Misrepresentation may be fraudulent or innocent. Where one party has been guilty of fraud there are no merits in his claim to enforce the agreement thus obtained. The injured party has the remedy of the tort of deceit, if he suffers loss by relying on representations known to be false.[4] The common law ignored innocent misrepresentation, unless the representation formed part of the contract, in which case an action for damages lay.[5] Equity adopted a broader approach, allowing an action for rescission in appropriate circumstances.

Duress

In Roman law the *actio quod metus causa* gave extensive protection. It operated *in rem*, since even an innocent third party might be forced to restore what he had gained as a result of duress by another. The threats must be of bodily hurt, of enslavement, of a capital charge, or of an attack on chastity. At common law duress might make a contract voidable, but the limits of duress were as in Roman law rather narrow. Actual or threatened violence or imprisonment was necessary. Doctrines, other than that of duress, may, however, be called into play. Thus it may be against public policy to enforce

[1] At 963.
[2] Per Lord Wilberforce at 972.
[3] Per Lord Pearson at 980.
[4] *Derry* v. *Peak* (1889), 14 A.C. 337.
[5] See also Misrepresentation Act, 1967, s. 2 (1), which imposes liability unless the person making the representation proves that he had reasonable grounds to believe it and did believe it at the time of making the contract. S. 3 restricts the operation of any clause excluding liability for misrepresentation.

a contract obtained by extreme moral pressure;[1] or the equitable doctrine of undue influence may be in point.

In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of the 'expectant heir', or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.[2]

§ 101. Unilateral Juristic Acts

In the interests of clarity is should again be pointed out that there are two uses of the term 'unilateral'. In the strict sense of jurisprudence, a unilateral juristic act is one in which the will of only one party is operative:[3] a bilateral act is one which is the result of agreement between two or more persons. In the second sense a contract (which is clearly a bilateral act) is described as unilateral if it imposes an executory duty on one party alone. It is the first sense with which we are here concerned.

A last will and testament is an example of a unilateral act, for the disposition of property may be determined by the testator alone—there is no need for two minds to be *ad idem*. A gift by deed is also a unilateral act. It is true that the will and the gift may fail of their intended effect if the beneficiaries refuse to accept, for even a present cannot be forced on a man against his will. But a gift by deed is a binding juristic act even before it comes to the knowledge of the beneficiary.[4]

In another type of unilateral act the transaction can be made fully effective even against the active dissent of the party affected. The forfeiture of a lease for breach of covenant falls under this head, since the landlord may terminate the tenant's rights in spite of the latter's active opposition. Such action by the landlord may, however, be regarded as a remedial right.

German law instances the constitution of an incorporated foundation and the offer of a reward as unilateral acts. In English law the

[1] *Kaufman* v. *Gerson*, [1904] 1 K.B. 591; or a marriage to escape fear of arrest in a communist country: *H.* v. *H.*, [1953] 2 All E.R. 1229.
[2] *O'Rorke* v. *Bolingbroke* (1877), 2 A.C. 814 at 823; *Zamet* v. *Hyman* (C.A.), [1961] 3 All E.R. 933; *Re Craig* (*deceased*), [1970] 2 All E.R. 390.
[3] Salmond, *Jurisprudence* (12th ed.), 334.
[4] *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296.

first transaction would normally be effected by drawing up a trust deed; the second would be treated as an offer which would become a contract if and when it was accepted by someone who performed the service required.[1]

[1] According to English theory, a person can sue for a reward only if he knew of the offer before he performed the act requested: *R.* v. *Clarke* (1927), 40 C.L.R. 227, and Cheshire and Fifoot, op. cit. 44.

REFERENCES

COHEN, M. R., 46 *Harv. L. R.* (1933), 553.
DAVIS, A. G., 52 *L.Q.R.* (1936), 225.
EASTWOOD, R. A., and WORTLEY, B. A., *J. Soc. of Public Teachers of Law* (1938), 23.
HOLMES, O. W., *The Common Law*, 298.
HUGHES, J. D. I., 54 *L.Q.R.* (1938), 370.
JACKSON, R. M., 53 *L.Q.R.* (1937), 525.
POUND, R., *Philosophy of Law*, 236.
WALTON, F. P., 41 *L.Q.R.* (1925), 306.
WINFIELD, P. H., 55 *L.Q.R.* (1939), 499.

XVIII

RIGHTS DIRECTLY CREATED BY LAW

§ 102. Introduction

The rights of contract arise directly from a iuristic act. Other rights are granted by the law, whether the person bound by the duty consents or not. The American Restatement contrasts three broad branches—contract, tort, and restitution.[1] In contract the underlying postulate is that a person shall obtain what was freely promised, in tort that a person has a right not to be harmed by an unlawful act; in restitution that a person has a right to have restored to him a benefit gained at his expense by another, if the retention of that benefit would be unjust. Since both in tort and restitution the rights do not arise from consent but are granted by the law, there will naturally be some overlapping of the boundaries in actual systems.[2]

§ 103. Delict

The simplest definition of a tort in English law is that it is a civil wrong which infringes a right *in rem* and is remediable by an action for damages, but historical considerations render it difficult to discover any form of words both accurate and concise. Some definitions tell us what a tort is not, but leave us in doubt as to what it is. Professor Winfield states that 'tortious liability arises from the breach of a duty primarily fixed by the law: this duty is toward persons generally and its breach is redressible by an action for unliquidated damages'.[3]

In Roman law delict was merely a generic term covering actions for *furtum, rapina, damnum iniuria datum* and *iniuria.* In French law (and indeed in most modern codes) the definition may easily be framed in terms of broad principle. 'A delict is an unlawful act infringing the right of another and causing damage, such act being

[1] W. A. Seavey and A. W. Scott, 54 *L.Q.R.* (1938), 29.

[2] Winfield, *Province of the Law of Tort*, ch. vii.

[3] *Text-Book of the Law of Tort* (8th ed.), 2. For other definitions see Winfield, *Province of the Law of Tort*, ch. xii; Salmond, *Torts* (14th ed.), 15; Buckland and McNair, *Roman Law and Common Law*, 263.

imputable to its author, and not constituting the fulfilment of some legal obligation on his part, or the exercise of a right. And the act must be done knowingly, and with the intent to cause injury.'[1]

The term 'quasi-delict' was invented in Roman law to cover cases of liability where, although there was neither intention nor fault, liability was imposed on grounds of expediency, e.g. a householder was liable if something was thrown from his dwelling and injured a passer-by. The obvious difficulty of discovering the actual perpetrator would have meant in practice the frequent denial of a remedy in the absence of some such rule. In French writing 'delict' is confined to intentional injury and 'quasi-delict' is used to cover injury caused by negligence.[2] In English law there is no such distinction, the term 'tort' covering both intentional and negligent injury as well as strict liability.

§ 104. Purpose of the Law of Delict

The purpose of the law of delict is to protect certain rights which relate to person, property, and reputation, and to provide compensation or redress for any wrongs which infringe them. The essential mark of the criminal law is punishment inflicted by the State, that of delict redress to a wronged plaintiff. But the emphasis on compensation has only lately been made clear. The Roman law of delict tended to exaggerate the penal element and is more akin to the approach of the criminal law than is the English law of tort.[3] Thus in *furtum* the thief was liable, not only to an action for the recovery of the property, but also to fourfold damages for *furtum manifestum* or double for *furtum non manifestum*. In the *Lex Aquilia* damages were calculated on a very favourable basis to the owner, and double damages lay if one who unreasonably denied liability lost the action.[4] The *furiosus* and the *infans* escaped liability, as it was felt unjust to punish where fault was absent. This is far removed from the approach of the English law of tort, which has no general defence of minority:[5] how

[1] Aubry and Rau, *Cours de droit civil français* (5th ed.), vi. 337.

[2] The French Code does not in its articles refer to this distinction, but the chapter heading includes delicts and quasi-delicts. This distinction has been worked out by writers and decided cases. See Aubry and Rau, op. cit. 363.

[3] Buckland and McNair, op. cit. 267–9. Thus under the *Lex Aquilia* if there were several wrongdoers each was liable for the full penalty and the fact that one had paid in no way released the others: *Dig.* 9. 2. 11. 2. [4] Gaius, *Dig.* 9. 2. 2. 1.

[5] Presumably the term *infancy* will now be changed to *minority*—see the Practice Direction, [1970] 2 All E.R. 280, arising as a result of the Family Law Reform Act, 1969, which reduced the age of minority from 21 to 18 years.

far, if at all, lunacy is a defence is still a question open to argument in the higher courts of appeal.[1]

The law faces a difficult task in determining the level of compensation, when a plaintiff is so injured that he has lost everything but life itself. 'Juries are set the task of weighing the imponderable and predicting the unforeseeable', as is pointed out in an incisive judgment by Barry J.[2]

The emphasis on compensation, instead of fault, has been encouraged by the practice of insurance. If an industry involves a dangerous activity it may be reasonable to impose strict liability: insurance really means that the consumers of the product will ultimately pay the insurance premiums and it is more just to spread the risk in this way than to leave it entirely on a plaintiff. Sometimes insurance is optional and taken out for particular risks: sometimes it is compulsory for one class of risk, as in the case of Workers' Compensation or third party risks where motor driving is concerned. Finally, we may have a comprehensive and compulsory scheme of social insurance covering such risks as unemployment, accident, and illness. Clearly the last must ultimately have some effect on the law of tort and point was given to this in England by the passing in 1946 of the National Insurance Act, the National Insurance (Industrial Injuries) Act, and the National Health Service Act.[3] Was it reasonable to allow a person to recover both his social insurance benefits and damages at common law? A special Departmental Committee produced an interesting report which throws light on the views held by various sections of the community concerning the ultimate ends of the

[1] A child may be in a favourable position as defendant, e.g. if negligence must be proved it must be shown that the child did not exercise the care that was reasonable for a child of that age. There is modern English authority on lunacy as a defence, and also authority from other common law jurisdictions, but the detailed rules relating to such a defence have yet to be worked out by the highest appellate courts. In *Morriss* v. *Marsden* (1952), 1 All E.R. 925, it was held that insanity is no defence to a civil action for damages for assault unless the defendant neither knew the nature of the act committed nor formed an intention to commit it. It was thought to be immaterial to ask whether or not he knew what he did to be wrong. In Canadian cases such as *Tindale* v. *Tindale* (1950), 4 D.L.R. 363 and *Phillips* v. *Soloway* (1956), 6 D.L.R. (2nd) 570, the defence was accepted as being a good one if the defendant literally did not know what he was doing. In New Zealand as early as 1900 it was held that lunacy is not a defence to a claim for intentional injury: *Donaghy* v. *Brennan* (1900), 19 N.Z.L.R. 289. It may be that with greater emphasis being given in modern times to the aspect of compensation rather than fault in the area of torts, severe limits upon the defence of lunacy in torts may be justified—see Denning L.J. in *White* v. *White*, [1950] P. 39 at 58–9.

[2] *Tzouvelis* v. *Victorian Railways Commissioners*, [1968] V.R. 112 at 120.

[3] W. Friedmann, 63 *Harv. L. R.* (1949), 241.

common law.[1] The Law Reform (Personal Injuries) Act, 1948,[2] adopted a compromise by which there is deducted from any damages recovered for loss of earnings or profits arising from personal injuries one-half of the value of the rights to insurance over five years from the time of the cause of action.[3] This is based on the fact that damages in tort are on a higher scale than the limited insurance benefits. The question of the deductibility of other collateral benefits in personal injury cases has also provided much judicial disagreement. When income tax was small the question did not arise whether compensation for loss of earnings should be reduced to take account of tax which would have been paid, if the earnings had been received. Now it is a relevant deduction.[4]

For the present the law of tort survives these charges. No doubt this is partly because social insurance is not the only purpose of the law of torts; awards of damages may operate as sanctions to support standards of care.[5] Moreover, there are many torts which social insurance will not affect, e.g. defamation, seduction, injurious falsehood, conversion, malicious prosecution, some injuries to property. Friedmann suggests that the width of the statutory schemes of insurance has led to a judicial tendency to be conservative in the interpretation and extension of common law doctrines.[6] It is yet rather early to draw definite conclusions. It is clear, however, that the modern view of tort is that its aim is to provide a reasonable adjustment of risk in society, as is illustrated by the dictum of Holmes J.: 'Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation or estate, at the hands of his neighbours, not because they are wrong, but because they are harms.'[7]

[1] 1946, Cmd. 6860; and the case law in the last ten years or so reveals strikingly divergent views about the effects, not only of insurance and superannuation schemes, but of the statutory background of modern taxation systems on the traditional law of torts—see *British Transport Commission* v. *Gourley*, [1956] A.C. 185; *West Suffolk County Council* v. *W. Rought Ltd.*, [1957] A.C. 403; *Judd* v. *Board of Governors of the Hammersmith, West London and St. Mark's Hospitals*, [1960] 1 All E.R. 607; *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] 1 All E.R. 125.

[2] 11 & 12 Geo. VI, c. 41.

[3] The formula is a detailed one, too long for exact reproduction: § 2 (1). A functional survey of the overlapping of the various systems of insurance, compensation, and tort is given by Atiyah, *Accidents, Compensation and the Law* (1970), ch. xviii.

[4] P. S. Atiyah, 32 *Mod. L. R.* (1969), 397.

[5] Even in the Soviet systems this is emphasized: see J. Hazard, 65 *Harv. L. R.* (1952), 545 at 577–8.

[6] 63 *Harv. L. R.* (1949), 241 at 258, instancing *Adams* v. *Naylor*, [1946] A.C. 543, and *Read* v. *J. Lyons & Co. Ltd.*, [1947] A.C. 156.

[7] *The Common Law*, 144.

But the persistent emphasis of the so-called moral theory that there should be no liability in the absence of intent or negligence shows that old ideas die hard.

§ 105. Standards of Care

The question of standards of care is important, since it determines how far the protection of the rights of the plaintiff is to be carried. Does his right to freedom from harm extend only to intentional injury, or does it extend to negligent injury, or is strict liability imposed on the defendant? In Roman law the problem was fairly simple. Firstly, there was no general principle of liability, since there was only a limited number of actionable wrongs. Just as the Romans developed no general theory of contract, so they developed no doctrine of delict as such. In the cases where liability was recognized there must either be wrongful intent (as in *furtum*, *rapina*, or *iniuria*) or negligence (as under the *Lex Aquilia*). The emphasis on fault was so strong that the heading of quasi-delict was invented to cover anomalous cases. 'Roman classical law was not far removed from absolute application of the rule: no liability without fault.'[1]

In French law a broad principle of liability was laid down in the code,[2] and nothing is known of specific torts as these are understood in English law.[3] The traditional interpretation of the code founded liability on fault although there were a few exceptions.[4] There is, therefore, no great difficulty in stating the general principle which lies at the base of the law and the example of France has been followed by many modern systems.[5] This tendency to create a general principle of liability based on fault unified the law.

English law is founded on the rather narrow forms of action, and broad generalizations concerning its early history are full of danger. But the rapid development of *case*, where liability was founded on fault, led to the rationalization of part of the law, and it was inevitable that attempts should be made to construct a coherent system out of the particular instances of specific wrongs. The principle of no liability without fault was peculiarly suited to the nineteenth century.

[1] W. W. Buckland, *The Main Institutions of Roman Private Law*, 327.
[2] C.C., Arts. 1382, 1383; F. P. Walton, 49 *L.Q.R.* (1933), 70.
[3] Amos and Walton, *Introduction to French Law*, 215.
[4] There were certain cases of vicarious responsibility, and fault was presumed where damage was caused by the fall of a building or by animals.
[5] e.g. *EGB.* 823, 826; Italian C.C., 1151; Swiss Code, 41. Cf. F. P. Walton, 49 *L.Q.R.* (1933), 78.

It was regarded as a moral theory, since the innocent actor escaped. It encouraged free activity, instead of cramping it by the imposition of strict liability. The doctrine could thus be linked with the currents of individualism and the theory of *laissez-faire*. Moreover, the standard of negligence was an elastic one that could be applied without difficulty to very different situations. Hence arose a tendency to write the history of tort as an evolution from the un-moral theory of acting at one's peril to the ethical theory that liability should be imposed only on those who acted unreasonably.[1]

To those nineteenth-century writers who argued this way, the decision in 1868 of *Rylands* v. *Fletcher*,[2] with its emphasis on strict liability, came as an unwelcome surprise. Salmond refused to accept the principle in its entirety,[3] Pollock accepted it only under protest,[4] and it was prophesied that the decision would be rapidly eaten away by exceptions. But strict liability became established and this century has seen a surprising elasticity in the doctrine of *Rylands' Case*. If we regard the law of torts as a penal instrument, then it may seem unjust to punish where there has been no fault; but once the emphasis is placed on compensation, it is clear that it is not unjust to cast the risk of essentially dangerous conduct on the person who pursues it.[5] Instead of *Rylands' Case* being crippled by exceptions, many watched with mingled fear and admiration its triumphant progress. A principle that began with water flowing from a reservoir and extends to caravan dwellers 'escaping' from a brickfield[6] must at least be alive. The courts have retained elasticity by refusing to make a closed list of the substances to which *Rylands' Case* applies and have imposed strict liability wherever the plaintiff had been subjected to excessive risk. Thus electric cables or gas mains in the street are within the principle, but not electric wiring or gas pipes in a private house, for the latter are both normal and necessary.[7] The test of natural user of land is really more suited to a stable community than a developing one, but the courts are careful not to deter development by a too harsh imposition of strict liability.[8] In truth, the modern doctrine of strict liability requires a delicate balancing of interests: the court

[1] Cf. J. B. Ames, 22 *Harv. L. R.* (1908), 99.
[2] L.R. 3 H.L. 330.
[3] Preface to *Torts*, 5th ed.
[4] 25 *L.Q.R.* (1909), 317 at 321; E. R. Thayer, 29 *Harv. L. R.* (1916), 801 at 814.
[5] R. Pound, 27 *Harv. L. R.* (1914), 195 at 233.
[6] *A.-G.* v. *Corke*, [1933] 1 Ch. 89, criticized W. S. Holdsworth, 49 *L.Q.R.* (1933), 158. For an analysis of the cases see W. T. S. Stallybrass, 3 *Camb. L. J.* (1929), 376 at 382.
[7] *Collingwood* v. *Home and Colonial Stores*, [1936] 3 All E.R. 200.
[8] W. Friedmann, 1 *Mod. L. R.* (1937), 39 at 52.

must consider not only the danger inherent in a course of conduct, but also whether that conduct is abnormal or usual, whether it is beneficial to the community or pursued only for individual ends. The rank growths of individualism are being checked by new doctrines of social value. The question is often put in the form—who can best bear the loss?

The modern extension of the field of strict liability is an interesting illustration of the adaptation of case law to new situations and new social philosophies.[1] We see illustrations of the same approach in Workmen's Compensation Acts and in Air Navigation Acts.[2] Nor is the principle confined to England alone. The increasing casualties caused by the motor car have aroused a greater interest in doctrines of strict liability. In America the very diversity of solutions shows that the law is driven, not by deductive logic, but by the pressing need to find an answer to a social problem.[3] The argument is that the motorist introduces a danger for his own pleasure or profit; moreover, he is better able to bear the loss since he can protect himself by a small insurance premium and thus spread the risks of traffic over motor users; why should he not bear the loss? In France, by rather dubious methods of interpretation, the theory was adopted that a motorist should be presumed to be at fault. But though the courts thus pay lip-service to fault, there is, in reality, an imposition of strict liability (*risque créé*), for the presumption can be rebutted only by proof of a cause exterior both to the car and the driver.[4] In administrative law we see traces of the same doctrine of *risque créé*. Thus it is significant that a country which placed such emphasis on fault should see the necessity of modifying its rules in this way. It is therefore clear that in modern times there is not merely one principle of liability, there are at least two. In English law, a check to the development of strict liability has been given by the speeches in *Read* v. *J. Lyons & Co. Ltd.*[5] The actual decision was that as there was no escape, no liability could be imposed. But what was more significant was the deliberate refusal to attempt to rationalize the law or to place

[1] There were, of course, precedents. Indeed, medieval liability may well have been strict, but the re-enunciation of the principle in *Rylands* v. *Fletcher* (*supra*) in 1868 was all-important.

[2] See A. D. McNair, *Law of the Air*, chs. i and iii, and the Act of 1936, 26 Geo. V and 1 Ed. VIII, c. 44.

[3] 32 *Col. L. R.* (1932), 785.

[4] L. Josserand, *Évolutions et Actualités*, 52 et seq.; F. Gény, *Méthode*, ii. 174–5; Amos and Walton, *Introduction to French Law*, 262; Deák, 79 *Univ. of Pa. L. R.* (1931), 271.

[5] [1947] A.C. 156.

it on a broad basis.[1] Counsel had attempted to persuade both the Court of Appeal and the House of Lords that, just as doctrines of negligence have been brought together within a broad principle, so the various doctrines of strict liability should be freed from their historical origins and based on a doctrine that abnormally dangerous conduct involves strict liability. This invitation was decisively rejected. The result of the decision is that the historical differences between *Rylands* v. *Fletcher*, liability for fire, dangerous chattels, and savage animals will probably remain in the law of tort.[2] The instances of strict liability, therefore, remain in separate pigeon-holes.

An analysis of standards of care produces the following result:

(*a*) *Strict liability*

While it is not accurate to say that defendant acts at his peril, nevertheless there is no need to prove negligence, and defendant can rebut a prima facie liability only by bringing himself within one of the rather narrow defences. The actual rules depend on historical considerations, but the broad justification is that it is reasonable to cast the risk of essentially dangerous conduct on him who pursues it.

(*b*) *Vicarious liability*

The liability of a master for the acts of his servant depends on the fact that the servant is rarely worth 'powder and shot' and it is not unfair that he who takes the profit should have the risk of loss. At common law the husband was liable for the torts of his wife because he got title to his wife's chattels, but a changing law of property has led to his exemption.[3]

(*c*) *Liability for negligence*

Negligence is used in two senses in English law. Used narrowly it means unreasonable conduct, the failure to act up to the standard which would be set by the reasonable man. In a wider sense it is the name of an independent tort and includes the notions of duty, breach of duty (unreasonable conduct), causation, and damage.[4] The standard

[1] 'Your Lordships are not called upon to rationalize the law of England': per Lord Macmillan, at 175.

[2] G. W. Paton, 23 *A.L.J.* (1949), 158.

[3] Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. V, c. 30. The liability of an employer for certain torts of an independent contractor depends on various considerations. The law is now too fluid to be expressed briefly.

[4] Per Lord Wright, *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A.C. 1 at 25.

is not subjective, for the court asks: 'what would a reasonable man have done after considering the circumstances that he ought to have known and the consequences that should have been foreseen?' Yet English law is not entirely objective in its approach. Thus a child of tender years is expected to use only the care reasonable for a child of that age. If a person holds himself out as possessing special skill, he will be judged by a higher standard. A point that has been little discussed is that of the physically infirm. If I am congenitally clumsy and yet drive a motor car, the existence of my physical defects is no defence, for my negligence really consists in the attempt to drive the car. But if we can reasonably expect forbearance from driving, we can hardly hope that the physically infirm will refrain from using the highway. Where contributory negligence is pleaded there is authority for the view that one who is deaf or has defective vision should not be judged by the standard of the physically sound.[1] Is a blind man who falls into a hole in the footpath, negligently created by the defendant, to be debarred on the ground that a man with sight could have seen it?[2]

(d) Liability only where a specific subjective element is present

There are some cases where liability is imposed only where a specific subjective element can be proved, e.g. a predominant intent to injure in the case of civil conspiracy, intention in the case of assault or in inducing breach of contract, malice in defamation where qualified privilege applies.

(e) Damnum sine iniuria

Lastly, there are cases of *damnum sine iniuria.* In some circumstances I may intentionally cause injury and not be liable; or escape in spite of unreasonable conduct which causes damage.

We may now approach the question whether there is a general doctrine of liability in English law. Much controversial writing exists, but the answer seems clear. There are broad principles of liability which the courts have applied to particular circumstances. There are decisions which exempt from liability on the ground that there is no

[1] *Daly* v. *Liverpool Corp.*, [1939] 2 All E.R. 142.

[2] *Restatement, Torts*, § 289, and W. L. Prosser, *Torts*, § 36, suggest the test is the reasonable care of a blind man; G. B. Weisiger, 24 *N. Car. L. R.* (1945–6), 187; G. W. Paton, 23 *A.L.J.* (1949) at 161–2.

duty. Between the two 'is a stretch of disputed territory, with the Courts as an unbiased boundary commission'.[1] Whatever may be the case in the future, it is not yet possible to say that he who causes harm is prima facie liable unless it can be justified or excused. English law has rationalized the doctrine of negligence, but much work is necessary before the whole law of tort is welded into a uniform and rational body of principles. This branch of law is far from static: it is not so much a collection of specific injuries as a reservoir of principles which have been applied with limitations which are sometimes rather arbitrary because of historical accidents. I can still intentionally injure my neighbour in many ways without being subjected to liability. The law is being slowly extended, and it may be that in time general theories of liability can be confidently set forth—but that time is not yet. When it does come there will not be one principle of liability but several based on the inherent risk involved in the conduct which is complained of.[2] Few would deny that all unjustifiable harm should be actionable, but, while such a philosophy may be behind the law, to suggest it as a working explanation of the cases seems premature.

Causation

The legal treatment of the problem of causation is an interesting one. Both in science and philosophy, cause has proved difficult to define. But the law is interested in tracing physical phenomena only in so far as they show the responsibility of a particular human being. I drop a burning match on a hot day and as a result Brown's house, which is two miles away, is burnt. The physical contributory causes are many—the dryness of the vegetation, a hot wind taking the fire in that particular direction, the absence of fire-breaks around the house. The law concentrates on my responsibility for starting a chain of causation. It is clear, therefore, that the problem must be dealt with on broad common-sense lines rather than by any scientific analysis that is too subtle. Law exists to be applied, and the best of rules

[1] G. L. Williams, 7 *Camb. L. J.* (1939), 131. 'It has been contended that if damage is caused to any person by the act of any other person an action will lie unless the second person is able to justify his action. Many cases show that there is no such principle in the law': per Latham C.J. in *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor* (1937), 58 C.L.R. 479 at 493.

[2] Pollock affirmed the existence of a general principle, *Torts*, ch. ii (but in the 15th ed. his editor is against him, 41–6): opponents are Salmond, *Torts*; Jenks, 14 *J. Comp. Leg.* (1932), 207 at 209; Goodhart, 2 *Mod. L. R.* (1937), 1. Glanville Williams mediates, 7 *Camb. L. J.* (1939), 111. Winfield in the first edition of his *Text-Book of the Law of Tort* adopted the first view, see discussion (8th ed.), 10.

on paper may prove so difficult to apply that expense and injustice result. Hence the law asks: 'Was the conduct of the defendant a substantial factor in bringing about the final result?' Again, once a cause is set in motion, its results may be infinite. Thus the loss of Brown's ship, because of a collision caused by the negligent navigation of another ship, may force Brown into bankruptcy, deprive his sons of their professional education, lead to his wife's suicide through worry, and the loss of a marriage by his daughter. 'The law cannot take account of everything that follows a wrongful act. . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.'[1] At bottom the problem is one of balancing interests—how far is the protection of the plaintiff to be carried?[2] Hence an act is the 'legal cause' of a consequence only if the law considers that liability should be imposed for that consequence. Hence 'legal cause' can be analysed only by examining the cases in which liability has been imposed. 'Direct cause' has no easily expressed meaning as it is used in law—it is a phrase that is a rationalization of concrete decisions.[3] The law would be simpler if some decisions were expressed in this way: 'undoubtedly in a physical sense the defendant's act was the direct cause of plaintiff's damage, but we consider for reasons of policy that it is inexpedient to impose liability.'[4] 'How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection against the carelessness of others.'[5]

[1] Per Lord Wright, *The Edison*, [1933] A.C. 449 at 460.

[2] If a defendant negligently severs an electricity cable, can a plaintiff recover for loss of production? See *S.C.M. (U.K.) Ltd.* v. *Whittall & Son Ltd.*, [1970] 3 W.L.R. 694. Lord Denning: 'In actions for negligence when the plaintiff has suffered no damage to his person or property, but has only sustained economic loss, the law does not usually permit him to recover that loss. The reason lies in public policy.'

[3] L. Green, *Rationale of Proximate Cause*; H. L. A. Hart and A. M. Honoré, *Causation in the Law* (1959); Thesiger J., *S.C.M. (U.K.) Ltd.* v. *Whittall & Son Ltd.*, [1970] 1 W.L.R. 1017.

[4] Compare *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453. It seems likely that the rule in *Re Polemis*, [1921] 3 K.B. 560 can now be laid to rest even in England. It certainly can be in all those jurisdictions which recognize the Privy Council as authoritative—see *Overseas Tankship (U.K.) Limited* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* (1961), 2 W.L.R. 126 (P.C.); A. L. Goodhart, *Obituary: Re Polemis*, 77 *L.Q.R.* (1961), 175; G. Williams, *The Risk Principle*, 77 *L.Q.R.* (1961), 179.

[5] Per Lord Pearce, *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. at 536. See also the decision of the J.C. in *Mutual Life and Citizens Assur. Co. Ltd.* v. *Evatt*, [1971] 1 All E.R. 150, where the court split three to two in determining the boundaries of the duty of care.

§ 106. Abuse of Rights

Strictly, the phrase 'abuse of rights' is not very elegant; how can the law denounce as illegal the exercise of a right which is granted by the law? The notion lying behind the doctrine is, however, that rights are created for a certain purpose and that a right ceases to be such if it is exercised for an end foreign to that for which it was given. Many modern codes recognize this principle,[1] but the greatest difficulty is to determine its real limits. Sometimes a purely subjective test is used—the intent to injure—but this can be proved only in the clearest cases. Another solution is to deduce the intent from the circumstances.[2] Josserand has made a lengthy examination of the problem[3] and he distinguished between three classes of rights: firstly, there are absolute rights on the exercise of which there is no check (for example, the right of cutting overhanging branches); relative rights which can be exercised only to protect some lawful interest; and altruistic rights the exercise of which is governed by the necessity of considering the interests of those who will be affected (e.g. the rights of a guardian over his ward). In short, Josserand pleads for the further *moralisation du droit*[4] by increasing the number of rights which can be exercised only to gratify a legitimate interest. To carry the doctrine to its logical end we should have to dethrone the individualist theory of rights and use as a test the measure by which that particular exercise was useful to the community.[5] An individualist theory of property renders it difficult to carry very far any doctrine of abuse of rights.

Yet most systems of law have curbed to some extent the abuses of exaggerated individualism. Thus ownership, defined by the French Code as the right to enjoy and dispose of things in the most absolute manner,[6] has been greatly cut down. The building of structures (such

[1] *BGB.* Art. 226: 'The exercise of a right is forbidden, if it can have no other purpose than to harm some other person.' (826 aims at the suppression of acts which are *contra bonos mores.*) Swiss C.C. 2: 'The law does not protect the manifest abuse of a right.' Chinese Code: 'A right cannot be exercised for the main purpose of causing injury to another.' Soviet Code, 1923: 'Civil rights are protected by the law, except in those cases in which they are exercised in a sense contrary to their economic and social purpose.' The Polish Code of 1934, Art. 135, speaks of an act 'going beyond the limits fixed by good faith, or by the end for which the right was conferred'. French law has no specific article, but the doctrine is accepted that abuse of rights is fault under C.C., Art. 1382. The Permanent Court of International Justice referred to the doctrine twice with approval: H. C. Gutteridge, *Comparative Law* (2nd ed.), 68.

[2] H. C. Gutteridge, 5 *Camb. L. J.* (1933), 22.

[3] *De l'esprit des droits et de leur relativité* (1927); *Évolutions et Actualités*, chs. iv, v.

[4] *De l'esprit des droits et de leur relativité* (1927), 91.

[5] Cf. L. Josserand, ibid. 73; W. Friedmann, 21 *Can. B. R.* (1943), 369.

[6] Art. 544. The article adds the necessary qualification: 'provided they are not used in a way prohibited by law or regulations.'

as false chimneys) for the purpose of blocking a neighbour's view, and the tapping of underground water solely to prevent a neighbour's use of it, are actionable. Even a refusal to enter into contract may lead to responsibility, if the law disapproves of the motive, for example, if an employer refuses to engage any union labour. The Russian Code regards as unlawful the exercise of acts contrary to their social or economic purpose. Ultimately, therefore, the dispute concerning abuse of rights is a conflict between the individualist view which would give as much freedom of self-assertion as possible and the collectivist view that would examine the exercise of rights from the angle of the community as a whole. So far, all legal systems have been fairly cautious in developing theories of abuse of rights.

In English law there are traces of the view: 'Keep within the law, and you may gratify your malice to your heart's content.'[1] But there are cases where rights are qualified, i.e. protected only if they are exercised for the purpose for which they are given. A combination of two or more has a qualified right to injure Smith, provided the intention is to protect a legitimate interest and not to gratify a 'disinterested malevolence'.[2] Where qualified privilege is raised as a defence to defamation, only an honest use of the occasion is protected.[3] The law of nuisance depends on a compromise between the interests of neighbours, and a proved intention to annoy may create liability for what would otherwise be covered by the principle of mutual forbearance.[4] Some U.S. cases have gone even farther. 'Spite fences' are not protected—'the right to use one's property for the sole purpose of injuring others is not one of the immediate and indestructible rights of ownership'.[5] Some jurisdictions give a remedy on facts analogous to *Bradford* v. *Pickles*.[6]

Gutteridge concludes that, while the doctrine of abuse of rights is recognized in most continental systems, there is little attempt to give a definite content to the theory.[7] The main difficulty is to discover

[1] C. K. Allen, *Legal Duties*, 96, referring to *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587 at 598.

[2] *Sorrell* v. *Smith*, [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435.

[3] *Watt* v. *Longsdon*, [1930] 1 K.B. 130.

[4] *Hollywood Silver Fox Farm* v. *Emmett*, [1936] 2 K.B. 468; criticized by Holdsworth, 53 *L.Q.R.* (1937), 1, and approved by Goodhart, 52 *L.Q.R.* (1936), 461, and 53 *L.Q.R.* (1937), 3.

[5] *Barger* v. *Barringer* (1909), 151 N. Car. 433; *Restatement, Torts*, § 829: *contra* *Cohen* v. *Perrino* (1947), 355 Pa. 461. Quebec allows a remedy: 25 *Can. B. R.* (1947), 512.

[6] [1895] A.C. 587. Cf. *Barclay* v. *Abraham* (1903), 121 Iowa 619; *Wyandot Club* v. *Sells* (1896), 4 Dec. 254, 3 Ohio N.P. 210.

[7] 5 *Camb. L. J.* (1933), 22 at 42.

a formulation that will neither be too narrow nor too wide. Undoubtedly there should be a remedy if the *sole* purpose of the exercise of a right was to injure another. But, as the conspiracy cases show, it is but rarely that 'disinterested malevolence' can be shown, for usually some interest of the actor can be pleaded as the object of the act. Even Mr. Pickles could claim that he drained the percolating water in order to encourage the corporation to buy his land. Clearly, if we put the emphasis on the purpose for which the right was given, much accurate analysis would be necessary before the application of the law was clear. Care is needed not to phrase the doctrine too widely, lest excessive scope be given to the vexatious litigant to interfere unduly with the freedom of his neighbour.

Legislation is active in preventing abuse of certain rights. Town planning laws prohibit conduct by the individual which would be socially inexpedient: industrial laws prevent abuse of economic power, and patent legislation[1] stresses that the right of the owner is not the only factor to be considered—in theory at least the legal rights of the owner are created and protected primarily to ensure that new inventions shall be encouraged and their benefits made available to the community generally.

§ 107. Functional Analysis

So far we have discussed the law of delict purely from the standpoint of the care required of the defendant. A functional analysis would ask—how far are these rules successful in achieving their end (so far as they may be said to have an end)?

Firstly, greater merit both from the theoretical and the practical approach can be claimed for those systems which base liability in tort on a broad principle or principles. It is theoretically more satisfying to have general principles of liability, just as the modern law of contract with its theory of actionable agreement is superior to the undeveloped Roman law. General principles of liability allow a coherent body of law to be developed in a more consistent fashion than if the law is confined in too many pigeon-holes. The Roman and English emphasis on specific delicts or torts leaves gaps in the law and there are various anomalies which can be justified by history alone. In English law one may be as careless as one pleases without

[1] Patents Act, 1949, e.g. compulsory licences (§ 37).

being subject to liability unless there is a duty to take care.[1] It being a question of law for the court to determine when a duty exists, this concept could have been used to introduce uniformity into the law, instead of leaving the question at large to the jury.[2] But an examination of the cases shows that the results of the emphasis on duty are rather surprising. Why should a manufacturer, when there is no commercial probability of intermediate examination, owe a duty of care to the ultimate consumer,[3] and the liability of a builder who puts up a defective ceiling be limited to those who have entered into contractual relations with him?[4] Realistically, the explanation is that the latter problem was decided in 1906,[5] the former in 1932, when the tendency to increase liability was stronger. The influence of the ghosts of the past is still important. It is true that within the individual forms of action there has been much rationalization, but this indirectly has had a confusing result. Rules that were once narrow and absolutely distinct have been extended until in practice there is much overlapping between the specific torts.[6] The law of negligence is fairly coherent, but in strict liability the exact relationship of the various rules to each other is still a matter of dispute. It has been said that the rules relating to liability for fire and to responsibility for damage done by savage animals are but instances of the rule in *Rylands' Case*,[7] yet there are many practical differences,[8] which were emphasized by the Lords in *Read* v. *J. Lyons & Co. Ltd.*[9] Any part of the law is fascinating while it is in a fluid state, but the time has come to rationalize all the rules of strict liability and remove detailed differences in particular cases which cannot be justified. One of the defects of case law is that it tends to create too many minute distinctions; in that part of the law of torts relating to the responsibility of an occupier to those who enter on his premises the English courts developed a variety of categories of those who enter as of right, those who enter under contract, invitees, licensees, and trespassers. Much learning surrounded the precise distinction between the duty of care owed in each of those cases, and not infrequently the rules proved too subtle and courts were led into error. The Occupier's Liability

[1] P. H. Winfield, 34 *Col. L. R.* (1934), 41.
[2] L. Green, *Law, a Century of Progress*, iii. 34 at 50–1.
[3] *Donoghue* v. *Stevenson*, [1932] A.C. 562, as explained in subsequent cases.
[4] *Otto* v. *Bolton*, [1936] 2 K.B. 46; P. H. Winfield, 52 *L.Q.R.* (1936), 313.
[5] *Cavalier* v. *Pope*, [1906] A.C. 428.
[6] W. Friedmann, 1 *Mod. L. R.* (1937), 63.
[7] (1868), L.R. 3 H.L. 330.
[8] G. W. Paton, 23 *A.L.J.* (1949), 158 at 167.
[9] [1947] A.C. 156.

Act, 1957,[1] was an attempt to provide broader rules and to obliterate unnecessary distinctions. Similarly, the law relating to liability for animals is complex and, in many ways, obsolete.[2] It is suggested that the kind of work exemplified by the Act of 1957 should be followed in other common law jurisdictions where it has not yet been attempted; and that similar work should be pursued with respect to other categories of liability where diverse rules as to strictness of liability still obtain.

On the other hand, the English reliance on case law has made the doctrine of tort very practical, and foreign lawyers emphasize that it is frequently possible in English law to find a speedy answer to a concrete problem which the general principles of a code leave in doubt.

Secondly, in most modern systems there is a tendency gradually to extend the field of liability. This is partly due to the growing acceptance of the doctrine that the object of tort is to compensate the plaintiff for injury and not to punish the defendant for his wrong.[3] This has caused a frame of mind which will apply strict liability more extensively than did our ancestors a century ago. The spread of insurance has enabled us to contemplate with equanimity the imposition of damages on a substantial scale and has tended to make the courts concentrate more on the woes of the plaintiff than the protection of the defendant.[4] The desire to favour a poor plaintiff is perhaps carried farthest in Soviet Russia, which lays down that if there is no specific duty broken, the court may consider the financial standing of the parties.[5]

The emphasis on compensation may be illustrated by modern developments of the law of contributory negligence. The penal theory requires that if the plaintiff's fault has contributed to the accident, he should be denied redress, for it is unjust to punish the defendant for what was caused in part by the fault of the claimant. But courts

[1] 5 & 6 Eliz. II, c. 31. Even where legislatures do not act there is still possibility of improvement by skilful work by the highest appellate courts—cf. *Thomson* v. *Cremin*, [1953] 2 All E.R. 1185 and *Commissioner for Railways (N.S.W.)* v. *Cardy* (1960), 34 *Aust. L.J.R.* 134.

[2] See the Report of the Law Commission, no. 13—a somewhat disappointingly conservative recommendation: 31 *Mod. L. R.* (1968), 683.

[3] See G. Williams, *The Aims of the Law of Tort* (1951), 4 *Current Legal Problems*, 137.

[4] See the judgment of Lord Denning in *Launchbury* v. *Morgans*, [1971] 1 All E.R. 642, where a majority of the C.A. treated the husband, on a 'pub crawl', as the agent of the wife who owned the car. Lord Denning said the wife was probably insured and so the plaintiffs could get redress.

[5] S. P. Simpson and J. Stone, *Law and Society*, 2008.

naturally dislike refusing a remedy to a pedestrian (whose fault may have been as small as his injury was grave) and allowing a negligent motorist (who may have suffered no loss) to escape, and this attitude has led to many refinements which today make this part of the law a despair to the teacher and a terror to the litigant. The reasonable theory is that of comparative negligence and this has been adopted by many foreign countries. In England, the Law Reform (Contributory Negligence) Act, 1945,[1] has modified the defence of contributory negligence by providing that

> where any person suffers damage, as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage.

This statute introduced a much-needed reform, as it was universally admitted that the law of contributory negligence was too harsh, and attempts to avoid a harsh doctrine make the law too complicated. But immediately controversy arose and authority was provided by the courts for the following propositions: (*a*) the doctrine of *Davies* v. *Mann*[2] and that of the last clear chance are one and the same;[3] (*b*) the doctrines are distinct;[4] (*c*) the doctrine of the last clear chance was dead before the Act of 1945;[5] (*d*) the doctrine is still in force after the Act;[6] (*e*) the Act substantially modifies a living rule of the last clear chance.[7] The moral it that it is difficult to avoid the effects of a stubborn doctrine of the common law.

All writers seem to be agreed that, regarded from the functional point of view, the law relating to personal injuries should be reformed: inevitably opinions differ as to the form which the reform should take. The necessity of proving negligence in motor car accident cases has often been criticized. Australia has suffered more casualties from the motor car than the total of dead and injured in the Boer War and

[1] 8 & 9 Geo. VI, c. 28; and the Australian states, for example, have made similar legislative reforms.

[2] (1842), 10 M. & W. 546.

[3] Denning L.J., *Davies* v. *Swan Motor Co.* (*Swansea*) *Ltd.*, [1949] 2 K.B. 291 at 324.

[4] Evershed L.J., same case at 317.

[5] Law Revision Committee, Eighth Report (1939), Cmd. 6032, Denning L.J., same case at 321; Lord Wright, 13 *Mod. L. R.* (1950), 2; and see *Alford* v. *Magee* (1952), 85 C.L.R. 437.

[6] W. T. S. Stallybrass, Salmond, *Torts* (10th ed.), preface; Asquith L.J., *Henley* v. *Cameron* (1949), 65 T.L.R. 17 at 20; A. L. Goodhart, 65 *L.Q.R.* (1949), 237.

[7] Glanville Williams, 9 *Mod. L. R.* (1946), 105.

two world conflagrations.[1] A Royal Commission in New Zealand[2] has recommended the abolition of the common law rules applying to actions for personal injuries, and the enactment of a compulsory state insurance scheme which would cover all injuries by weekly payments and require no proof of fault in the defendant. This proposal runs counter to many vested interests. Private insurance companies would lose a source of profit: the legal profession would suffer by the disappearance of this type of action from the courts, and many plaintiffs prefer the chance of substantial damages to the solid reality of smaller weekly compensation.

Even, however, if the common law is retained, there are serious difficulties. Many plaintiffs will lose their actions; some who win may not be able to recover from a poor defendant; various factors lead to long delay before judgment is given. The plaintiff is not encouraged to speed his suit, until he knows the extent of his injuries. Damages must be recovered in one action once and for all. The court is faced with the difficulty of weighing 'medical imponderables'. Also, is it permissible to consider inflation and the effect of income tax in determining the award of damages? In *Thurston* v. *Todd*,[3] Asprey J. regretted that he was not empowered to deal with the case by awarding damages on a periodical basis, subject to review when the real extent of the injuries was ascertainable. Otherwise there is a serious risk of injustice to one party or the other.

The Law Reform Commission of New South Wales in a Working Paper[4] realized that there are two advantages in the rule of 'once for all': it saves the legal costs of periodic revision, and there is a therapeutic value in the award of a final sum for compensation.[5] However, South Australia[6] has passed a statute which empowers the Supreme Court to enter a declaratory judgment on the issues of liability and to postpone the assessment of damages (with a normal maximum period of postponement of four years) until the medical prognosis has become reasonably clear. In the meantime, appropriate periodic payments may be ordered. The New South Wales Commission approves this approach provided that it is confined to cases where the Court on the evidence is unable to reach a decision with reasonable confidence.

[1] Sir John Barry, 31 *A.L.J.* (1964), 339.
[2] *Compensation for Personal Injury in New Zealand* (*The Woodhouse Report*), 1967.
[3] 83 W.N. (N.S.W.), Pt. i. 335.
[4] 1969 (not printed).
[5] An improvement in health can no longer reduce his claim, so he may well recover if he can.
[6] 1967, no. 21.

Atiyah considers exhaustively whether the object of the law of tort should be general deterrence or an efficient distribution of loss.[1] Even if the law of tort does provide some element of deterrence (in spite of the fact that liability is frequently covered by insurance), it is an expensive process. Atiyah calculates that nearly half of the insurance premiums paid by motorists disappear in administrative and legal costs. The relevant cost in distributing social security payments is ten per cent. Atiyah concludes that there is virtual unanimity in condemning the existing tort system, but much less agreement about what to put in its place.[2]

Thirdly, there is an increasing tendency to give protection to personal rights, even if there is no injury to property in the strict sense of the word. The negligent infliction of nervous shock is now recognized as a cause of action in English law,[3] and damages may be awarded for loss of expectation of life.[4] This last example is rather interesting, for the infliction of death is not a tort in English law—logically, therefore, there should be no action for the loss of ten years of life. But the courts frankly admitted the anomalous nature of the rule which denies a cause of action when death is negligently inflicted and refused to extend the doctrine farther than was required by a narrow view of the theory of precedent. In many continental systems offensive invasion of the privacy of another is an actionable wrong; English law has refused to recognize such a tort,[5] although in particular cases what is in essence a right of privacy may be protected by the use of other rules. Further examples show that English law is still backward in its protection of some personal rights. The law of slander is based on damage rather than insult; recovery for seduction at common law required proof of loss of service;[6] in some jurisdictions truth is still a complete defence to those who publish the youthful lapse of a grave and now blameless citizen, and only in criminal libel must it also be shown that the publication was in the public interest. Yet where juries are concerned 'a soiled reputation seems assured of more liberal assuagement than a compound fracture',[7]

[1] *Accidents, Compensation and the Law.* [2] Ibid. 603.

[3] *Hambrook* v. *Stokes*, [1925] 1 K.B. 141; *Bourhill* v. *Young*, [1943] A.C. 92.

[4] *Rose* v. *Ford* [1937] A.C. 826; and see D. Kemp and M. Kemp, *The Quantum of Damages in Personal Injury Claims* (1954), ch. ix.

[5] Cf. *Victoria Park Racing Co. Ltd.* v. *Taylor* (1937), 58 C.L.R. 479.

[6] This action is now abolished by statute: Law Reform (Misc. Prov.) Act, 1970, c. 33.

[7] Per MacKinnon L.J., *Groom* v. *Crocker*, [1939] 1 K.B. 194 at 231. 'I can well imagine the other Mr. Groom saying to the plaintiff: "You have all the luck, I had my skull fractured and I only get £900. But because someone said you fractured it,

and this is an index of the modern realization of the importance of the protection of personal rights.

§ 108. Quasi-contract

It is impossible to define accurately the nature of quasi-contract, for it originated as a heterogeneous collection of actions which could not easily be fitted under the heading of delict or contract.[1] The term really means that a man in certain cases is bound as if he had made a contract, but, as the obligation is frequently enforced in circumstances in which it is clear that no contract was intended, the term is a source of confusion. It is desirable that a more appropriate nomenclature should become established—such as 'unjust enrichment' or 'restitution'.[2] From the standpoint of jurisprudence, many quasi-contracts are analogous to delict rather than to contract; for in contract the duty is incurred by the free consent of the party, whereas in delict and most quasi-contracts the duty is laid down by the law.

Roman law instances such cases as the following: *negotiorum gestio*,[3] the liability of a guardian to his ward, the relation between common owners who were not partners and the *condictio indebiti*.[4] This *condictio* is a particular remedy for certain types of unjust enrichment, but Justinian did not include analogous examples under his heading of quasi-contract. Thus we do not find in Roman law a broad principle that unjust enrichment should be restored; it can be said only that there were several remedies which covered part of the ground.

The French Code defines quasi-contract[5] (not very elegantly) but instances only two specific cases—*negotiorum gestio* and unjust enrichment. The textbooks and courts have, however, developed a broad principle of unjust enrichment which is discussed in the next section. In English law the traditional classification of the forms of action has had rather a narrowing effect. The remedy of *indebitatus assumpsit* was extended to cover cases of a contract implied in

you get £1,000. And it was only said to my solicitors, who would not believe it for a moment."'

[1] P. H. Winfield, *Province of the Law of Tort*, ch. vii.

[2] W. A. Seavey and A. W. Scott, 54 *L.Q.R.* (1938) at 38–9.

[3] A *gestor* who in an emergency looked after the affairs of an absent citizen without his authority could recover his expenses in certain cases.

[4] *Inst.* 3. 27: a claim for the return of money paid in error.

[5] C.C., Art. 1371.

law.[1] Lord Mansfield attempted to rescue this branch of the law from the 'marsh of technicality into which it was sinking'[2] and laid down a broad doctrine depending on natural justice and equity, the conception of *aequum et bonum*.[3] This attempt has been sharply criticized, partly because of the confusion between equity and common law, partly on the ground that these vague tests are not a very precise guide.[4] But is the fiction of the implied contract of any real assistance in determining what after all is a question of policy? Historically the doctrine was useful as it enabled *assumpsit* to be extended to a new situation. But how seriously should we take these fictions today? Is the fiction which was once progressive now to be used to hamper the law?[5] Winfield is courageous enough to define quasi-contract without any reference to an implied contract—'liability not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit'.[6]

In considering the actual rules of English law, firstly, we note that there is no remedy for *negotiorum gestio*, on the ground that 'liabilities are not to be forced upon persons behind their backs'[7]—American law has been here rather more liberal.[8] Secondly, some cases which are treated as quasi-contracts are not really such.[9] Among the true cases Winfield instances (*inter alia*) total failure of

[1] The contract implied by law must be distinguished from a contract tacitly made by conduct. If I board a tram, a real contract is made: if I refuse to restore money paid in error, the law imposes on me an obligation to restore. Winfield, *Province of the Law of Tort*, ch. vii; R. M. Jackson, *History of Quasi-contract*.

[2] Winfield, *Province of the Law of Tort*, 127.

[3] *Moses* v. *Macferlan* (1760), 2 Burr. 1005.

[4] *Sinclair* v. *Brougham*, [1914] A.C. 398; *Baylis* v. *The Bishop of London*, [1913] 1 Ch. 127; *Holt* v. *Markman*, [1923] 1 K.B. 504 at 513, where Scrutton L.J. said that the history of this action is one of 'well-meaning sloppiness of thought'. Cf. C. K. Allen's retort, 54 *L.Q.R.* (1938), 201 at 205: 'It is strange that to some even of the most acute legal minds the law seems to be most "sloppy" when it is most sensible.'

[5] Lord Wright, 6 *Camb. L. J.* (1938), 305 at 325–6. Is the law prevented from implying a fictitious contract in circumstances in which a real contract could not have been made, e.g. because it was *ultra vires*? But a lunatic cannot make a real contract and yet may be bound in quasi-contract. An American writer refers to the argument based on *ultra vires* as a heresy which happily does not exist in America: E. S. Thurston, 45 *Mich. L. R.* (1947), 935 at 941. On the other hand, Lord Radcliffe emphasizes that quasi-contract should not be so extended as to evade the law: *Boissevain* v. *Weil*, [1950] 1 All E.R. 728 at 734.

[6] *Province of the Law of Tort*, 119.

[7] *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234 at 248; *Re Cleadon Trust Ltd.*, [1939] Ch. 286. Friedmann regards this as demonstrating the individualism of the common law: 21 *Can. B. R.* (1943), 369.

[8] *Restatement of the Law of Restitution*, §§ 114 et seq.

[9] e.g. Contracts of record (judgments and recognizances), duties arising from a public calling or profession: Winfield, *Province of the Law of Tort*, 149.

consideration, money paid under mistake, the liability of a husband for his wife's necessaries, contribution, and the liability of a lunatic or drunkard for necessaries.[1] If a minor buys food on credit this may be a case of quasi-contract, for the minor is not bound by his promise to pay a certain price, but he is required to pay a reasonable price on the ground that otherwise he would be unjustly enriched.[2] But some executory contracts will be enforced against a minor[3]—here the law does not demand the restitution of an undeserved benefit but rather enforces a real contract made by the minor.[4] Hence it is not accurate to say that in all cases a minor's liability for necessaries is quasi-contractual.

§ 109. Unjust Enrichment

The doctrines which fall under the head of quasi-contract are really founded on a broad principle that unjust enrichment should not be retained at the expense of one who has suffered. In some systems, however, the actual rules of quasi-contract are rather limited, and the broader doctrine has been called into play to supplement the law. In French law the principle is known by the name of *actio de in rem verso*,[5] which 'is founded on the principle of equity which forbids one man to enrich himself at the expense of another'. It applies in every case in which, 'the estate of one person being enriched without lawful cause at the expense of another person, the latter, in order to obtain what is due to him, does not enjoy the benefit of any action based on contract, quasi-contract, delict or quasi-delict'.[6]

Some of the more recent codes contain a general article providing that unjust benefit must be returned.[7] The *Restatement of the Law of Restitution* provides interesting material, as it attempts to get

[1] *In re Rhodes* (1890), 44 Ch. D. 94. This matter is now dealt with by statute: Sale of Goods Act, 1893, § 2.

[2] Fletcher Moulton L.J., *Nash* v. *Inman*, [1908] 2 K.B. 1 at 8–9.

[3] *Roberts* v. *Gray*, [1913] 1 K.B. 520; Anson, *Contract* (23rd ed.), 200.

[4] 'As at present advised I find difficulty in acceding to the view that there is nothing that can properly be called a valid contract on the part of an infant—that all that can be inferred is an obligation on his part, which is improperly termed a contract, to repay money spent in supplying necessaries': per Lord Hanworth M.R., *Doyle* v. *White City Stadium*, [1935] 1 K.B. 110 at 123. P. A. Landon, 51 *L.Q.R.* (1935), 270, and Cheshire and Fifoot, *Law of Contract* (2nd ed. 296–7) are rather critical of this dictum.

[5] This action has a different operation from the Roman remedy.

[6] Cited Amos and Walton, *Introduction to French Law*, 206.

[7] Polish Code (Art. 123); C.C. of Japan (Art. 703); Soviet Russia (Arts. 399–402); *BGB.* Art. 812; Swiss Federal Code of Obligations (Art. 62); Chinese Code (Art. 179). See H. C. Gutteridge and R. J. A. David, 5 *Camb. L. J.* (1934), 204 at 209, and L. Josserand, *Évolutions et Actualités*, 152.

behind the forms of action and the historical divisions between law and equity to the real principles on which this part of the law is based. Quasi-contract provides many examples of restitution, but we see others in equity, e.g. the doctrine of the constructive trust. This last phrase is defined in the *Restatement* in a very broad fashion as denoting cases where a person holding title to property is under an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.[1] This is rather a wider definition than would be given by an English lawyer. The *Restatement*, therefore, treats under the subject 'Restitution' both legal and equitable remedies.[2]

If our law were to be logically arranged it would be necessary to consider whether some remedies which now fall under tort should not be placed under the head of 'Restitution': e.g. replevin, detinue, and trover. The lesson to be gathered from the study of any living system is that it is impossible to force the growth of living forms into rigid classifications. But the jurist should attempt to correlate as far as possible those branches of the law which depend on the same principles or give analogous remedies.

The question how far English law has adopted the principle of unjust enrichment is a matter of great dispute. Lord Wright[3] pleads for a complete resurvey of this branch of the law, arguing that the fiction of the implied contract is now otiose, and that the basis of the law should be restitution where it is unreasonable and unjust for the defendant to retain the benefit which he has received. It would, of course, be necessary to evolve detailed and definite rules, but if these are based on an intelligible principle, then the law can be developed in a more coherent fashion than if it rests on the insecure basis of an obsolete fiction. The theory of the implied contract still has supporters,[4] but it really only pushes the difficulty a stage farther back, for we still have to ask when it is just and reasonable for the law to imply such a contract.[5]

[1] § 160.

[2] Cf. P. H. Winfield, 54 *L.Q.R.* (1938), 529 at 532: 'It may be a dreadful shock to the pure common lawyer and to the pure equity lawyer to find themselves compelled to embrace each other, but it is high time that they should realize that there is but one principle in this branch of the system.' The application of the term 'Restitution' has the approval of Lord Wright: *Fibrosa Spółka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32.

[3] In *The Future of the Common Law*, 94; *Legal Essays and Addresses*, 1 at 33.

[4] D. W. Logan, 2 *Mod. L. R.*, 153 at 158, sums up the authorities.

[5] Anson, op. cit. 620.

REFERENCES

ALLEN, C. K., *Legal Duties*, 95.
ATIYAH, P. S., *Accidents, Compensation and the Law* (1970).
FLEMING, J., *The Law of Torts* (2nd ed.), (1960).
GOODHART, A. L., 2 *Mod. L. R.* (1938), 1.
GUTTERIDGE, H. C., 5 *Camb. L. J.* (1933), 22.
HOLMES, O. W., *The Common Law*, Lectures III, IV.
SEAVEY, W. A., and SCOTT, A. W., 54 *L.Q.R.* (1938), 29.
WILLIAMS, G., *The Aims of the Law of Tort* (1951), 4 *Current Legal Problems*, 137.
WINFIELD, P. H., *Province of the Law of Tort*, ch. vii, and 54 *L.Q.R.* (1938), 529.

XIX

REMEDIAL RIGHTS

§ 110. Introduction

Remedial rights arise from the infringement of a primary right, whether that right is created by a juristic act or directly by law. Thus the breach of a contract is an unlawful act which breaks a duty which has been voluntarily incurred; the commission of a tort is an unlawful act which is the breach of a duty laid down by law. In this chapter we consider the various types of remedial rights which the law will allow.

§ 111. Types of Remedial Rights

(*a*) *Self-help*

The early method of enforcing rights was by self-help,[1] but law can operate effectively only when it masters the natural desire of man to 'take the law into his own hands'. The great need for any primitive system is to secure order and to protect the weak against the lawless activities of the strong. Pollock and Maitland suggest that the law in the thirteenth century kept up its courage by bold words: 'it will prohibit utterly what it cannot regulate.'[2] Now that the courts are strong enough to deal with even the most recalcitrant subject, the law allows 'an amount of quiet self-help that would have shocked Bracton',[3] and the rights of recaption of chattels, self-defence, distress for rent, distress damage feasant and abatement of nuisance illustrate methods by which a person may still take active steps to remedy a wrong without setting in operation any process of a court. But the law zealously guards against any abuse of these remedies—for example, Lord Atkinson has said:

> the abatement of a nuisance is a remedy which the law does not favour. . . . 'The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be

[1] *Supra*, §§ 13 and 14.
[2] *History of English Law*, ii. 572.
[3] Op. cit.

justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but . . . appeal to a court of justice.'[1]

(*b*) *Legal Process*

I. *Declaratory judgment.* In most cases a person can enforce his rights only by the use of the appropriate legal process. Sometimes the mere declaration that the right exists may be all that a plaintiff requires, for his opponent may be quite willing to carry out such legal duties as a court may declare binding. Hence the *declaratory* judgment has become quite important in modern times. It would be ridiculous if the court, in effect, said that the only way to determine whether the suspect was a mushroom or a toadstool was to eat it[2]—that is, that I must first run the risk of breaking the law before I can ask the court what the precise legal position is. The declaratory judgment must be distinguished from the moot case and the advisory opinion. Courts are too busy to solve problems that are not related to the conflicting interests of two parties actually before the court, and the answering of moot problems would be dangerous, for those whose interests were affected might not have the opportunity of presenting an argument. A declaratory judgment is the result of an action between two parties arising out of a dispute as to their legal rights, and the sole significant difference from an ordinary action is that the plaintiff merely asks for a declaration of rights and not for the execution of any legal process. But such a judgment is binding between the parties in any future litigation arising out of the same facts.[3]

II. *Prevention.* If I discover that you are about to break a legal duty owing to me, the most effective protection that the law can give is to act before the threatened wrong takes place. Medicine has no monopoly of the maxim that prevention is better than cure. Before the court had developed an effective process, the parties themselves attempted to secure the observance of agreements by requiring, at the time the agreement was made, either the surrender of a hostage,

[1] *Lagan Navigation Co.* v. *Lambeg Bleaching Co.*, [1927] A.C. 226 at 244–5.

[2] E. M. Borchard, 31 *Col. L. R.* (1931), 561 at 589.

[3] W. I. Jennings, 41 *Yale L. J.* (1932), 407; and see *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113; *Vine* v. *National Dock Labour Board*, [1957] A.C. 488; *Pyx Granite Co. Ltd.* v. *The Ministry of Housing and Local Government*, [1960] A.C. 260; S. A. De Smith, *The Province of the Declaratory Judgment Re-determined* (1958), 21 *Mod. L. R.* 401; J. G. Borrie, *The Advantages of the Declaratory Judgment in Administrative Law* (1955), 18 *Mod. L. R.* 138; J. D. B. Mitchell, *The Flexible Constitution* in 1960 *Public Law*, 332.

or of a chattel, as security. Modern law has the more convenient remedy of the injunction by which the court will order the defendant to carry out a positive duty or refrain from committing a particular wrong. If I discover that you are about to defame me in a novel which is in the hands of your publishers, I can attempt to prevent the publication of the novel and thus to protect my reputation before it is ruined.

III. *The enforced performance of a primary right.* Thus the law may prevent an injury before it actually takes place. If a primary right has already been broken, in some circumstances the law will give redress by enforcing the primary right so far as that is possible. If Jones's building interferes with Brown's ancient lights, an English court may compel Jones to remove the building. If Robinson has not carried out his contract, specific performance may be decreed, i.e. he will be ordered to carry out its terms on pain of being guilty of contempt of court. The common law was defective in that it possessed no adequate machinery for these purposes, but the power of the Chancellor provided an effective machinery through the use of the injunction. Equitable remedies cannot, however, be secured as of right, but only if the court considers that damages would not be an effective remedy and that it is equitable to make a decree.[1] In French law a defendant could be ordered to deliver *certa res* or a sum of money, but only in rare cases could any other act be ordered. *Nemo praecise cogi potest ad factum.* But the convenience of a wide protection of primary rights is shown by the efforts of French law to introduce indirectly a power that was not given directly by the Code. By what is termed an *astreinte* the defendant is ordered to pay a certain sum as damages for every day that elapses before the duty is fulfilled, the amount of the sum being determined by a desire, not to compensate the plaintiff, but to conquer the obstinacy of the defendant.[2]

In some cases it is physically impossible for the law to enforce the performance of a primary right—no legal process can restore to a wife her breadwinner, if he has been killed by the defendant's negligent act. In such instances the law must be content with awarding damages, not because they are considered adequate, but because there is no other course open.

[1] *Hutton* v. *Watling*, [1947] 2 All E.R. 641 at 645; *Charrington* v. *Simons & Co. Ltd.*, [1970] 2 All E.R. 257.

[2] Amos and Walton, *Introduction to French Law*, 186; G. F. Krassa, 21 *Can. B. R.* (1943), 337.

In other cases the law refuses a grant of specific performance on grounds of policy. It would obviously be impolitic to force a lady to carry out a promise to marry, if she was unwilling to do so. Whatever was once the case, a husband cannot now by English law imprison his wife to secure her obedience to his commands,[1] nor will the court force a wife to return to her husband against her will. It is needless to emphasize that the court will not enforce agreements which it regards as *contra bonos mores*. Contracts for personal services also present many difficulties. If an opera singer has bound herself to appear only in Brown's theatre, the law may prohibit her from accepting a better offer from Jones, but to compel the lady to sing against her will might lead to fantastic results. Specific performance may be refused where undue hardship would be caused to the defendant.

IV. *Damages*. It has been said that no part of English law is so uncertain and so confused as that relating to damages.[2] This is due partly to the inherent difficulty of doing justice to both parties. Sentiment leads us to compensate the plaintiff for all loss, impartiality to remember that, especially where there is no fault, too great a burden should not be placed on the defendant. Partly the confusion is due to our lack of basic theories in tort, partly because the law of damages is surprisingly modern and has not yet been thoroughly worked out. The fact that there has been so much dispute whether there is any difference between contract and tort in the rule relating to remoteness of damage is surely significant.[3]

There are several varieties of damages. The amount awarded may be such as to indicate that 'the Court has formed a very low opinion of the plaintiff's bare legal claim, or that his conduct was such that he deserved, at any rate morally, what the defendant did to him'.[4] These are termed *contemptuous* damages. What are called *nominal* damages do not necessarily indicate that the court has any scorn for the plaintiff's case.[5] Trespass to land is actionable *per se*, i.e. without proof that any actual damage has been done; an owner may sue a trespasser for nominal damages merely as a warning to others. The most common type of damages is *compensatory*—in this case the aim is to grant such compensation as seems a fair recompense.

[1] *R.* v. *Jackson*, [1891] 1 Q.B. 671.
[2] Cf. Atkin L.J. (as he then was) in *The Susquehanna*, [1925] P. 196 at 210.
[3] A. L. Goodhart, 2 *Univ. of Toronto L. J.* (1937), 1.
[4] Winfield, *Text-Book of the Law of Tort* (6th ed.), 180.
[5] Damages are not necessarily nominal because they are small. I may sue for compensation for damage estimated at five shillings—if I recover, this would be compensatory damages.

Difficult problems arise which cannot be solved by any *a priori* theory. If damages are given for loss of expectation of life, it is clearly impossible accurately to assess in money the value of ten, twenty, or thirty years of existence.[1] No damages can adequately compensate for loss of health in a motor-car accident. Just as in problems of causation the lines cannot be drawn with logical accuracy, so in assessing damages the law attempts a reasonable compromise, arbitrarily but necessarily regarding certain types of damage as too remote. It is, perhaps, inevitable that the cases are hard to reconcile. If you convert my goods, should I receive the actual value of the goods or in addition the profit which I have lost on a contract of resale which I have already made? This simple question is not easy to answer on the cases as they stand.[2] The Court of Chancery by Lord Cairns's Act, 1858, was given power to award damages in lieu of an injunction, where damages would be an adequate remedy. If the wrong has not yet taken place, how are the damages to be ascertained? This raises the problem of *anticipatory* damages.[3]

Finally, damages may be *exemplary* or vindictive. Just as in contemptuous damages the court, considering the plaintiff's moral conduct, reduces the amount payable, so in the case of exemplary damages the conduct of the defendant is scrutinized and made a ground for inflating damages.[4] An insulting assault, such as spitting in a man's face, or a wanton trespass in order to disturb a garden party, may be visited with very heavy damages, although no financial loss can be proved.[5] In seduction the action is technically for loss of services, but actually exemplary damages are allowed as a *solatium* for the outrage to the family honour. In contract, the only case in which exemplary damages can be obtained is that of breach of promise to marry.[6] Since the decision of the House of Lords in

[1] Compare the varying figures awarded for loss of expectation of life ranging from £90 awarded for a child of three years who was killed, £1,500 for a child of eight years, to £1,000 for a girl in her twenties. The House of Lords has now decreed that damages should be set at a much lower figure, *Benham* v. *Gambling*, [1941] A.C. 157.

[2] *The Arpad*, [1934] P. 189; A. L. Goodhart, 2 *Univ. of Toronto L. J.* (1937), 1; and see *Hall & Co. Ltd.* v. *Pearlberg*, [1956] 1 All E.R. 297; *Heskell* v. *Continental Express*, [1950] 1 All E.R. 1033 at 1049; G. W. Paton, *The Measure of Damages in Detinue and Conversion*, 22 Aust. L. J. (1949), 406.

[3] *Leeds Industrial Co-operative Society Ltd.* v. *Slack*, [1924] A.C. 851.

[4] Winfield, op. cit. 182.

[5] *Merest* v. *Harvey* (1814), 5 Taunt. 442; *Loudon* v. *Ryder*, [1953] 2 Q.B. 202; *Williams* v. *Settle*, [1960] 2 All E.R. 806.

[6] In the United States of America many states have prohibited, actions for breach of promise to marry. For U.K., see Law Reform (Misc. Provisions) Act, 1970.

Rookes v. *Barnard*,[1] the doctrine of exemplary damages has been somewhat cut down, but the High Court of Australia has refused to follow this decision.[2] However, in *Broome* v. *Cassell & Co. Ltd.*,[3] the Court of Appeal, somewhat boldly, decided that the decision of the Lords was *per incuriam*, as it ignored previous decisions of the House, and it was not until 1966 that the Lords took power to overrule their own decisions.

The facts of the case in the Court of Appeal show that in certain circumstances the courts should have power to award exemplary damages, e.g. for deliberate or reckless defamation.

Exemplary damages are often regarded as frankly punitive, in that the defendant is forced to do more than make compensation for the loss he has caused. But if we regard the law as protecting not only financial interests but also certain rights of personality, then exemplary damages can be regarded as compensation for a wanton outrage—an *iniuria* in the Roman sense.

Purely penal damages are recoverable in English law only in that curious anomaly, the action by the common informer. In order to supplement the weak enforcement of the law, certain statutes laid down that pecuniary penalties could be recovered by anyone who cared to sue the doers of certain prohibited acts.[4] In Roman law, however, the damages in delict were frequently calculated on a penal basis. Thus in *furtum*, the owner not only had an action for the recovery of goods, but could recover a penalty of twice or fourfold the value according to whether the *furtum* was *non manifestum* or *manifestum*.

Another distinction in the law of damages is that some wrongs are actionable *per se* (such as trespass to land or libel) and others are actionable only on proof of actual loss (such as civil conspiracy). Not all forms of 'damage' are recognized as sufficiently important by the law to justify a cause of action which requires proof of actual damage —thus the law does not attempt to give a remedy for mental pain and suffering *per se*. But once there is a cause of action on other grounds, what Street aptly calls 'parasitic damage'[5] may be allowed

[1] [1964] A.C. 1129.

[2] *Australian Consolidated Press* v. *Uren*, [1969] 1 A.C. 590. The Privy Council upheld the right of the High Court to adopt its own rule. [3] [1971] 2 W.L.R. 853.

[4] Cf. the revival of the Sunday Observance Act, 1871, which made liable to penalties those who sold seats, or advertised the selling of seats, for performances on Sunday: *Orpen* v. *New Empire Ltd.* (1931), 48 T.L.R. 8. This Act was repealed by the Statute Law (Repeals) Act, 1969.

[5] *Foundations of Legal Liability*, i. 461; H. Street, *The Law of Torts* (4th ed.) (1968) at 455.

to swell the compensation. The disgrace, anguish, and wounded feelings of a father at his daughter's seduction are not a cause of action *per se*: but if loss of service be proved, such factors may increase the damages.[1]

[1] This action is now abolished—see Law Reform (Miscellaneous Provisions) Act, 1970.

XX

EXTINCTION OF RIGHTS

§ 112. Extinction of Rights

THERE are many ways in which rights may be extinguished. In some systems of law this question is discussed in relation to each type of right,[1] but this approach, however necessary in dealing with the minutiae of any one system, is inappropriate for jurisprudence. The only possible method is to treat together the general causes of extinction of rights. Rights may be extinguished by performance of the duty, consent, the exercise of a power by one party without the consent of the other, impossibility of performance, frustration, the operation of law or prescription.[2]

1. *Performance may be actual or substituted*

Dealing first with the former, it is clear that if the right is to one specific act or forbearance or a limited number of acts or forbearances, then compliance with the duty extinguishes the right, for it has served its purpose and has no longer a reason for continuing. If Jones pays me the five pounds that he owes me, that destroys my right to demand the money. But the extinction of the right does not mean that the position is the same as if the right had never existed, for, if it afterwards appears that owing to a mistake of fact my claim to the money was not valid at the moment when it was paid, then Jones may be able to recover it.

But if the right is to a series of acts or forbearances, then performance of the first act of the series does not affect the obligation to perform the rest. Where rights *in rem* are granted by the law (e.g. the right of an owner that no one shall trespass on his land), then the legal duty of performance is continuous; for persons are bound not only to forbear from trespassing once, but to continue to forbear. This is, perhaps, too obvious to need stressing.

[1] Thus the *Restatement of the Law of Contracts* gives twenty-one methods by which contractual rights may be extinguished: § 385.

[2] Cf. C.C., Art. 1234, which instances payment, novation, voluntary release, compensation, merger, loss of the *res*, avoidance or rescission, prescription.

On analysis, the cases of substituted performance really fall under other heads, for the 'substitution' must be due either to an agreement of the parties or to the operation of law—and both of these are discussed below. If I have contracted with Jones for the purchase of a German car, I may agree, if the performance of the contract is difficult, to accept in place of it an English car. This is, in reality, the destruction of the one obligation and the creation of another by the agreement of the parties. Set-off illustrates substitution by operation of law. If Jack owes Tom ten pounds and then, owing to other engagements between the same parties, Tom becomes indebted to Jack for five pounds, Tom can claim only five pounds.[1]

2. *Consent*

The great majority of rights may be waived by agreement between the parties.

Where rights arise from an agreement, the very terms which create the right may provide for its extinction in certain contingencies. Thus a condition subsequent may destroy the rights which have been created,[2] or a clause may give one of the parties, or both, the power to withdraw or to annul the agreement in certain circumstances.[3]

'Release' is the term used in many parts of the law to denote the surrender of a right. Thus if a simple contract is still executory on both sides, the parties may by agreement destroy the rights that they have just created. But the doctrine of consideration qualifies English law. My waiver of rights is consideration for your waiver, where both of us forgo something; but if a contract has been executed by A, A is not bound by his release of B, unless consideration exists or the release be made by deed or unless he is affected by some form of 'equitable estoppel'.[4] A promise to forgo part of a debt is not binding unless there be consideration for it. In systems which do not base the law of contract on consideration there is not this complication,[5] but

[1] In some systems of law, set-off operates only in an actual action between the parties: *Searles* v. *Sadgrove* (1855), 25 L.J.Q.B. 15. In German law there is an independent right of set-off: *BGB.* Art. 387. In French law, 'compensation' takes place as a matter of right by the sole operation of the law, even without the knowledge of the debtor: C.C., Art. 1290.

[2] Strictly a condition precedent does not destroy rights, but rather prevents them from arising.

[3] Conditions may also be implied by law. Thus a common carrier may be discharged from his obligation to deliver the goods safely, if they are lost through act of God or king's enemies.

[4] *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] 1 K.B. 130; and *Combe* v. *Combe*, [1951] 2 K.B. 215; and § 96 *supra*.

[5] Cf. C.C., Arts. 1282 et seq.

the doctrine of *contrarius actus* has had great influence—an obligation made in a solemn form must be destroyed by the method by which it was created.

Novation is another method of discharge of rights by agreement, but it is more appropriate to rights *in personam*. Novation may take place in three ways.[1] Firstly, there may be a change of form, as when the duty to pay the price under a contract of sale is transformed into a promise to pay by *stipulatio*. Secondly, the subject-matter of the obligation may be altered, as when Jones agrees to accept Blackacre instead of Greenacre. Thirdly, the parties may be changed, either the right or the duty being transferred to one who previously was outside that particular contractual bond. James may release William from his duty, on condition that the duty is assumed by Philip: or Kenneth may assume the duty to pay Joseph instead of Jack, the original debtor. Technically, novation is really the cancellation of one complexus of rights and duties and the substitution of another for it.[2] Today assignment[3] has become so much simpler that there is not the same need for technical rules of novation as there was in primitive systems where the tie of *obligatio* was so intensely personal that it was considered unthinkable that a creditor could deal with a debt owed to him by assigning it to another.

3. *The exercise of a power by one party to destroy an obligation without the consent of the other*

In certain cases there may be a power in one party to avoid a contract without the other's consent. Thus to protect the inexperience of the infant, he may be favoured by the law with this power.[4] Again, one who has obtained rights by fraud, duress, or undue influence is liable to have those rights defeated by the exercise of a power of avoidance.

If there are reciprocal obligations which have been validly created, one who commits a breach of his duties may lose the right to call on

[1] C.C., Arts. 1271 et seq.; *Restatement of the Law of Contracts*, § 424.

[2] An exact analysis may become important in Private International Law—the debtor should be discharged according to the proper law of the contract and the creation of the debt would be governed by the proper law of the debt: *Re United Railways of Havana and Regla Warehouses Ltd.* (C.A.), [1959] 1 All E.R. 214.

[3] *Supra*, § 73.

[4] The common law rule gave power to avoid contracts which were neither for necessaries nor for the infant's benefit. But the rule has now been modified by statute: Sale of Goods Act, 1893, § 2.

the other for performance. This is sometimes termed discharge of contract by breach. Any breach of contract creates remedial rights; but in addition, my breach of a contract may destroy any claim (which I would otherwise have had) that the other party should perform his obligations. By discharge we must understand, not merely the right to bring an action under a contract because the other party has not fulfilled its terms (the contract being still in existence), but the right to consider oneself exonerated from any further performance under the contract—the right to treat the legal relations under the contract as having come wholly to an end.[1]

4. *Impossibility of performance and frustration*

If the fulfilment of a promise is impossible *ab initio* under all conceivable circumstances, most legal systems discharge the right to performance. More difficult problems arise when performance becomes impossible through a change of circumstances which occur subsequently to the creation of the right—supervening impossibility or *casus*. In Roman law *casus* would relieve only that party for whom performance was impossible, leaving the other to fulfil his obligations. This might easily lead to unjust results, but in the newer types of contract *bonae fidei* the claim would contain the words *ex fide bona*, and the *iudex* would condemn only for such sum as was reasonable after taking into account all the circumstances.[2] Modern Roman doctrine has emphasized the second tendency, and in French law today, where performance of the obligation is impossible because of *force majeure*, the obligation is discharged and the parties are put back as far as possible into their former position.[3] But the defence was narrowly construed and during the First World War jurists elaborated the doctrine of *imprévision* which was based partly on good faith and partly on the maxim *rebus sic stantibus*.[4] This, however, was applied mainly in administrative law.[5]

English law began with a very strict rule that although supervening

[1] Anson, *Contract*, ch. xv; *Restatement, Contracts*, § 397.

[2] W. W. Buckland, 46 *Harv. L. R.* (1933), 1281; R. Gottschalk, *Impossibility of Performance in Contract*; G. J. Webber, *Effect of War on Contracts*; R. G. McElroy, *Impossibility of Performance*.

[3] C.C., Arts. 1147–8; Amos and Walton, *Introduction to French Law*, 195–6.

[4] i.e. the theory that agreements should be binding only so long as conditions remain substantially the same. This doctrine was frequently urged in international law as an excuse for breaking a treaty.

[5] R. David, 28 *J. Comp. Leg.* (1946), 11 at 13. This volume also contains studies of frustration in Scots, S. African, and German law.

impossibility would be a defence for the breach of a duty laid down *by the law*, yet if the duty had been assumed *by contract*, then a party must pay damages if he cannot fulfil the promise.[1] The argument was that it was always possible for a party to a contract to protect himself by the insertion of a special clause. In spite of this doctrine, however, English law has gone very far in the creation of a doctrine of impossibility of performance. Death of the promisor destroys a duty to fulfil a contract for personal services: a serious illness may have the same effect,[2] or a relaxed throat may relieve a singer from the duty to take part in an opera.[3]

English law, however, frequently treats under one head problems that are not really the same: destruction of the subject-matter of the contract, supervening illegality, total failure of consideration, and the doctrine of commercial frustration. Different considerations apply in each of these cases, and the tendency to group them together under the heading of impossibility of performance has not led to clarity. This confusion was shown in the group of cases arising out of the postponement of the coronation procession. Is a contract discharged if it related to the hire of rooms from which the procession might be viewed, but did not specifically refer to the procession? It was not physically impossible to carry out the contract, for the rooms were available for use, but the Court of Appeal held that the contract was discharged on the ground that the circumstances, on the basis of which the parties had impliedly contracted, had been entirely changed.[4] Until 1942, English decisions left the parties as they were at the time the contract was discharged—if the whole rent or a deposit was by the terms of the contract payable on a date before the postponement was announced, then such sum must be paid. The Roman rule seems fairer, that the *iudex* should decide what was due *ex fide bona*. In 1942 the House of Lords[5] unanimously overruled the so-called rule in *Chandler* v. *Webster*.[6] It is true that both parties are released from further performance of the contract, but in quasi-contract the loser can recover where there has been a total failure of consideration. As Lord Simon pointed out, however, the English rule was not abstractly fair in all cases, for English law did not apportion a prepaid sum—if

[1] *Paradine* v. *Jane* (1647), Aleyn 26.
[2] *Robinson* v. *Davison* (1871), L.R. 6 Ex. 269.
[3] Even if the condition is due to the singer's failure to change wet clothes? Visc. Simon, *Constantine Line Ltd.* v. *Imperial Smelting Corp.*, [1942] A.C. 154 at 166–7.
[4] *Krell* v. *Henry*, [1903] 2 K.B. 740; A. D. McNair, 35 *L.Q.R.* (1919), 84.
[5] *Fibrosa Spólka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32.
[6] [1904] 1 K.B. 493.

there was a total failure of consideration, the whole sum had to be repaid even though the party had already been put to expense in preparing to carry out the contract. If there was not a total failure of consideration, then apparently nothing was repayable. This matter has now been covered by legislation[1] and the court is empowered to make a wider adjustment of the rights and liabilities of the parties. The statute does not define frustration, but rather regulates what is to happen, once it has occurred.

Commercial frustration frequently arises in time of war, for in many cases, although performance is physically possible, it would be so long delayed that to enforce the obligation would be harsh.[2] A doctrine of frustration was developed, but it is usually considered under the heading of impossibility of performance, and today it is becoming increasingly difficult to draw a clear line between the two doctrines. It is significant that the *Restatement* defines impossibility as not only strict impossibility, but also impracticability because of the extreme and unreasonable difficulty, expense, injury or loss involved.[3] The correct view seems to be that of Lord Sumner who describes the modern doctrine as 'a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands'.[4] Lord Wright states that the court in the absence of express intention of the parties determines what is just.[5] To some judges this seems too great an interference with the autonomy of the will,[6] and hence a narrower doctrine is advanced on the basis of a term implied in the contract. One interpretation makes the basis of the implied term 'what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable'[7]—on this objective test there seems little difference between the two theories.[8] The House of Lords seems now to have taken the view that the two theories reach the same result in the end; and that frustration will be found if, because of altered circumstances, performance would be something

[1] Glanville Williams, *The Law Reform (Frustrated Contracts) Act, 1943.*
[2] H. C. Gutteridge, 51 *L.Q.R.* (1935), 91 at 110.
[3] *Restatement of the Law of Contracts*, § 454.
[4] *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*, [1926] A.C. 497 at 510.
[5] *Legal Essays and Addresses*, 258.
[6] J. Stone, *Province and Function of Law*, 101.
[7] *Fibrosa Spólka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 at 70.
[8] One difference is that, if the parties foresaw the contingency, and made no provision, the theory of the implied term would probably not allow of frustration: it might possibly be allowed on the objective theory. Cf. the discussion by Cheshire and Fifoot, *Law of Contract* (5th ed.), 467, of *W. J. Tatem Ltd.* v. *Gamboa*, [1939] 1 K.B. 132.

substantially different from what was contracted for. This may be put in a number of ways: the terms of the contract must be construed to see if they can be applied to the altered situation; is the fundamental nature of the adventure so altered by changed circumstances that fulfilment on the original terms is no longer possible? have later events so altered the circumstances that on a proper interpretation of the contract it could no longer be performed as bargained for when made?[1] The difficulty is to achieve a fair compromise and yet not to interfere too greatly with the security of contract. A party must not be allowed to escape from a contractual tie, merely because a change in the circumstances turns an anticipated profit into a loss. If a contract relates to the sale of German aniline dyes, the outbreak of war with Germany may render performance illegal and probably impossible: but if Jones contracts to sell dyes, the mere fact that the outbreak of war renders it excessively costly to fulfil the contract does not absolve him.[2] War casts a severe strain on whatever rules a legal system may adopt: currency control or a sudden leap in the exchanges may change entirely the relative position of the parties and there are frequently no specific provisions in the contract dealing with such contingencies. Sudden inflation may destroy the economic value of a creditor's rights. Hence the law must make a reasonable compromise between the desire to achieve justice and the necessity of upholding the sanctity of contract.

5. *Operation of law*

A right may be destroyed because a general rule of law is called into operation, or else because a change in the law destroys a particular right. To illustrate the former, a right may be extinguished because debtor and creditor become the same person (*Confusio*).[3] A man cannot be his own debtor. It was once held that Phyllis's right to sue Jack for negligence for personal injury would be destroyed by her subsequent marriage to Jack,[4] for the fiction is that for some purposes husband and wife are one person at law. Again, if a higher security is accepted instead of a lower, the lower security is

[1] See *British Movietone News Ltd.* v. *London and District Cinemas Ltd.*, [1952] A.C. 166; *Davis Contractors Ltd.* v. *Fareham U.D.C.*, [1956] A.C. 696; and *Tsakiroglou & Co.* v. *Noblee and Thorl GmbH.*, [1961] 2 All E.R. 179.

[2] *Blackburn Bobbin Co. Ltd.* v. *Allen & Sons Ltd.*, [1918] 2 K.B. 467.

[3] C.C., Art. 1300.

[4] *Gotliffe* v. *Edelston*, [1930] 2 K.B. 378: overruled *Curtis* v. *Wilcox*, [1948] 2 K.B. 474.

extinguished and merges in the higher (*Merger*). An instance of this is the extinction of a right of action for breach of a legal duty by the award of a judgment for damages. Set-off is another illustration of the operation of a rule of law. When a bankrupt is discharged there is a statutory release from debts and liabilities provable under the bankruptcy. If a deed or contract in writing be materially altered by addition or erasure, it may be discharged by operation of law.

Loss of rights by a change in the law hardly needs illustration. Where there are no constitutional safeguards, an omnicompetent parliament may sweep away whatever vested rights it pleases. In England there is a presumption of interpretation that statutes should, if possible, be so construed as not to have retrospective effect, but this is only a canon of interpretation which may be rebutted by the clear language of the statute.[1]

6. *Prescription*

Chinese law had no rules of prescription till 1930,[2] but most legal systems recognize that the passing of time may defeat the claims of the indolent. One who has enjoyed long possession does not necessarily possess the best title, but the effect of possible revivals at any time of 'stale claims' is so unsettling that it militates against an ordered community life. Hence the passing of time may create, transfer, or destroy rights. These rights may concern a claim *in personam* for compensation or the title to movable or immovable property. Hence two questions arise: why should the law prohibit actions for redress after a certain space of time? Why should continued possession (even where it is wrongful) be effective to defeat the rights of the true owner? The answer to the first question is that the law aids the vigilant and not the slothful. But both questions raise the same issues, and it is easier to proceed by discussing the second question. One argument in favour of prescription is that possession is prima facie evidence of ownership and that those who have held possession for a long time are normally the owners.[3] But owners do not need the benefit of the doctrine of prescription, though it is certainly sometimes easier to prove long possession than legal right, for a title, easily provable today, may be more difficult to prove in fifty years. Acquiescence by

[1] *Ward* v. *British Oak Insurance Co. Ltd.*, [1932] 1 K.B. 392.
[2] Tien-Hsi Cheng, 1 *Current Legal Problems* (1948), 170 at 178.
[3] Salmond, *Jurisprudence* (12th ed.), 436.

the claimant in the loss of his right needs a thorough explanation, if we are not to assume either that he was not interested in substantiating his claim, or that there were legal flaws in it which rendered a successful action impossible. It is noteworthy that international law recognizes the doctrine of prescription, basing it on two principles: firstly, that an unreasonable delay in presenting a claim may place the other party at a serious disadvantage, since he may be unable to produce evidence or witnesses which might have been available at an earlier period; secondly, that lapse of time may be evidence of a tacit abandonment of the claim.[1] Similarly English equity approves the maxim that it will aid the vigilant and not the indolent. 'A Court of Equity . . . has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.'[2]

In truth, the whole doctrine, like that of prohibiting actions after a certain length of time, is based on broad views of policy. It is unsettling to allow no time limit to legal claims, and indolence brings its own reward. The small percentage of cases in which there may be injustice is outweighed by the legal interest in establishing security. Where the period of limitation is too short (for example, the six months of the Public Authorities Protection Act, 1893)[3] injustice may be caused to a reasonably diligent plaintiff, but that is an argument against too brief a term, not against the institution of prescription itself. If statutes providing the rules of limitation of actions are not clear, then the object of reducing litigation may be defeated by arguments based on the meaning of the statute. This shows that acts of limitation achieve this purpose effectively only if they are efficiently drafted.[4]

The refusal to recognize stale claims may take various forms. Firstly, there may be limitation of actions. A statute may lay down that certain actions shall not be brought more than six years after the cause of action has arisen.[5] This destroys the *remedy*, but leaves

[1] B. E. King, 15 *Brit. Y.B.I.L.* (1934), 82; L. F. Vinding Kruse, *The Right of Property*, 366.

[2] Per Lord Camden, *Smith* v. *Clay* (1767), 3 Bro. C. C. 646.

[3] 56 & 57 Vict., c. 61, § 1. The period is now one year: Limitation Act, 1939, 2 & 3 Geo. VI, c. 21, § 21.

[4] e.g. in England there have been 100 reported decisions from 1957 to 1970 on the interpretation of these Acts—Note, 33 *Mod. L. R.* (1970), 318.

[5] Cf. 21 Jac. I, c. 16.

the right subsisting. If a creditor does not sue within the requisite period, his right still exists, although it is now imperfect since he can take no active steps to enforce it. But the existence of the debt is sufficient consideration to make enforceable a fresh promise to pay after the period has elapsed. If the claim is for the return of a chattel, under English law before 1939, only the remedy was extinguished. The original wrongdoer was protected because of the inability of the owner to sue him; but if the wrongdoer sold the chattel to an innocent purchaser after the period of prescription had elapsed, the innocent purchaser could be sued in conversion if he refused to restore the chattel to the true owner. This anomalous position was the logical result of the fact that the statute only barred an action for the original conversion and as title was not affected, a fresh conversion by a third party created another remedy.[1] This rule has now been abolished by the Act of 1939.[2]

Secondly, the law may not only prevent an action being brought after a certain length of time but also (where title to property is concerned) destroy the title of the owner whose goods have been adversely possessed by another for the requisite period, yet stop short of creating a legal title in the adverse possessor, and leave him in the position of having only the best possessory right.[3] This has sometimes been referred to as negative or extinctive prescription. Before the Limitation Act, 1939, came into force, this type of prescription applied only to real property, but it now applies to chattels as well.

Thirdly, there may be acquisitive prescription, in which, after the expiration of the necessary period, the law gives to the adverse possessor a full legal title—for example, *usucapio* in Roman law. English law, save where easements are concerned, has no doctrine of acquisitive prescription, nor can conclusive evidence of such an institution be discovered in Greek law.[4] Roman law kept quite

[1] *Miller* v. *Dell*, [1891] 1 Q.B. 468.

[2] Limitation Act, 1939, 2 & 3 Geo. VI, c. 21, § 3.

[3] Compare the English Real Property Limitation Acts of 1833 and 1874. The notion that possession for the requisite period conveys a 'parliamentary title' to the possessor is now regarded as incorrect: *Taylor* v. *Twinberrow*, [1930] 2 K.B. 16; *Kirk* v. *Sutherland*, [1949] V.L.R. 33.

[4] See P. Vinogradoff, *Historical Jurisprudence*, ii. 213. It is common, however, for systems of land title registration, like the *Torrens* systems, to provide for the acquisition of a title based upon mere adverse possession—see e.g. Transfer of Land Act, 1958 (Victoria, Act no. 6399). Division 5 of that Act provides for acquisition by possession; and Section 62 empowers the Registrar to make an order vesting an estate in fee simple in a claimant who bases his claim on adverse possession merely.

distinct the acquisition of title by the necessary period of enjoyment and the limitation of actions. *Usucapio* was based on the desire to remedy formal defects in transfer rather than to protect an adverse possessor. This is shown by the rules that the possessor must have good faith when possession began and that his holding must begin in some transaction which normally is a basis for the acquisition of ownership. Such requirements are not present in the English statutes which are based on a desire to preserve the *status quo* rather than to reward only the deserving.[1] Moreover in Rome a *res* that had been stolen or taken by force did not fall under the rules of *usucapio* until the 'vice' of the taking had been purged by the return of the *res* to the owner. The Romans also had other rules based on a desire to limit actions—thus *longi temporis praescriptio* was negative or extinctive and did not create *dominium* in the adverse possessor.

[1] M. J. Goodman, 33 *Mod. L. R.* (1970), 281; *Hayward* v. *Chaloner*, [1968] 1 Q.B. 107. 'The Statute of Limitations is not concerned with merits': per Lord Greene, *Hilton* v. *Sutton Steam Laundry*, [1946] 1 K.B. 65 at 73.

REFERENCES

BUCKLAND, W., 46 *Harv. L. R.* (1933), 1281.
MCNAIR, A. D., 60 *L.Q.R.* (1944), 160.

XXI

THE CONCEPT OF PROPERTY

§ 113. Introduction

The term 'property' has a bewildering variety of uses. Firstly, it sometimes means ownership or title and sometimes the *res* over which ownership may be exercised. Thus we may ask whether in a contract induced by fraud the property in the goods passed to the purchaser; or we may speak of Blackacre as property. Even in the sense in which property means ownership usage varies.[1]

A classical contrast is between property (in the sense of title) which creates rights *in rem* and obligation which creates rights *in personam*. But clearly the law of property does not include all rights *in rem*, at any rate if we define that term in the modern fashion as covering rights which bind persons generally. My right not to be defamed or imprisoned is not a property right, unless we make the term 'property' so wide as almost to deprive it of meaning.

On the other hand, the term 'property' is frequently used in a broad sense to include assets which the technique of the law would regard as mere rights *in personam*.[2] A share certificate is strictly only evidence of a right to a certain proportion of the funds of a company, yet we habitually speak of it as property. It would save confusion if the term 'patrimony'[3] were used to cover the whole of a person's assets instead of thus extending the term 'property'. Patrimony would include: (*a*) *dominium*; (*b*) proprietary interests less than ownership; (*c*) claims upon others, e.g. obligations.

[1] Austin, Lec. XLVII. (*a*) Sometimes ownership is confined to the greatest right of enjoyment known to the law, and servitudes are excluded; (*b*) sometimes life interests are described as property; (*c*) if the emphasis is placed on a contrast between property and possession, even servitudes are sometimes described as property in the sense that there is a legal title to them; (*d*) sometimes property means the whole of a man's assets, including both rights *in personam* and rights *in rem*—patrimony. Lord Porter has said: 'Property is not a term of art', *Nokes* v. *Doncaster Collieries*, [1940] A.C. 1014 at 1051. For a discussion of the meaning of 'acquisition of property' in § 51 (xxxi) of the Constitution of the Commonwealth of Australia, see *Minister of State for the Army* v. *Dalziel* (1944), 68 C.L.R. 261. *Infra*, § 115.

[2] *Infra*, § 118.

[3] Thus in French law patrimony is the totality of a man's assets and liabilities so far as they can be assessed in money; the term excludes political or family rights: Amos and Walton, *Introduction to French Law*, 16.

First we shall discuss the law of things, and then *dominium* or ownership.

§ 114. Things

Austin defined things as such permanent objects, not being persons, as are sensible or perceptible through the senses—permanent objects in the sense that they are perceptible repeatedly.[1] Dictionaries illustrate the very wide use of the word 'thing' in popular speech, but there are two elements that seem to be common to most usages of the word. Firstly, a thing must have a certain element of permanence. This was what Austin emphasized in order to distinguish a thing from a fact or an event. A puff of smoke would not normally be regarded as a thing as it is too transient, but the precise degree of permanence required is difficult to determine.[2] Secondly, it must have a certain element of physical unity. Where the unity is organic there is little difficulty—a sheep or a horse is undoubtedly a thing. Inorganic unity raises more difficult questions. A brick is a thing, yet, when a house is constructed of bricks, we regard the house itself as a thing. Indeed, if the house is on a farm we may go farther and regard the whole farm as a working unity. Thus, in common speech our use of the word 'thing' will vary according to our purpose at the moment. We may even call a collection of living units a thing, e.g. a flock of sheep. This approach has influenced the law, and the Romans distinguished between *res singulae* and *universitas rerum*.

The legal use is even broader than that of popular speech. 'A thing is, in law, some possible matter of rights and duties, conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.'[3] In this sense every legal right has a *res* as its object. According to the classical analysis, a right-duty relationship concerns two persons, relates to an act or forbearance, with regard to some particular *res*. Thus the object of a right of ownership may be Blackacre, the object of my right not to be defamed is my reputation. In this sense, *res* concerns much more than is covered by the law of property, but as the analysis of a *res* is so bound up with this subject, it is more convenient to discuss it at this place. Unfortunately, however, legal usage is not consistent,

[1] *Jurisprudence*, i. 358; A. Kocourek, *Jural Relations*, ch. xviii.
[2] C. K. Allen, 28 *Calif. L. R.* (1940), 421 at 422.
[3] F. Pollock, *First Book of Jurisprudence*, 130. . .

and there are really many different elements of thought. A thing may mean:

1. A thing in the material sense which is corporeal and tangible and has an organic or physical unity, e.g. a horse or a block of marble.
2. A thing which is corporeal and tangible, but consists of a collection of specific things, e.g. a flock of sheep.
3. A thing which exists in the physical world but is not material in the popular sense, e.g. electricity.
4. A thing which is neither material, corporeal, nor tangible but is an element of wealth, e.g. a copyright or a patent. Buckland points out that although the Romans when classifying things had in mind material things, nevertheless in other parts of their writing a thing is treated as an element of wealth, an asset; this is an economic conception which is very different from the sense in which the word is used by Austin, who treates a thing as a permanent external object of sensation.[1]
5. A thing which is not material and which is not directly an economic asset or element or wealth, e.g. reputation. If every right concerns a *res* then we must admit this wider conception. The law of defamation binds others by a duty not unjustifiably to interfere with the thing in question, my reputation.

Some German writers suggest that a thing is 'a locally limited portion of volitionless nature'.[2] This may be true of the popular usage, but it is not of the legal. A slave may be a *res*, an idol may be a legal person. Law distinguishes not between those who possess volition and things which do not, but between legal persons to whom the law imputes a will (John Smith or an idol) and things which cannot hold rights but can merely be the objects thereof. Law in this instance has refined usage.

Again, it is inconvenient to say that a *res nullius* is not a thing until it has been acquired by someone.[3] It may be that, if the law specifically refuses to allow some *res* to be in any circumstances the object of a right,[4] it should fall outside the definition of a *res*. But whatever is a potential object of legal rights should be considered a *res*. A lion is a *res* even before it is caught.

[1] *Text-Book of Roman Law* (2nd ed.), 182.
[2] T. E. Holland, *Jurisprudence* (10th ed.), 97.
[3] C. K. Allen, 28 *Cal. L. R.* (1940) at 431.
[4] As in the *res communes* of Roman law—air, running water, and light.

Things may be divided as follows:

(*a*) *Corporeal and Incorporeal*

German law uses the word 'thing' only for *res* that are corporeal.[1] But it is not easy to determine the bounds of *corporeality*. If a corporeal *res* is one that can be touched and occupies space, what of electricity? It has been held by some German courts that since electricity is not a thing, appropriation of it is not theft. One definition of a thing is 'any object which loses its essential qualities by being sub-divided'. But this is not very apt: Blackacre is undoubtedly a thing, yet it may be sub-divided without losing its quality as land.

English usage is wider. The law of real property[2] set the example of distinguishing between that which is corporeal and that which is incorporeal, but many interests of the latter type are included in the definition of land itself. Land, as defined in the Law of Property Act, includes 'a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land'.[3] The distinction between land, houses, and things under the land (which are corporeal) and such things as rents (which are incorporeal) may be a convenient one, but it tends to confuse. From one point of view, land is a material *res* over which certain rights may exist. The Californian Civil Code defines land as the solid material of the earth, whatever be the ingredients of which it is composed. But legal systems have not relied on this materialistic philosophy.[4] Thus to remove garden soil is not to remove land. Kocourek defines land as three-dimensional space,[5] and English law with its doctrine that land extends *ad inferos et usque ad coelum*[6] gives to

[1] *BGB.* Art. 90; E. J. Schuster, *Principles of German Law*, 58. 'In the main classification with which Gaius and Justinian begin their discussion . . . the writers seem to have in mind physical things', but if we consider the meaning of *res* in that part of the *Institutes* dealing with the law of things, the word *res* seems to mean 'any right, any legally protected interest, the value of which can be expressed in terms of money for the purpose of *condemnatio* in an action': W. W. Buckland, *Main Institutions of Roman Law*, 91.

[2] Technically only chattels are things in English law, but it is convenient to discuss here also the problem of land.

[3] 15 Geo. V, c. 20, § 205 (1) ix.

[4] It seems that in Queensland all minerals are reserved to the Crown, and the definition of minerals is so wide that it includes most of the ingredients of which the soil is composed—theoretically, therefore, the landowner's right to the soil is restricted: T. P. Fry, *Freehold and Leasehold Tenancies of Queensland Land* (University of Queensland, 1946), 102.

[5] *Jural Relations* (2nd ed.), 335–6.

[6] Actually when the aeroplane made this doctrine a matter of practical importance the meaning of this maxim became a matter of dispute, but the knot was cut by legislation, so that the exact rule of the common law is still unsettled: R. A. Mace, 17 *Univ. of Cin. L. R.* (1948), 343; A. D. McNair, *Law of the Air*. See also *Kelsen* v. *Imperial Tobacco Co. (Great Britain and Ireland) Ltd.*, [1957] 2 All E.R. 343; *Woollerton and Wilson Ltd.* v. *Richard Costain Ltd.*, [1970] 1 All E.R. 483.

the humble plot-holder a sense of vast possession. Hence if I excavate Jones's block to a depth of 60 feet, and carry away the soil and clay, Jones's *land* still remains. As land is space, there is no reason why it should not be divided horizontally—thus A may own the minerals under the land, B the first floor of a building, C the second floor, and so on. Some of the modern arrangements for 'Own your own Flats' depend upon such a horizontal division of land being accepted. To define land in terms of space *simpliciter* seems, however, too wide. Even if the landowner has rights that extend *ad coelum*, land is necessarily based on some material part of the earth's surface. To own a cubic mile of air space near Mars is not to own land in the sense in which the term is normally used.

But, as we shall see in greater detail in discussing the law of property, there may be many rights over land. Smith may own Blackacre, Jones may have an easement over it, and Robinson a rent-charge. Smith, as owner, is in closest relation to the land and his rights are held to concern a corporeal hereditament. The rights of Jones and Robinson are held to be incorporeal hereditaments. In truth they are *iura in re aliena*, rights over a *res* which is owned by another. In each case the rights depend on the existence of the same *res*, the land—but the rights of the owner are the most extensive. A tithe, however, which is a mere right to a certain share of (produce), was regarded as an incorporeal *res* which could have an 'owner'. Once we speak of ownership of things which are not corporeal, where are we to stop? My reputation is a *res* in a broad sense, but it would be straining language to say that I own that incorporeal *res*. It is perhaps a pity that the word 'ownership' was not confined to corporeal things and another term used where incorporeal *res* are concerned.[1] It certainly is convenient to speak of ownership of a goodwill, but the goodwill is merely a mass of claims against another (or others) and a series of expectations that customers will continue to resort to the same firm. In a sense, of course, the real value of ownership of land is that it gives power to exclude others, but there is also in this case a relationship to a material *res* which is lacking in the instance of goodwill. But, as we shall see, English law has created many interests in land which may be held by different people and it is common usage to regard each of these interests as having an 'owner'. Unfortunately also, the ownership of corporeal things is sometimes spoken of as corporeal ownership, as if ownership itself were tangible; ownership

[1] A. H. Campbell, 7 *Camb. L. J.* (1940), 206 at 221.

of incorporeal things as incorporeal ownership, as if it were the only type of ownership of this kind. Ownership is merely a relation between a *dominus*, a *res*, and persons generally, and relations can hardly be corporeal.

Similarly it is inaccurate to speak of corporeal and incorporeal rights. Since a right is merely a relationship between persons, with respect to a *res*, all rights are incorporeal. The right of ownership of Blackacre is just as incorporeal as my ownership of a patent—what distinguishes the two cases is that in the first ownership exists over a material *res*, whereas in the second the patent really consists of a bundle of claims to prevent others from using the process protected by the patent. When writers speak of a corporeal right, they concisely but inaccurately refer to a right over a corporeal thing: by an incorporeal right is meant a right over an incorporeal thing. The same confusion has arisen in private international law: sometimes the term immovables refers to immovable things in the material sense and sometimes to mere interests in immovable things. A mortgage is not an immovable in the first sense, but if it is a security over land, it may be in the second.

It is sometimes stated that the notion of an incorporeal thing is a refined conception of jurisprudence. It may be true that early law does not analyse with clarity, but interests in many incorporeal things are protected. In primitive law some of the few forms of individual property are myths, ceremonies, and chants—a primitive anticipation of copyright.[1] Medieval law is rich in incorporeal things.

> The lawyer's business is not to make them things, but to point out that they are incorporeal. The layman who wishes to convey the advowson of a church will say that he conveys the church: it is for Bracton to explain to him that what he means to transfer is not that structure of wood and stone which belongs to God and the Saints, but a thing incorporeal.[2]

The feudal manor was really a bundle of rights over incorporeal things. The main difficulty in transfer is that while material things may be delivered, an incorporeal thing cannot—hence the need for the exercise of the right before the transfer is regarded as complete, the turning of beasts into the pasture or the presentation of a clerk to the church.[3]

[1] T. G. H. Strehlow, *Aranda Traditions*, 119–20.
[2] Pollock and Maitland, *History of English Law*, ii. 123.
[3] Ibid. 224.

(*b*) *Chose in Action and Chose in Possession*

The old rule of English law was that 'all personal things are either in possession or in action. The law knows no *tertium quid* between the two'.[1] A chose in action includes 'all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession'.[2] But the meaning of the term has been modified in its long history and today there is no general agreement as to its exact limits. If John owes Paul ten pounds, Paul has a chose in action; the owner of a motor car has a chose in possession, for even although another may be unlawfully using it, the owner has the right of retaking the chattel, whereas a creditor is confined to suit in the courts. Patent rights, copyrights, probably rights of action for breach of contract, and a right of action for damages in tort are also choses in action.[3] The growing importance of negotiable instruments and company stock, the increase in value of authors' rights, bring it about that choses in action are playing a greater part in the economic life of today than in the past. A cheque or a bill of exchange is technically mere evidence of a right to sue the drawer: a company share is evidence of a right to receive dividends and to share in the property of the company, if it is dissolved while solvent. In truth, these choses do not seem to be things at all except in the broader sense. They are units of wealth—'a description, or delimitation, of the subject matter of a right'.[4] Some are documents of title (e.g. a bill of lading) and are frequently referred to as property, but this can hardly apply to a right of action for damages in tort. The attempt to treat all choses in action, however different they may be, as bound by the same rules, inevitably led to difficulties, and modern history shows a patchwork of statutory amendments dealing with particular problems. Just as the law has fallen into confusion in its attempt to distinguish between corporeal and incorporeal things, so it has created difficulties by the wide extension of the term 'chose in action'.

One mark of most modern forms of property is freedom of alienation—yet, a chose in action being an obligation, it was long held that this exclusively personal tie could not be assigned.[5] In the medieval

[1] Per Fry L.J., *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261 at 285; P. Bordwell, 19 *N. Car. L. R.* (1941), 279.
[2] *Torkington* v. *Magee*, [1902] 2 K.B. 427 at 430; Elphinstone, 9 *L.Q.R.* (1893), 311.
[3] *Curtis* v. *Wilcox*, [1948] 2 K.B. 474 at 480.
[4] C. K. Allen, 28 *Calif. L. R.* (1940) at 426.
[5] *Novation* could, of course, destroy the old obligation and create a new one, but this is hardly assignment: *supra*, § 112.

period an additional argument against free transfer was that rights might be assigned to persons who could exercise illegitimate pressure on the person bound by the duty.[1] Today, paradoxically enough, that form of property which is most easily transferable, a negotiable instrument, falls under the heading of chose in action. The mark of a negotiable instrument is that a bona fide purchaser for value takes a good title, even though the title of the seller was faulty. Today many choses in action are really indistinguishable from things unquestionably accepted as personal property since they are transferable and have a market value; others fall more easily under the head of *obligatio* such as a right to sue for damages for an assault.

(*c*) *Res mancipi et nec mancipi*

Nearly all systems of law distinguish between two types of property, one of which is regarded as superior and is marked by special rules of transfer or succession.[2] The typical modern distinction is between movables and immovables: Roman law naturally had special rules relating to land, but the essential early distinction was that between *res mancipi* and *nec mancipi*. At the time this division became stereotyped, *res mancipi* included those forms of property which were economically most important to a primitive community—land, houses, slaves, beasts of draught and burden, and rustic servitudes,[3] while within *res nec mancipi* fell the less important types of property. The form of the ceremony suggests that land was not alienable when the distinction first arose, but later it was added to the list. Changes in economic life caused an overshadowing of the importance of these primitive types of property—moreover, the convenience of the simpler rules which were applied to *res nec mancipi* was recognized and the distinction was finally abolished by Justinian. In the same way, in English law real property was beset with a mass of technical rules from many of which personal property was free, and the modern tendency is to assimilate the law of realty to that of personal property, though important differences still remain.

(*d*) *Movable and Immovable*

The modern distinction, which is of great importance in private international law, is between movable and immovable property. The

[1] Holdsworth, op. cit. vii. 524. But a fear of maintenance was probably not the only reason, for in early times, while things were transferable, there was more difficulty in applying this to rights.

[2] H. J. S. Maine, *Ancient Law* (ed. Pollock), 283.

[3] Gaius, 2, 14*a*.

typical immovable is land and the things that are attached thereto. One suggested definition is that a thing is immovable if it cannot be moved without being divided into several units.[1] This hardly fits the case of land, for the removal of soil even to a great depth leaves the land still in existence—indeed the concept of land is that of space as much as the material of which that part of the earth is made. In its spatial aspect land is immovable—in its material aspect it may be removed, at least partially.[2] A house attached to land is an immovable in law, but obviously it may be moved in fact. The nature of an immovable cannot be understood unless we realize that, starting from a physical test, the law has gradually extended the notion. There is no *a priori* test, as the cases in private international law show—from a practical point of view we must accept the view of *lex situs*. Thus in many systems ships are immovable in law, though a vessel that is immovable in fact is of very little use. French law speaks of immovables by destination (for example, the horses and cattle that are placed on land for its economic exploitation) and immovables by declaration (for example, a person may impress on certain movables, such as shares in the Bank of France, the legal characteristics of immovables).[3] The old law of the Southern States in America treated the slave as an immovable, as he was attached to the land.

Land has certain characteristics which distinguish it from other forms of property. Firstly, though nothing may be eternal, land is more enduring than personal property, and hence future interests in land have a definite value. Moreover, the fact that land cannot be moved, combined with its relative permanence, makes it especially valuable as a security. Furniture may be surreptitiously hidden or accidentally destroyed, but the mortgagee does not need to worry lest the land be concealed, and the risks of destruction of the land (e.g. by incursion of the sea) are comparatively small. Again, land can be subdivided without necessarily losing its value. A father does not divide his motor car into two pieces for his sons, whereas half of his landed estate may be of great service to each. Land has one great disadvantage—flocks and herds may multiply by natural increase, whereas, save for expensive works of reclamation, the quantity of land remains the same. In the pastoral and agricultural eras, land is the main form of wealth and it is displaced only by the rising tide of industrialism.

[1] E. J. Schuster, *Principles of German Law*, 60.
[2] C. R. Noyes, *The Institution of Property*, 395; A. Kocourek, *Jural Relations* (2nd ed.), 334.
[3] C.C., Arts. 517 et seq.

But, however far industry develops, land will still remain the essential foundation for most human undertakings—even the giant transports of the air still require land on which to rest and be reconditioned.

In contrast to modern systems, in Roman law the distinction between land and other property was comparatively insignificant. Thus a lease of land was not distinguished from the hire of a movable: the rights of succession were the same for both types of property.[1]

(e) *Real and Personal Property*

Bracton divided actions into real, personal, and mixed,[2] the first term being an adaptation of the Roman *actio in rem* and the second of the Roman *actio in personam*.[3] Broadly, a right *in rem* may mean either a power to recover a specific thing, or more often a right which avails against persons generally.[4] The Romans asked what was the nature of the right asserted—if the *intentio* claimed title to a specific *res*, the action was *in rem*; if the *intentio* was framed as an *obligatio* it was *in personam*. Hence when an owner sued to recover land, ox, sheep, or chariot the action was *in rem*—in other words, in this respect there was no difference between movables and immovables. English law looked not to the claim, but to the result of the action—if judgment was for the recovery of a specific *res* the action was real, if the judgment was for damages only it was personal. A real action in English law, then, is one in which a *res* may be specifically recovered. But, by an historical accident, land was the only *res* that could be specifically recovered, for in the case of movables the defendant might choose between returning the chattel and paying damages—hence land came to be described as real property, movables as personal property. The term 'real action' has a double meaning: it is an action which may result in a judgment for specific restitution or an action for the recovery of land. If this were the whole story, we could say that real property consists of immovables, personal property of movables. But unfortunately at the time that the terminology became fixed, the tenant, if ejected, could sue the landlord only for compensation—he could not get a judgment restoring the land, for he was not seised of the land. By the close of the Middle Ages the tenant was effectively

[1] Buckland and McNair, *Roman Law and Common Law*, 56. There were some differences, e.g. there was a longer period of *usucapio* for land: land could not be stolen; the possessory remedies were different.

[2] Lib. iii, cap. iii, par. i, fol. 101*b*.

[3] T. C. Williams, 4 *L.Q.R.* (1888), 394—this article is freely drawn on in this section.

[4] *Supra*, § 65.

protected, but it was then settled that a leasehold interest was only personal property.[1] Since, however, leasehold partook partly of the nature of land and partly of chattels, it received the name of chattel real. Personal property, therefore, in English law consists of movables and in addition leasehold interests.

This division into real and personal property has been of great importance in English law.[2] Before 1925, in England, the following were some of the differences between these two types of property. Firstly, the rules of descent on intestacy were different; secondly, personal property could only be absolutely owned, whereas a freehold could be split up into successive interests; thirdly, personal property was primarily liable for the payment of debts. The complexity of the law of real property led to statutory reforms in the nineteenth century, and an express object of the English consolidation of 1925 was to assimilate as far as possible the law of real and personal property, but important differences still exist.

(*f*) *Miscellaneous Distinctions*

Things may also be divided into fungible and non-fungible. The first consist of 'movable things which in ordinary dealings are usually determined by number, measurement or weight'.[3] Land is sold in specie, i.e. a particular plot is transferred and the purchaser does not merely buy one acre of English land; whereas in the case of butter, the trader normally orders not a specific piece but the quantity and quality which he desires—1 cwt. of Danish butter. In such a case the contract is performed by delivery of any butter that has the necessary characteristics. (Of course, there is no reason why a trader should not buy a specific parcel of butter, and in that case the contract will not be satisfied by the delivery of other butter, even if it be of the same quality).[4]

[1] Financial considerations played a part, for it was convenient to keep leasehold as a form of investment outside the strict rules of real property: Pollock and Maitland, *History of English Law*, ii. 113.

[2] The English lawyer is so used to this distinction that in Lord Kingsdown's Act, 1861, dealing with the wills of British subjects made abroad, the draftsman relied on the distinction between real and personal property, whereas it would have been more consonant with private international law to make the distinction that between immovables and movables: J. H. C. Morris, 62 *L.Q.R.* (1946), 170 at 175.

[3] *BGB.* Art. 91. A group of which 'any unit is from its nature or by mercantile usage treated as the equivalent of any other unit', Uniform Sales Act (America), § 76.

[4] Austin, ii. 780, emphasizes that the test is not the nature of the *res*, but the nature of the obligation in question.

A distinction often confused with that which has just been discussed is between things which are consumed by use and those which are not. The former may be defined as 'movable things intended to be used or enjoyed by means of being consumed or alienated'.[1] The purpose for which champagne is designed is drinking, and it ceases to exist as champagne immediately it is so used. Most movable property is subject in some degree to the ravages of time, but a gold candlestick or furniture may be used for generations without being destroyed, whereas *res quae usu consumuntur* do not survive a single 'use'. Money is not destroyed by use, but it is alienated—we cannot continually buy cigarettes with the same coin.

The main legal reason for classifying things is that dealings in them may be facilitated by the growth of such special rules as are necessary for each class.[2] But the methods of division vary so much in each system that it is impossible to do more than indicate some of the more important methods of classification.

§ 115. *Dominium* and Ownership

'Early law does not trouble itself with complicated theories as to the nature and meaning of ownership and possession',[3] but a very small degree of civilization will produce the phenomenon of a divorce between the two. Roman law made a very clear-cut division between *dominium* and *possessio*, much clearer than was the case in English law. The Romans began with a technical concept of *dominium* as the absolute right to a thing, *possessio* denoting rather mere physical control which had as such no legal consequences in early law; English law on the contrary 'reached the conception of ownership as an absolute right through developments in the law of possession'.[4] English medieval writers emphasize seisin and the right to possess, where Roman law spoke of *dominium*. 'The common law never had any adequate process in the case of land, or any process at all in the case of goods, for the vindication of ownership pure and simple.'[5] 'The best right to seisin is still the only form of ownership recognized by English law.'[6] One reason for this was that in Rome it was much

[1] *BGB.* Art. 92 (1).
[2] Austin, ii. 781.
[3] Holdsworth, *History of English Law*, ii. 78.
[4] Ibid. vii. 458–61.
[5] Pollock and Wright, *Possession*, 5. Cf. Pollock and Maitland, *History of English Law*, ii. 46.
[6] Holdsworth, op. cit. iii. 93. 'Indeed we may be left doubting whether there was any right in movable goods that deserved the name of ownership': Pollock and Maitland, op. cit. ii. 151.

easier to prove title than in early English law. *Usucapio* was a root of title and would cure formal defects (at least where there was good faith and *iusta causa*) within a remarkable short space of time, whereas before 32 Hen. VIII, c. 2, there was scarcely any limit to the tracing back of title to land in English law.[1] The Greeks took a relative view similar to English law—he was owner who could prove a better right to possession that anyone else.[2] Indeed, there is authority for saying that at one period the common law recognized not *dominium* and *possessio*, but seisin only.[3] Nevertheless, we must not conclude from this that today the position is necessarily the same. Holdsworth considers that the development of ejectment has introduced an absolute right of ownership—'a person who wishes to recover against the possessor must show, not merely a better right than the possessor, but an absolute right'.[4] This conclusion has, however, been questioned on the ground that few plaintiffs can ever show *dominium* in the Roman sense, because even a paper title covering sixty years would not necessarily exclude the possibility of an adverse claim.[5] With regard to chattels also, the concept of ownership has not been fully developed in English law.[6]

The Roman notion of *dominium* is thus absolute in the sense that it is not relative—a person either is *dominus* or he is not, for *dominium* can be acquired only in set ways. But both Roman *dominium* and English ownership are sometimes said to be absolute in another sense—that John may do as he likes with his own.[7] This statement was probably never true: at any rate it does not describe the situation today. The full rights of an owner are:

(*a*) the power of enjoyment (e.g. the determination of the use to which the *res* is to be put, the power to deal with produce as he pleases, the power to destroy);
(*b*) possession which includes the right to exclude others;
(*c*) power to alienate *inter vivos*, or to charge as security;
(*d*) power to leave the *res* by will.

[1] Buckland and McNair, *Roman Law and Common Law*, 64.
[2] P. Vinogradoff, *Historical Jurisprudence*, ii. 198.
[3] Holdsworth, op. cit. iii. 95.
[4] Ibid. vii. 79.
[5] A. D. Hargreaves, 56 *L.Q.R.* (1940), 376; for Holdsworth's reply see 56 *L.Q.R.* (1940), 479. But cf. the situation under '*Torrens*-type' land title registration systems.
[6] A. K. R. Kiralfy, 12 *Mod. L. R.* (1949), 424.
[7] Cf. the traditional definition that ownership is the right of enjoying or disposing of things in the most absolute manner. The French Code of 1804 emphasizes the absolute power of the owner much more than the German Code of 1900.

One of the most important of these powers is the right to exclude others. 'The property-right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing.'[1] Use is not enough, for one may use property which one does not own, and use is not necessary, for many an owner does not use all the property he possesses. But every owner does not possess all the rights set out above—a particular owner's powers may be restricted by law or by an agreement he has made with another. Thus the law of nuisance limits the use to which my land may be put, and in most modern cities complex building regulations are in force. Power to alienate may be limited in the interests of the family as in France, where a father cannot dispose *inter vivos* or by will of more than a certain proportion of his estate.[2] The Nazi legislation of 1933, in order to create a strongly rooted peasantry, prohibited the alienation or division of farms of medium size; on death, the land descends *in toto* to one heir, and is put beyond the reach of creditors.[3] If the test of ownership were absolute power over property, there would be few owners in civilized states today.

Similarly, the owner may grant to another many of his rights and yet remain owner. X may lease his land for a pepper-corn rent for ninety years; make his land security for a debt; grant easements or allow another possession. In classical Roman law a quiritary owner might sell a slave to a purchaser for value, but, if the ceremony of *mancipatio* was not carried out, the *dominus* still remained owner until the period of *usucapio* had elapsed. '*Dominium* is the ultimate right, that which has no right behind it. It may be a mere *nudum ius* with no practical content, but it is still *dominium ex iure Quiritium*.'[4] The fact that an owner may cede so many rights and still remain owner raises difficulties of definition. From this angle Noyes regards ownership as a magnetic core which remains when all present rights of enjoyment are removed from it and which attracts to itself the various elements temporarily held by others as they lapse.[5] Thus if a lease expires, or an easement is lost, it is the owner of the land who benefits.

[1] J. H. Wigmore, *Select Cases on the Law of Torts* (1912), ii. 858, cited H. Cairns, *Law and the Social Sciences*, 60; F. S. Cohen, *Dialogue on Private Property*, 9 *Rutgers L. R.* (1954), 357.

[2] C.C., Art. 913.

[3] E. H. Kaden, 20 *Iowa L. R.* (1935), 350, discusses the Hereditary Peasant Farm Law. The heir can succeed only if he is agriculturally competent. One effect of this law was to create a landless proletariat of younger brothers who could be settled in neighbouring countries to extend German influence.

[4] Buckland, *Text-Book of Roman Law* (2nd ed.), 188.

[5] *Institution of Property*, 310. Cf. J. W. C. Turner, 19 *Can. B. R.* (1941), 342.

Austin distinguishes between ownership and a mere servitude by saying that the mark of a servitude is the rigorous limitation in set terms of the powers of a holder, whereas there is in every system some one mode of property in which the liberty of user is more extensive than in other cases—the powers of an owner are unlimited and indefinite save in so far as there is specific legal regulation or a specific right outstanding in a third party.[1]

To overcome these difficulties it is convenient to distinguish between:

(*a*) ultimate ownership, where but the residual core is left to the owner, the rights of present enjoyment being held temporarily by others;

(*b*) complete or beneficial ownership, where the owner enjoys all the rights and privileges which it is legally possible for an owner to have;[2]

(*c*) fractions split off from ownership, some or all of which may be held by persons other than the owner, so long as the 'magnetic core' remains in the owner.

To attempt to trace the history of ownership is full of peril, for we tend to look at early law through the spectacles of our modern culture and to fill the gaps in our facts with plausible conjectures. The early days of the clan seem very remote from our modern individualism. The *paterfamilias* had power over wife, descendants, and chattels, but rights over persons were not clearly distinguished from rights over property. The social unit governed itself, and it is idle to ask whether the control of the *paterfamilias* is best described as political power or private ownership, for in the realm of beginnings such questions are not asked. What was real was the actual power of the *paterfamilias*, tempered perhaps in its exercise by consultation with others.[3] Within the group, save for articles of personal use, there was little need to distinguish between *meum* and *tuum*—both persons and chattels were considered as belonging in the group rather than to particular individuals.[4] Indeed, until there is some form of organization above the

[1] Austin, Lects. XLVII, XLVIII. The Swiss Code regards ownership as the right to deal freely with a *res* within the limits of the law.

[2] Cf. *Restatement of the Law of Property*, p. 11.

[3] C. R. Noyes, *The Institution of Property*, 123; C. W. Westrup, *Introduction to Early Roman Law*, ii.

[4] Noyes, op. cit. 127–9. The learned author points out that if ownership means the separation of *meum* and *tuum*, then we see only the beginnings in the family group; if ownership requires a division between the property of different families, then we

family, it is difficult to see how the question of ownership can arise—within the group it is unnecessary, and until there is a co-ordinating power or the growth of a community, conflicts between groups are determined by force and not by law.

It is largely a matter of definition when we can conceive of property as actually beginning. The first step is to distinguish power over goods and slaves from power over free men. Two strains influence our modern English law—the doctrine of Rome and the practical influence of feudalism.

It has already been pointed out that the concept of *dominium* was much more developed than the notion of ownership in English law. It has been described as the 'ultimate right to the thing, or . . . what is left when all other rights vested in various people are taken out'.[1] While the powers of a *dominus* might be limited by law, there was no 'limited ownership' in the English sense—future interests could not be carved out of the land with the facility which the English doctrine of estates allows. A man might be bound by contract to reconvey property on the happening of a certain event, but (at least in classical law) there was no method by which a person could be made *dominus* only for a definite time. The usufructuary, the Roman equivalent of the English tenant for life, was not treated as owner, but as the mere holder of a servitude.[2]

The other strain which influences modern thought is that of feudalism, its most interesting theoretical contribution being the number of interests that could exist simultaneously in the same piece of land. Where a tenant held of his lord, who was *dominus* in the Roman sense? Where only two persons were concerned, it might be possible to speak of *dominium directum* and *dominium utile*, but what of a case where there were nine rungs in the feudal ladder?[3] Feudalism cannot be made to fit a Roman theory which demanded one absolute *dominus* and one alone. Logically it might have been possible to regard the king as *dominus* of all land which his tenants held, but to confine the term 'ownership' in this way seemed rather artificial to English law. In effect each person interested in the land had rights and duties which were laid down by the feudal bond.

require some co-ordinating agency above the family: there was little notion of alienation. The idea was of a politico-economic organism, not of a proprietary fund.

[1] Buckland and McNair, *Roman Law and Common Law*, 61.

[2] Op. cit. 70. In German law also, it is not possible to split ownership up into fragments or estates. Usufruct is treated as a mere servitude.

[3] Pollock and Maitland, *History of English Law*, i. 211.

Under the feudal system many interests of different *quality* were enjoyed simultaneously—under the modern doctrine estates may co-exist, provided the periods of enjoyment are different. Had the land itself been the subject of thought, English theory would probably not have become so complex; but once the lawyers began to play with that artificial entity, the estate, it was possible to carve out future interests with great facility. 'Proprietary rights in land are, we may say, projected on the plane of time. The category of quantity, of duration, is applied to them.'[1] A Romanist would be very puzzled by a system which regards a tenant for life as an owner, or by the concept of remainders.

Once estates, instead of the land, became the immediate object of thought, it was easy to conceive of each estate as having an 'owner' —indeed, to speak of ownership of lesser interests such as legal charges. In a very real sense in English law limited ownership may exist. Indeed, estates in land almost shade off into servitudes. 'That English law should regard these tenants under leases for life as freeholders . . . is very remarkable: hirers are mingled with owners, because according to the great generalisation of English feudalism, every owner is after all but a hirer.'[2] The 'wonderful calculus of estates', which is still the distinctive feature of English law,[3] has great convenience, but terminology is determined by usage rather than by any general theory of ownership. We say that a tenant owns the leasehold, but not the land. On the other hand, when we speak of possession, the tenant possesses the land but not the freehold. It is impossible to fit the individualism of English law to the terminology of other systems. Here, as elsewhere, the division of law and equity makes the picture even more complex. What are we to think of terminology which speaks of the trustee as the legal owner and the beneficiary as the equitable owner? Once we think of each interest in land as having an owner, then it is perhaps natural to think of an owner of an interest at law, and the owner of an interest at equity, but it is very puzzling to those who build on the strict distinctions of Roman law.

Salmond treats ownership in its most comprehensive sense as the relation between a person and any right that is vested in him.[4] 'That which a man owns is in all cases a right': to speak of the ownership of

[1] Pollock and Maitland, *History of English Law*, ii. 10. See also C. R. Noyes, *Institution of Property*, 257–8.
[2] P. Vinogradoff, *Villainage*, 330–1.
[3] Pollock and Maitland, op. cit. ii. 11.
[4] *Jurisprudence* (12th ed.), 250. In this edition the difficulties of Salmond's view are discussed.

a material object is merely to use a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right in the land, namely, the fee simple of it. This dictum has been severely criticized by Cook.[1] There are many rights which a person may possess, and to use the word 'owner' to express the relationship between a person and a right is to introduce unnecessary confusion. In every system there is one method of enjoyment of property which is more extensive than others, and to this relationship the term 'ownership' is normally applied. A person *has* rights: ownership is the name given to one particular type of right or, more accurately, bundle of rights. Ownership of Blackacre gives to the owner many claims, privileges, powers, and immunities. What makes Salmond's argument seem plausible is that English law has not confined the term 'ownership' to enjoyment of material things. As we have pointed out, the law sometimes speaks of ownership of a copyright or a patent. In both cases there is no material object which is the subject-matter of ownership, for a copyright is merely a mass of claims and powers; but it was perhaps inevitable that the term 'owner' should be found a convenient one to denote the person who possessed the claims and powers in question. The Roman notion, however, is simpler since it confines *dominium* to absolute ownership of material things.[2]

For most purposes of jurisprudence, however, it is convenient to define ownership in terms of a relationship between persons with respect to a *res* which can be thought of as property, and where the relationship can be seen as a property relationship. Rights of ownership, as has been pointed out, like other rights are relations between legal persons. The distinguishing marks of the relations that are thought of as property, and the rights which are called rights of ownership in the law, turn on the one hand on the extent of the 'owner's' powers to exclude or permit others to enjoy the *res*, the subject of the right, and, on the other hand, on the nature of the *res* itself.[3]

§ 116. *Ius in re aliena*

An owner may transfer to another certain of the rights which inhere in him by virtue of his ownership. He may surrender possession by

[1] Introduction to W. N. Hohfeld, *Fundamental Legal Conceptions*, 12.

[2] K. Renner, *Institutions of Private Law*, 17, shows that this is the typical approach of continental codes, but English law with its broader use of the term is able to get closer to economic realities.

[3] Felix S. Cohen, *Dialogue on Private Property*, 9 *Rutgers L. R.* (1954), 357.

granting a lease of Blackacre to a tenant, pledge a gold watch as security for money, or grant to the owner of neighbouring land the right to use a path across his estate. *Iura in re aliena* may be described as encumbrances, as rights *in rem* over a *res* owned by another. The important test is that the right must 'run with' the thing encumbered —it must bind the *res* no matter into whose hands it may come. Thus an easement binds the servient tenement and a purchaser of it will be bound whether he was aware of the easement or not.

Encumbrances are not confined to real property. I may pledge personal property as security, for example, a string of pearls. Difficult questions arise, however, when we consider the creation of charges, not over real or personal property, but over rights *in personam*. Suppose A charges his book debts in B's favour; this limits his power of disposal over money paid to him. This charge may prevent other creditors seizing money paid to A until B is paid—in this sense the right avails against persons generally and seems to be a true encumbrance. But money possesses the peculiar character that one who gives value for it receives a good title even if the transferor is a thief —hence a charge cannot be as effective as an easement over land which will bind all purchasers. If A, in defiance of the charge, spends the money in order to buy meat, B cannot claim that the butcher took subject to the charge. In truth, an assignment of book-debts is not an encumbrance at all, but a transfer of certain rights *in personam* from one person to another,[1] a transfer the effectiveness of which will depend on the particular rules of the system in question.

There may be many types of encumbrances, but the three chosen for discussion are lease, servitude, and security.

(*a*) *Lease*

A lease may be defined as an agreement expressing an intention of the parties that the right to exclusive possession shall be granted by the owner of the land to the lessee, such possession to pass either at once or at an agreed future date.[2] If we wish to distinguish between a lessee and a mere lodger, we must ask whether exclusive possession, which creates an interest in land, is granted.[3] The tenant has the right

[1] Salmond, *Jurisprudence* (12th ed.), 241, gives a very wide definition of an encumbrance, but the difficulties are pointed out by A. H. Campbell, 7 *Camb. L. J.* (1940), 215–16. [2] G. C. Cheshire, *Modern Real Property* (8th ed.), 342.

[3] In *Shell-Mex* v. *Manchester Garages*, [1971] 1 All E.R. 841 at 843, Lord Denning rejects the older view that the decisive test is whether exclusive possession is given. The test is whether it is a personal privilege given to a person, or whether it grants an interest in land.

to exclude all persons from the land, including the owner save in so far as a power of entry has been reserved by the lease. In English law there are many differences between the rules relating to a lease of real property and a hire of movables; in Roman law *locatio-conductio* covered all forms of property.

In English law a lease creates a true encumbrance, for the tenant cannot be ejected from the land so long as the conditions of the lease are observed. If the owner sells the land to a third party, the purchaser takes subject to the lease, whether he was aware of its existence or not. Hence if either the owner or a third party unlawfully ejects the tenant, the latter may recover possession. In Roman law the lease did not create a true encumbrance, since if the tenant was ejected, he was confined to a claim *in personam* against the landlord for breach of contract. Incidentally, a tenant did not acquire possessory rights, and so was not as well protected as in English law.

(*b*) *Servitude*

The holder of a servitude has a right *in rem* which gives him the power either to put a *res* belonging to another to a certain class of definitely limited uses or else to prevent the owner of the *res* from putting it to a certain class of definitely determined uses. An owner is assumed to have all possible powers relating to a *res*, save in so far as these are limited by a definite prohibition of the law or by the right of another; the holder of a servitude is assumed to have no power over the *res* save such as are created by the facts that gave rise to the servitude.[1] Thus the holder of an easement to cross Blackacre may have only a power to pass on foot. A legal servitude is a true encumbrance because it will bind purchasers of the *res* even if they are ignorant of the existence of such a claim.

Grant of a power to cross land once or twice creates a mere licence: a servitude must relate to a possible series of acts or forbearances. No rigid definition is possible. There is no need for a servitude to be perpetual, but if it is too limited in time it ceases to be a true servitude—i.e. it is not called a servitude. As Austin puts it, the holder of a servitude has the right to put the subject generally to uses of a general class.[2]

Servitudes may inhere in a person only as owner of a particular

[1] Austin, ii. 794.

[2] Or else to prevent the owner doing acts of a general class. A servitude is a right to generically and not specifically determined uses: Austin, ii. 809.

piece of property—this is termed real servitude. Thus Jones, the owner of Blackacre, may have power to cross Greenacre, but if Blackacre is sold to Robinson, Jones loses the power and Robinson acquires it. Hence arises the metaphor of the dominant and servient tenement—as a figure of speech we may regard Blackacre as holding the easement and Greenacre as being subject to it. This only means that the easement inheres in the owner of Blackacre for the time being and binds the owner of Greenacre whoever he may be and whether he bought with knowledge of the easement or not. English law divides real servitudes into easements and profits. A profit is a right to take something off another's land,[1] provided the thing which is taken is capable of ownership. Thus A may have the right to take sand or turf or stones from the land of another. An easement is a privilege without a profit;[2] it may confer a limited right of user of another's land (e.g. to drive across it) or it may restrict the owner from using the land in certain ways (e.g. from building so as to obstruct the flow of light to a building on the adjoining land).[3] In English law real servitudes are limited to real property. It is difficult to see in the case of chattels how there could be a dominant and a servient chattel. Land is immovable, and a certain right over a neighbour's land may be reasonably necessary to the enjoyment of Blackacre. Chattels, however, are movable and juxtaposition of chattels is but temporary. Hence there seems no end to be served in inventing a law of 'real'[4] servitudes for chattels.

In contrast to real servitudes are personal servitudes, which inhere in a particular person as such and not merely in a person as the owner of certain land. (The use of the term personal has no reference to rights *in personam*; all servitudes create rights *in rem*). Post-classical writing in Roman law mentions *usufruct*, *usus*, and *habitatio* as examples. According to the definition suggested above *usufruct* should hardly be regarded as a servitude for it gives large and indefinite powers of enjoyment, whereas a servitude grants powers that are

[1] *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475 at 484.

[2] Cheshire, *Modern Real Property* (8th ed.), 445.

[3] Roman law divided real servitudes into rustic and urban, but the exact principle of division is not clear. The urban servitudes mostly relate to buildings. The four early rustic servitudes were *iter*, *actus*, *via*, and *aquaeductus*. These were equivalent to English easements. Many of the other rustic servitudes were analogous to the profits of English law: W. W. Buckland, *Text-Book of Roman Law* (2nd ed.), 262.

[4] That is, real in the sense that the servitude inheres in the owner of a certain piece of property. Cf., however, *The Strathcona*, [1926] A.C. 108, where the purchaser of a ship with knowledge of a charter-party was held to be a constructive trustee. Apart from equity, covenants cannot 'run with a chattel'; but cf., *per contra*, *Port Line Limited* v. *Ben Line Steamers Limited*, [1958] 2 Q.B. 146.

strictly limited; moreover, usufruct exists only for a definitely limited period. The English lawyer treats the usufructuary as a limited owner —the nearest equivalent seems to be the life tenant. Bracton 'flirted' with the notion of calling a tenant for life a usufructuary, but he forbore.[1] In Roman law a personal servitude was limited to the life of the holder and was inalienable. Austin suggests that there was no theoretical reason why a personal usufruct should not be given to a certain person and his heirs,[2] for the adjective 'personal' is not meant to refer to the length of the interest but only to emphasize that the servitude does not inhere only in the owner of land as such.

Austin claimed that, since every servitude availed against persons generally, a servitude could impose on others only a negative duty; we can imagine a right against persons generally that they shall refrain from a certain course of action, but it is difficult to conceive of a right *in rem* which casts an active duty on persons generally.[3] As Roman law put it, *servitus in faciendo consistere non potest*. But a real servitude is said to be a right *in rem* because it will bind the owner of the servient tenement, whoever he may be. There is no difficulty in regarding the owner of the servient tenement as being under an active duty, say, to keep in repair a road over which a neighbour has the right of way. Indeed, the fact that such an example may be found in German law shows the danger of *a priori* reasoning that a certain type of servitude cannot possibly exist. Legal systems have a curious habit of giving the lie to bold generalizations.

(*c*) *Security*

An early method for the enforcement of debts was to seize the body of the debtor, and if we believe the accounts of early Roman law, unpaid creditors could do more than take it out of the hide of the debtor, for his very body could be cut in pieces.[4] The notion is rather that of a physical liability to suffer in the event of non-payment than of a legal duty to pay. If the creditor wished for security, then another person would stand as hostage, the liability being then transferred from the body of the debtor to that of the unfortunate hostage. This distinguished primitive rules from the modern law of surety, where

[1] Pollock and Maitland, *History of English Law*, ii. 8. There were detailed differences. Probably in early times the tenant for life was not liable for waste, whereas the usufructuary had to treat the *res* like a *bonus paterfamilias*; moreover, the tenant for life had seisin and in litigation he represented the land.

[2] *Jurisprudence*, ii. 820.

[3] Op. cit. 811.

[4] H. F. Jolowicz, *Historical Introduction to Roman Law*, 189.

the liability of the surety is secondary only, the debtor himself being primarily liable. Moreover, today there is a clear distinction between *surety*, in which one person guarantees the debt of another if that other defaults, and *security*, in which a particular *res* is charged with the debt. Suretyship is used today, but now that the power to imprison for debt has been so greatly circumscribed, in an economic sense the creditor has rights only against the property in the hands of the debtor or surety—for a discharge from bankruptcy may extinguish the debts even if only a proportion of them has been paid. It is the benefit of *real* security,[1] which alone is a true *ius in re aliena*, that a specific chattel or specific parcel of land is made subject to a charge for the debt.

There are various steps in the evolution of real security. One early method is that of *fiducia*—the title to the *res* is transferred to the creditor who binds himself by a *fiducia* to reconvey the *res* when the debt is paid. In this case, since the creditor owns the *res*, he has a *ius in re propria*. This form had, however, two disadvantages: the debtor lost the use of the *res* immediately the money was borrowed, and, as the creditor was the owner, he could pass a good title if he sold in breach of the *fiducia*.

A further development is to give the creditor possession alone, leaving the title of the *res* in the debtor. This protects the debtor from alienation by the creditor, but the latter has no power to realize the security on default. However, if a power of sale is given to the creditor on default by the debtor, this is a convenient form of security. *Pignus* in Roman law and the modern pledge or pawn illustrate this stage.

But neither of these forms of security was suitable for farm-land or for 'tools of trade', because, if the debtor lost control of these, his earning capacity was affected. In *hypotheca* the creditor was given possessory rights, but custody and physical control remained with the debtor until default was made in payment. A farmer by this method could borrow on the security of his land or cattle and remain in undisturbed occupation until he made default. Since pledge required surrender of the physical control to the creditor, only one pledge could be created, but with *hypotheca* it was possible to create successive charges. Both pledge and *hypotheca* are essentially *iura in re aliena*, for they give to the creditor rights *in rem*.

If we look at the mortgage historically, we see that it has passed

[1] The adjective *real* here means only that a right *in rem* is created over a *res*: it is not confined to *real* property in the English sense.

through two stages—firstly, that of the pledge, and secondly that of actual transfer of title to the creditor—and it will probably end by becoming a mere charge.[1] Even when at common law the mortgagee took a transfer of title, equity took the view that the debtor should be protected, and allowed recovery even after the date of repayment was passed. Once the Chancellor effectively protected the 'equity of redemption' it was true to say that the common mortgage by conveyance was 'one long *suppressio veri* and *suggestio falsi*'.[2]

In English law today some forms of real security vest possession in the creditor (e.g. pawn); others give the creditor legal title but leave the debtor in control until default. Lien at common law is the right of one in possession of goods to remain in possession until certain claims, which he has against the owner, are satisfied.[3] This 'possessory' lien is dependent on the retention of the goods by the creditor, and is only a right of retention. Once possession is lost the lien disappears, and there is no right of sale. In equity and maritime law, however, the creditor need not have possession of the *res*—his claim is rather that certain specific property should be primarily applied to the satisfaction of the debt. A maritime lien may arise from several causes, e.g. because of damage done by a collision, claims by seamen for wages, a bottomry bond,[4] salvage or moneys due to the master for wages or disbursements.[5] Since the lien grants a right *in rem*, it attaches to the ship, and thus the present owner of the ship may suffer in pocket, even although he himself was not personally responsible for the events which gave rise to the lien.[6] If I hire my car to Jones and he causes an accident, the car cannot be seized by the injured party, since his claim is merely *in personam* against Jones and not against me at all. But in maritime law, even although the collision was due to the negli-

[1] Hanbury and Waldock, *Mortgages*, 21–2; and under *Torrens*-type land title registration systems it has done so—see Transfer of Land Act, 1958 (Victoria—no. 6399) where § 74 (2) provides: 'any such mortgage or charge shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged or charged.' [2] Maitland, *Equity* (2nd ed.), 182.

[3] A lien may arise (*a*) by operation of law, e.g. a lien of common carriers over goods for which the freight has not been paid; of an innkeeper over the goods of a guest till the lodging is paid; of a solicitor or artificer who has spent money or expended skill on the property of another; (*b*) by contract. *Caldwell* v. *Sumpters*, [1971] 3 All E. R. 892.

[4] A bottomry bond is an advance of money made to the master of a vessel on the security of the vessel and/or of its cargo and made in case of dire necessity. These bonds are of less importance now because wireless renders communication easier with the owners.

[5] The maritime lien has been described as one of the first principles of the law of the sea: *The Tolten*, [1946] P. 135. [6] Griffith Price, 57 *L.Q.R.* (1941), 409.

gence of a charterer, the ship itself may, if necessary, be attached to satisfy the judgment. An innocent purchaser of a ship without notice of the lien may find that the vessel is bound by a bottomry bond. An equitable lien exists independently of possession, but it is not like the maritime lien, a perfect right *in rem*, as it does not bind a purchaser for value without notice—it is really a claim that according to the rules of equity certain property should be made subject to the particular charge in question, and as the claim is only an equitable one it may be defeated by one who obtains the legal estate without notice. Thus a vendor, even after he has parted with possession, has a lien in equity for the full amount of the unpaid purchase money.

§ 117. The Trust

One of the best demonstrations of the usefulness of the concept of the trust is an examination of the intricate devices used by other legal systems in an attempt to achieve what is so successfully done by the trust.[1] So accustomed were Englishmen to the trust that its curious nature and its practical contribution were not fully realized until Maitland wrote his classic papers.[2] Rather than attempt to fit the trust into the classifications of Roman law, it is better to deal with it separately.

It is difficult to see how the notion of the trust could have been satisfactorily developed without the separation of law and equity. To those who like their notions clear cut, a dual ownership, which is not co-ownership, is inconceivable. The ownership of the trustee recognized at law and the equitable duty imposed on the trustee of carrying out the terms of the trust have led to a useful division between responsibility and benefit of which English lawyers have not been slow to make use. If, of course, that were the whole story, the trust would be ineffective—an owner at law may pass a legal title, and the rights of the beneficiary might in that case be defeated. But equity evolved a formidable procedure of following the trust property, and the trust will bind the property no matter into whose hands it comes unless it be transferred to a bona-fide purchaser for value without notice.[3] Clearly, such equitable rights could hardly evolve save where there was a separation between two systems of law. The continental jurist is puzzled by any reference to a right that partakes of the nature of rights *in rem* and rights *in personam*. He asks: Who has the ownership? If it is given to the trustee, the beneficiary has a mere right *in*

[1] F. Weiser, *Trusts on the Continent of Europe.* [2] *Collected Papers*, iii. 321.
[3] *Supra*, § 65.

personam; if to the beneficiary, then the trustee is a mere agent. There has been, in recent times, great interest on the Continent in the Anglo-Saxon trust,[1] but its true nature is often misunderstood.

The trust has served in many fields. Firstly, it has been used by associations as a means whereby the group property can be applied to the desired purposes—behind the hedge of trustees a community life may flourish, even although incorporation has not been granted.[2] Secondly, the problem of endowments and of gifts for charitable and religious purposes is made easy, for the property may be vested in trustees for such purposes (provided they be legal) as the settlor desires. Thirdly, the trust has been of great social importance in making possible a facile settlement of family property; the young have been protected from their inexperience; a married woman, through the help of equity, secured a certain measure of economic independence in spite of the common law rule which then vested her chattels in her husband. Indeed 'protective trusts'[3] have been developed by which the beneficiary is sheltered almost to an extreme degree, since it may be provided that, if he should attempt to assign his interest or should become bankrupt, his rights cease, but that thereafter the trustee shall have an absolute discretion to apply the income for his benefit. So far has the law allowed a parent to go in his desire to protect his child from rash speculation or extravagant living. In America some courts have even upheld clauses which provide that the income of the trust should not be subject to claims by creditors.[4] The creditor must be lucky enough to get the money after it is paid to the debtor, and before he has spent it. This carries protection to an extraordinary length and is hard to justify on any gounds of policy. How far is it 'desirable to permit one generation to give to the next generation the powers and privileges conferred by wealth and relieve it from the responsibility which ordinarily accompanies the ownership of property'?[5] If such devices were confined to beneficiaries under age, there would be little question; but they may be used to protect a beneficiary of any age.

[1] See, for example, P. G. Lepaulle, *Traité théorique et pratique des trusts*; W. Siebert, *Das rechtsgeschäftliche Treuhandverhältnis*; A. Nussbaum, 38 *Col. L. R.* (1938), 408.

[2] *Supra*, § 92.

[3] A. W. Scott, *Harvard Legal Essays* (ed. R. Pound), 419.

[4] Scott, op. cit. 423.

[5] Scott, op. cit. 432. For a more favourable view, see G. P. Costigan in *Legal Essays in Tribute to McMurray* (ed. M. Radin), 85. Costigan favours protective trusts so long as only a reasonable income is guaranteed and the creditors can seize anything above that limit.

Many systems of law possess some means of dealing with the reckless spendthrift,[1] but the institution of 'prodigality' has some advantages over that of the spendthrift trust: firstly, it is applied only to those cases where such control seems necessary; secondly, it may be applied against the will of the extravagant one, whereas in English law (while a settlor may, of course, draft a trust as he wishes when he gives property to another) there is no means of taking from an incompetent person the control of property which he owns. Although the trust has played its part in consolidating the family fortunes, the individualism of English law refuses to recognize that a man's family has any claim to prevent him from wasting his substance in riotous living.

There are two more fields where the trust has proved of great practical importance. The postponed trust for sale has rendered it easy to retain the business of a testator as a going concern until the moment arrives when it may be economically profitable to sell, without depriving the beneficiaries of the intermediate profits. Lastly, the trust has today become an instrument of 'high capitalism'.

What has made the trust so effective is the co-operation of the courts—in effect the court may be asked to supervise the execution of the trust deed. 'In no other circumstances can a private individual impose administrative duties upon the court to this extent, by his own volition.'[2]

§ 118. Analysis of Property in the Modern World

(*a*) *Extension of the Term 'Property'*

As we have already pointed out 'property' is an ambiguous term in English law, for its meaning varies according to the purpose in hand. This is an example of the 'instrumentalist' theory of definition—we cannot describe the real essence of the term property; we can define it only for a particular purpose and that definition is valid only within the given context. Firstly, there are technical reasons for an extension of the term in certain cases. To overcome the effect of the maxim that equity will protect only rights of property, there was a temptation to seek a tinge of property in what were really personal rights.[3] Some constitutions have a general clause prohibiting the taking of property without the payment of compensation, and very wide decisions have been made as to what is property within the

[1] L. Josserand, *Évolutions et Actualités*, 159.
[2] A. Nussbaum, 38 *Col. L. R.* (1938), 408 at 412.
[3] *Supra*, § 65.

meaning of this rule. 'Property necessarily includes the right to contract.'[1] Examples such as these extend the term 'property' to cover whatever has a present or potential material value.[2]

Economically, the nature of property is being extended. The once overwhelming importance of landed property is now eclipsed by the growth of new forms of wealth. Much of the most valuable property today consists in the right to share in a particular fund, e.g. shares in a company. To the logic of the law a share certificate is theoretically mere evidence of a right to receive dividends and to share in the funds of the company if it be dissolved while still solvent. But economically the share certificate is itself property, since in most cases it has a market value and is fully transferable.[3] A railway ticket for one purpose is merely evidence of a contract: in the law of larceny it is property.

Some modern economists consider that we have in effect built a hierarchy of interests relating to funds, just as our ancestors built a feudal hierarchy upon the land.[4] In technical legal parlance, a claim can only be made against a legal person, but there are two practical factors to be noted. Firstly, now that imprisonment for debt has been largely abolished, a claim against John Smith is, in effect, a claim against such funds as he has under his control. If Smith cannot meet his debts he may go bankrupt, though his discharge may be postponed until he has paid, say, ten shillings in the pound. Personal liability for debts today means only a legal duty to pay which may be avoided by bankruptcy; it does not mean the physical liability of early law when the debtor suffered in person and the easy escape of bankruptcy was not available. Secondly, the frequent use of the device of incorporation joined with limited liability allows a trader, not only to place his eggs in many baskets, but to confine his loss on any one venture to the eggs in that particular receptacle. John Smith may create three 'one-man' companies, make a fortune out of one, and leave his creditors to bear the loss on the other two. The device of 'holding' companies has rendered it possible for the corporation to limit its liability very successfully, and the parent company in control of subsidiaries has economic power and the prospect of taking such profit as there may

[1] *Dugger* v. *Insurance Co.* (1895), 95 Tenn. 245 at 252, cited C. R. Noyes, *Institution of Property*, 353.

[2] See *Minister of State for the Army* v. *Dalziel* (1944), 68 C.L.R. 261; and *Bank of New South Wales* v. *The Commonwealth* (1948), 76 C.L.R. 1.

[3] Cf. K. Renner's brilliant analysis in *The Institutions of Private Law and their Social Functions*.

[4] Cf. C. R. Noyes, *Institution of Property*, 504, 516.

be, but its possible loss on any particular venture is restricted to the capital invested therein. Thus from the economic point of view, incorporation means the limiting of liability to certain funds, and the modern system of 'holding' companies and 'interlocking' corporations means that a great number of these funds may be created. In many volumes of reported cases, nearly one-third of the litigants are corporations, and in each corporation many persons may have an interest. The invention of the share has made it easy to divide up the interest in these funds by any particular method desired. So much of our modern wealth is locked up in companies that our law of property seems very remote from that of Rome, where property consisted mainly of material things to which an absolutist concept of *dominium* could be applied. Now much wealth consists of paper which represents a claim of some sort upon corporation funds. Moreover, there has been a fundamental cleavage between ownership and control. In the days before the modern corporation, when an owner controlled his property, it was assumed that self-interest would ensure profitable use of it which would react to the advantage of the community. Now a corporation may be controlled by one interest holding a comparatively small block of shares. The classical study of Berle and Means[1] shows that where shareholders are widely dispersed, a holding of even five per cent of the voting stock may give control. By the device of 'pyramiding' or creating holding companies, the extent of financial power may be greatly increased; in one case an investment of less than twenty million dollars, controlled assets worth two billion dollars.[2] Thus the majority owners of the stock may lose effective power. What is in the financial interests of those in control may not assist the shareholders, especially as profits may be diverted to a subsidiary in which the controlling group has a larger interest. It is futile to attempt to approach this problem with the concepts of jurisprudence designed for a simpler economy.

In examining the break up of the old concept that was property and the old unity that was private enterprise, it is therefore evident that we are dealing not only with distinct but often with opposing groups—ownership on the one side, control on the other—a control which tends to move further and further away from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own position. The concentration of economic power separate from

[1] *The Modern Corporation and Private Property.*
[2] Op. cit. 73; G. D. Hornstein, 92 *Univ. of Pa. L. R.* (1943), 1.

ownership has, in fact, created economic empires . . . relegating owners to the position of those who supply the means whereby the new princes may exercise their power.[1]

As in feudalism, ownership of land carried with it political power, so control of modern company groups gives power to command.

What some modern writers call 'intellectual' property has become more important in modern times. The extensive advertising and persuasive salesmanship of modern business has made increasingly valuable such forms of property as copyright, patents, and property in designs. To sell the 'moving picture rights' becomes the dream of a young novelist; international conferences are held with the object of securing as world-wide a protection as possible for the rights of an author. The normal right which an author or artist desires is the power to restrict reproduction of his work without consent in order that others may not unjustifiably profit from the toil of his brain. The rules of copyright achieve this end. Some systems of law have introduced *le droit de suite* which attempts to secure for the artist a fair return for his labours. Before he has achieved fame an artist is compelled to sell his work for very little: later, speculators may reap great profits. In France and Belgium the artist is entitled to a certain percentage of the sale price every time a work of this kind is sold by public auction.[2] In the sphere of literary copyright it has been suggested that lending libraries diminish an author's royalties because so many read the same copy, and that measures should be taken to recompense the writer. In addition to the financial interests of the author or artist, there is the desire of the creator that his work should not be mutilated or deformed. Jones may sell all the rights in his play, but feel that his reputation would suffer if the play is altered by inept producers and then presented under his name. As a French court has said: 'Independent of pecuniary interest there exists for the artist an interest more precious, that of reputation.'[3] Continental systems seem to have gone farther than English law[4] in modifying juristic concepts to protect the author. Logically it seems anomalous that an author

[1] Berle and Means, op. cit. 124. The learned authors conclude (p. 356) that the modern corporation should be operated not solely in the interests of the shareholders, or of the controlling group, but rather in the interests of the community itself.

[2] L. F. Vinding Kruse, *The Right of Property* (trans. P. T. Federspiel), 339, referring to the French law of 20 May 1920 and the Belgian law of 25 June 1921.

[3] Cited M. A. Roeder, 53 *Harv. L. R.* (1939), 554; Kruse, *The Right of Property*, 75 et seq.

[4] English law allows the author a remedy in defamation if an inferior story by another is put forward as a work of the plaintiff: *Ridge* v. *English Illustrated* (1913), 29 T.L.R. 592.

who has completely parted with his work should yet be able to prevent its deformation, but theory may invent an implied term in the contract that the work shall not be so treated as to injure the reputation of the author.

Copyright is not property in the material sense—it is a mere right to prevent reproduction without consent—but it is a most valuable economic asset. There must be originality, but there is no examination as in the case of patents by a public official before the patent is protected. A patent is available only where registration is granted: copyright exists without registration, and the question of originality is argued only if an action is brought for infringement.[1] Copyright may exist even where there is no literary value. Libraries for many years had committed breaches of copyright by providing photostats of articles to students and research workers—now a limited protection is given by the Act of 1956.[2] Once the period of copyright expires, anyone may reproduce the work without cost. Vinding Kruse suggests that the State should still exact a royalty and use it as a fund to assist creative work.[3]

The scientific discovery of the inventor may be protected by the law of patents. The interests to be reconciled are those of the inventor, the industrial expert who exploits it, and the public. The first and the last are usually less able to protect themselves. English law does not give protection to scientific discoveries as such—there must be a process which is patentable. Soviet and Czechoslovak law goes further than English law in protecting the discoverer of new scientific ideas.[4] Between the brilliance of the laboratory worker and the successful marketing of a commodity there is a wide gap which may require the expenditure of vast sums of money. A new drug must be subjected to wide clinical trials, and made the subject of a huge marketing campaign, before profit can be created by sales. Out of many discoveries there are few that return gain. Hence the entrepreneur, who must risk much, drives a hard bargain with the inventor. It is to the advantage of the community that there should be a government instrumentality, which can guide the inventor inexperienced in the ways of industry to make the best use of his discovery.[5]

[1] *Warwick Film Productions Ltd.* v. *Eisinger*, [1967] 3 All E.R. 367.
[2] 4 & 5 Eliz. II, c. 74.
[3] *The Right of Property*, 309. An interesting study of the functioning of copyright law with the conclusion (which few authors would accept) that copyright law is not really necessary is that of S. Breyer, 84 *Harv. L. R.* (1970), 281.
[4] S. J. Soltysinski, 32 *Mod. L. R.* (1969), 408.
[5] e.g. the National Resources and Development Corporation.

Is it in the interest of the community that a patentee should be able to withhold a patent from the community, e.g. if a monopoly buys up a patent which it does not intend to use, but which it wishes to prevent others from using?[1] Should the State have power to enforce compulsory licences in the interest of society?[2]

There are industrial secrets which cannot be, or are not, patented. How far should the law protect a manufacturer from industrial espionage, or the use of secrets obtained in confidence? The present law is rather confused—'property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention'.[3] In 1968 Sir Edward Boyle moved the second reading of the Industrial Information Bill, which was designed to protect this form of industrial 'property' which obviously may have great economic value, but the Bill was not passed, and the law still remains confused.

Another form of intangible property is the franchise—the licence obtained from the State to run a bus service, a television station, a taxi; these may have great economic value. Somewhat similar is the licence to practice certain professions, entry to which is limited by law to those with certain qualifications. This is a valuable right, but it is not a property right, for it cannot be sold or transferred to another. A doctor may sell his practice, but only to one who is professionally qualified. A barrister cannot sell his practice, for it is a personal pursuit.

(*b*) *The Effect of Increasing Regulation by the State*

The increasing interference by the State with the rights of owners and the rise of collectivist theories are modifying the notion of irresponsibility or absolute control and leading to the theory that property is a social responsibility. The modern inroads on the theory that an owner is one who can do as he likes with his own would have horrified Soames of Galsworthy's *Forsyte Saga*: to a Forsyte, even the Married Women's Property Act was an interference with the husband's right of property which contained a threat to the stability of society—apparently on the cynical view that wives with economic independence would not remain with their husbands, and thus endanger the family structure.

[1] W. Friedmann, *Law and Changing Society*, 78.
[2] Cf. Patents Act, 1949, §§ 16–19.
[3] Gareth Jones, 86 *L.Q.R.* (1970), 463.

The following are examples of State control which are now commonplace:

(i) Protection of the rights of certain tenants against the landlord, both as to the maximum rent payable and as to continuity of tenure. This is common with regard to cheaper residential and also agricultural tenancies.

(ii) Positive or negative rules concerning user. During a time of war, the need for the production of food may lead to strict rules concerning the method of dealing with agricultural land. Forestry is another example. From the seventeenth century Denmark had legislation controlling the rights of landowners to deal with forests—the community interest was regarded as superior to the individual rights of the owner. 'Protective' forests may be necessary to prevent erosion, or drifting sand, or to provide water catchments free of contamination by mud.

Town planning is not, as is sometimes suggested, an entirely modern concept. The central portions of Melbourne and Adelaide were 'town planned' from their inception, but the subsequent suburban growth on the fringes was for too long left to take care of itself. The object of town planning is to prevent development contrary to the public interest and to make long-term rules concerning roads, shopping centres, zoning of industrial and residential areas. Town planning requires great skill, but it is relatively easy to apply to a virgin area, compared with one that is already crowded with substandard housing. An interim development order may cover a huge area for which new buildings are planned, and there is often personal tragedy when a private dwelling is acquired to allow of development necessary for the community. All that society can do is to see that really adequate compensation is paid and that alternative housing is available in a community which is planned to conserve human values and not merely to provide bigger and better buildings.

Town planning, if it leads to expropriation, will necessitate compensation to the owner who has lost his property. But where a zoning restriction is imposed, an owner may suffer much loss without remedy. Property may be worth vastly more if it may be sold for offices, shops, or petrol stations, but if a limitation to residential purposes only is applied to an area, the landowner loses the chance of speculative profit.

(iii) Expropriation for community purposes—freeways, aerodromes,

rehousing. In these cases compensation is normally payable. Danish law requires that the entire economic loss to the landowner should be paid—merely paying the market value of the land is not enough, for goodwill may be lost if the land on which there is a shop is compulsorily acquired. This is an area where the dispossessed owner may suffer great loss.

(iv) Normally, rights are given to public utilities to acquire easements, e.g. for drainage, telephone poles, or electric distribution systems. Where it is necessary to transmit high voltages on steel towers, this may lead to conflict between the economic interest of cheap electricity and the aesthetic desire to preserve the amenities of the landscape.

(v) The breaking up of large estates for 'closer settlement' is another example of state interference. This may be done either by a steeply graduated land tax that renders the large estate uneconomic, or else by direct expropriation and the division of the area into smaller farms.

(vi) Taxation may be used to redistribute property, e.g. succession and estate duties, land tax, income tax: taxation may be necessary to provide revenues for the State, but there are also other policies behind its imposition.

These examples of state regulation of the uses to which property may be put are of the utmost importance in conveyancing, and the task of the lawyer is thereby rendered more complex. It is of vital importance to a purchaser whether there is an interim development order, or whether a new freeway is planned which will take the front of his garden, or whether a house has been condemned as unfit for habitation.

§ 119. Theories of Property

There are two types of theories of property—one attempts to explain how property came to be, to describe the facts; the other passes an ethical judgment on those facts and attempts to justify (or condemn) the institution of private property. Sometimes, however, these two aims are combined: for example, a writer argues that property arose to reward private enterprise and that therefore it is ethically justifiable.[1]

[1] For a critical account of the traditional theories, see H. J. Laski, *A Grammar of Politics*, ch. v.

(*a*) One theory is that property arose by the taking control of a *res nullius—occupatio*. He who first reduces into possession a piece of property has the best of justifications for remaining in control.[1] But the acceptance of what has been flippantly termed 'the divine right of grab' is not so widespread today as once it was. Maine suggests that the doctrine that *occupatio* gives title is probably the result of later thought. 'It is only when the rights of property have gained a sanction from long practical inviolability, and when the vast majority of the objects of employment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with *dominium* over commodities in which no prior proprietorship has been asserted.'[2] In a crowded world *occupatio* applies only to a relatively unimportant degree—less often does the vacant forest await the tiller. The theory of *occupatio* hardly provides a reasonable account of the origin of property, and it is even less satisfactory as a justification of property. Why should he who is lucky enough to seize a thousand acres become owner?

(*b*) Another theory regards property as the result of individual labour. Industry should be encouraged by granting to a worker the ownership of any *res* which is created by his toil. But this doctrine seems to imagine a simple state of society in which each man creates his own products. Things must be created out of something—if the material be a *res nullius*, there is something to be said for rewarding the work of the creator. What, however, if Peter makes a suit out of James's wool (*specificatio*)? Here the claim of the owner of the material and the right of the manufacturer come into conflict. The fact that there was a dispute between the Proculians and Sabinians shows that the answer to this problem is not easy, and Justinian's solution that the manufacturer gained title, if the *res* was a *nova species* and irreducible to its former state, is obviously a compromise.[3] In modern society it is impossible (at any rate in the industrial world) to say in more than a few cases what is the result of the labour of any one individual. Moreover, much wealth is not the result of labour at all, but of some fortunate accident, e.g. the increased value of land on which oil or coal is found. An owner may

[1] Huntington Cairns, *Law and the Social Sciences*, 61; Kant, *Philosophy of Law* (trans. W. Hastie), 82.

[2] H. J. S. Maine, *Ancient Law* (ed. Pollock), 269. Cf. J. Bentham, *Limits of Jurisprudence Defined*, 85: 'Till law existed, property could scarcely be said to exist. Property and law were born and die together . . . take away law and property is at an end.'

[3] W. W. Buckland, *Text-Book of Roman Law* (2nd ed.), 215.

neglect his land, but sell at a huge profit because a railway opens up that part of the country. The existence of this 'unearned increment' shows that wealth is not always the result of individual labour. Another factor to be considered is that what the community needs is not merely labour, but socially useful labour. The trafficker in drugs labours, but does not aid the community. Moreover, one who successfully acquires a fortune may withdraw his descendants from the labour market by removing from them the necessity of earning their daily champagne.

Nevertheless, the theory contains a grain of truth. Society needs labour and the occupations are still few where the intrinsic interest is so great that men will labour for the love of it. An incentive to toil must be provided, and the labourer should receive a just return. Conversely, society should demand from possessors of property service commensurate with the privileges they enjoy. 'No man . . . has a moral right to property except as a return for functions performed.'[1]

(*c*) According to the Hegelians some control of property is essential for the proper development of personality. The community has slowly evolved from status to contract, from group holding to individual property—liberty has grown in the process, and it is the control of property that makes men free. There is in this a valuable truth—he who is wholly dependent on property controlled by others in their own interest can hardly live the life of the free. But the argument does not justify, but rather criticizes, the present system which allows concentration of property in a minority of the community.[2] The Hegelian theory really leads to the conclusion that society should be so organized that every member can, by toil within his powers, acquire such property as is necessary for true self-realization.

(*d*) Some have considered that private property is a creation of the State and achieved only after a long struggle with the clan.[3] If we regard as the essential characteristic of private property the right to exclude others, to charge the *res* for debt, to alienate or leave by will, it is true that the State has provided the machinery by which these rights are enjoyed. The clan favours joint exploitation, dislikes alienation, and regards disposal by will as contrary to the interests of the family. Moreover, while the economic exploitation by the tiller of the

[1] H. J. Laski, *A Grammar of Politics* (5th ed.), 184.

[2] Cf. H. Rashdall: 'We cannot justify the whole capitalistic system *en bloc* by the bare formula that property is necessary to the development of individual character': *Property, its Duties and Rights*, 66. Cf. R. H. Tawney, *The Acquisitive Society*.

[3] E. Jenks, *Law and Politics in the Middle Ages*, 237–8.

soil may take place where there is no state, it is to the military exploits of the State that the huge proprietary manor is due. But is not this argument rather a case of *post hoc ergo propter hoc*? The State was a resultant of social and economic forces and did not arise *ex nihilo*. These same forces were tending to the creation of individual property. The emergence of the State and the creation of private property were the effects of the same causes and we can hardly say that one is the creation of the other. Moreover, private property may exist even where there is not a highly developed State, although protection of the owner's right to exclude others can hardly be effective till there is a developed legal order.

It is impossible to conceive of the modern forms of property in the absence of a sophisticated set of legal rules with an effective sanction behind them. Property today does not consist only of land and the produce thereof—this might be defended by a strong right arm or a horde of knights. Wealth that is built up by contract, that relies on the company share or debenture, the security of the cheque or bill of exchange, the television rights—all these assets are valuable only if there is a stable business community with effective sanctions of law. The modern company is a team and a hierarchy of interests has been built on the 'fund' employed—it is obvious that an effective company structure must depend on an effective Companies Act. The State, therefore, may claim that it is a partner with the entrepreneur in the creation of wealth, and therefore that the State can justifiably levy its toll when necessary for what are deemed to be social ends.

(*e*) The increasing tendency in modern times is not to attempt to justify the institution of private property by an *a priori* theory, but to build doctrines on an analysis of the functioning and social effects of the institution. This approach is sometimes called the functional theory, and it lays down that property which is the result of effort or involves the giving of service is ethically justifiable, but property which is an undeserved claim on the wealth produced by others is not.[1] If property is to be effective in encouraging production, then society should see that it is distributed on proper principles. Duguit would put it that property ceases to be a right and becomes a duty; the owner is no longer free to exercise his arbitrary will but must perform a social function.[2]

[1] R. H. Tawney, *The Acquisitive Society*; H. Cairns, *Law and the Social Sciences*, 75. 'The justification of property must depend not upon any *a priori* principle, but upon its social effects': H. Rashdall, in *Property, its Duties and Rights*, 68.

[2] *Transformations du droit privé*. Duguit wished to subject everything to the rule of

Under any theory, some property must be available to the individual. Even under socialism there must be recognition of private property in articles for consumption and personal use. In the U.S.S.R. some writers speak of the resurgence of private property—it is now possible even to become a *rentier* in a small way by lending the State money.[1] The real question before the modern world is not whether property shall be destroyed but whether some of the excesses of private ownership of the means of production are to be cut down. No individual, however powerful he may be, can today create wealth without the help of the social framework and the co-operation of his fellows, and therefore society can well demand that, once created, wealth should be used for those purposes which will be of greatest benefit to the community. Duguit, however, goes too far in suggesting that there has been a complete revolution in the legal approach to property. The owner still has many 'sovereign' rights, though the area of complete freedom is being gradually restricted.

The modern theory thus seeks a justification of private property in the results that it achieves and criticizes the institution so far as it fails to achieve those results. Such an approach is closely linked with a functional study of what property means in the legal sense. Today we see the effective working of the institution of property, not in a mere analysis of concepts borrowed from Roman law, but in a realistic study of what legislatures and courts are actually doing.[2] Vinding Kruse has pointed out that the real task of the social sciences is to 'dedogmatize' the people—writing has been so full of ideological cant (whether capitalist, socialist, or communist in bent) that we do not accurately see whither the law is tending.[3] The old melodrama has too much influence. In some writings on the current scene, Big Business or the International Jew are cast to play the part of the villain; to others, Government Bureaucracy is destroying liberty of enterprise and the freedom of the individual; to a third group, Bolshevik Communism is a poison seeping through the world and destroying all that is lovely and of good repute. A realistic survey shows that we cannot explain the law of any country in terms of abstractions. Law is a compromise, and today there is in England what would have appeared radical socialism to the landowners of 1910. Beating the

law—not only the sovereignty of the State, but those relics of arbitrary power which an owner still possessed: Achille Mestre, *Archives de phil. du droit* (1932, 1–2), 163.

[1] S. P. Simpson and J. Stone, *Law and Society*, 1991.

[2] Cf. C. R. Noyes, *Institution of Property*, 419.

[3] *The Right of Property*, 5.

drum of propaganda may serve some purposes, but it neither advances the study of jurisprudence nor gives a real appreciation of what is happening in the world today. What is apparent is that absolute rights are ceasing to exist, if they ever did exist, and are being replaced by qualified rights the exercise of which is limited by the philosophy and needs of the community in question.

§ 120. ACQUISITION *INTER VIVOS*

(*a*) *Original Acquisition*

A person is said to acquire derivatively when he accepts a conveyance of title from a previous owner: in original acquisition a *res* which has no owner is reduced into possession and title acquired. The latter was naturally more important in primitive times than today when the world is crowded and most things are subject to ownership. In English law, owing to the feudal doctrine that all land is held of the king, land cannot become a *res nullius* and even in the case of personal property the list of such things is very limited.[1]

Occupatio was the term given in Roman law to the acquisition of title in a *res nullius*. Apart from specific game laws, the birds of the air are the property of him who first reduces them into possession. It was generally considered that *occupatio* also applied to *res derelictae*—when an owner abandoned his property, he lost title at once, and the *res* was therefore open to acquisition by anyone. The Proculians, however, held that an owner did not lose his property till some other person reduced it into possession. On this theory, abandonment was an example of *traditio incertae personae*—the owner by abandoning the *res* manifested an intention to transfer title to the first taker. But the Proculian view did not prevail,[2] although in English law there is some authority for it.[3]

Accessio[4] may be an example either of original or derivative acquisition according to the circumstances. If I darn my socks with wool which is not mine, the wool 'cedes to', or is merged in, my socks

[1] Holdsworth, *History of English Law*, vii. 479.

[2] *Inst.* 2. 1. 47; *Dig.* 41. 7. 1. pr.; 41. 7. 2. 1.

[3] Holdsworth, op. cit. 495–6; see the *Arrow Shipping Co. Ltd.* v. *The Tyne Improvement Commissioners*, [1894] A.C. 508, per Lord Macnaghten, at 532; *A.-G.* v. *Trustees of the British Museum*, [1903] 2 Ch. 598, at 608–9; *The Tubantia*, [1924] P. 78, at 87; *Johnstone & Wilmot Pty. Ltd.* v. *Kaine*, [1928] 23 Tas. L. R. 43, at 56–8.

[4] 'Acquisition of property by its incorporation in what already belonged to the acquirer': Buckland, *Text-Book of Roman Law* (2nd ed.), 208.

and I thereby become owner of it. If the wool was a *res nullius*, it is a case of original acquisition; if the wool belonged to another, I acquire title without his consent. If an island is created by natural forces in a river, a riparian owner[1] acquires a right to so much of the island as lies between the centre of the river and his own land. Since the island has no previous owner, this is a case of original acquisition.

(*b*) *Acquisition of Title from Another without Consent*

Normally we can acquire title to a *res* owned by another only with that other's consent. If a thief purports to transfer to a purchaser title in the *res* stolen, the maxim *nemo dat quod non habet* applies. But there are certain cases where an owner may lose title without his consent:

(*a*) By the happening of an event—a river in flood may tear away portion of A's land and cast it against the ground of B. The Romans applied the curious rule that B obtained title as soon as the portion had been there for a considerable time and trees carried with it had taken root in his ground.[2]
(*b*) By the operation of law—bankruptcy, execution against property, expropriation in the public interest.
(*c*) By the wrongful act of the acquirer—*specificatio*,[3] adverse possession bringing into play the rules of prescription.[4]
(*d*) By a wrongful act of one who has mere possession but not ownership of the goods.

Normally, an agent can pass title only if he has the authority of the owner so to do. The common law favours what Demogue has called static security, since it desires to protect the title of the real owner, even at the cost of rendering transactions slow and cumbersome by requiring the purchaser to investigate the title of him who purports to sell. The business world, on the other hand, favours dynamic security, emphasizing the necessity for speed of transactions and the protection of the purchaser in good faith even if this occasionally defeats the true owner's title. The concept of static security is seen in the land law, where rigorous investigation of the owner's title is necessary; that of dynamic security in the law relating to negotiable instruments, where a bona-fide purchaser for value (without notice of any flaw in the

[1] Whose lands are not *agri limitati*.
[2] *Supra*, § 119.
[3] *Dig.* 41. 1. 7. 2.
[4] *Supra*, § 112.

vendor's title) can rest assured that his title cannot be disturbed by any claim that the true owner gave no consent to the transfer. The use of money would be rendered difficult if the right of the holder of the coins had to be investigated before it was safe to deal with him—imagine a parchment title accompanying every pound note. The battle for the extension of the concept of negotiability to debenture bonds[1] illustrates in an interesting fashion the conflict of commerce with the law.[2] Again, the title of a true owner of any personal property might be defeated by sale in market overt;[3] the Factors Acts from 1824 onwards protect a purchaser who buys from a mercantile agent who is in possession of the goods with the consent of the owner, even although the agent had no power to sell.[4] With regard to land 'constructive notice' and the requirement of strict investigation may be a useful doctrine 'for title is everything and it can be leisurely investigated', but to apply these doctrines to commerce would be 'doing infinite mischief and paralysing the trade of the country'.[5]

Accessio[6] has become more important because of the ramifications of hire-purchase. If I take a flock of sheep on hire-purchase, who owns the natural increase? This clearly depends on the contract, but in the absence of a term relating to this, it has been held that the young belong to the lessee.[7] However, a contract between two parties does not affect the title of a third. If I obtain a truck on hire-purchase from A, and instal a new engine bought on hire-purchase from B, what are B's rights if A repossesses the truck? A Victorian court held that title to the engine would not pass unless the owner of the engine intended that. The onus lies on the owner of the vehicle to show that the engine cannot be identified and removed. Clearly the engine could be removed without damage to the rest of the vehicle, and therefore title was not lost by B.[8] On the other hand, it has been held in Canada that tyres fitted to a truck are governed by the doctrine of *accessio*.[9]

[1] *Crouch* v. *Crédit Foncier* (1873), L.R. 8 Q.B. 374; *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337.

[2] R. S. T. Chorley, 48 *L.Q.R.* (1932), 51.

[3] Although under the Larceny Act, if a thief is convicted of larceny an order for restitution may be made by the court: Larceny Act, 1916, § 45 (1), (2).

[4] See 52 & 53 Vict., c. 45.

[5] Per Lindley L.J., *Manchester Trust* v. *Furness*, [1895] 2 Q.B. 539 at 545.

[6] *Supra*, § 119.

[7] *Tucker* v. *General Investment Trust Ltd.*, [1966] 2 All E.R. 508. See A. G. Guest, 27 *Mod. L. R.* (1964), 505.

[8] *Rendell* v. *Associated Finance Pty. Ltd.*, [1957] V.R. 604.

[9] Cited Guest, *supra*, at 509.

(c) *Acquisition of Title by Consent of the Owner*

The consent of the owner is expressed in a juristic act, but frequently, in addition to agreement, some systems require a delivery of the property (either with or without set formalities) before title will pass.[1] This has already been discussed in treating of the law of sale.[2]

The acquisition of title by the consent of the owner is a case of succession. In English law we cannot regard the acquisition of property by the adverse possessor as a true case of succession, for the possessor does not acquire a 'parliamentary' conveyance' from the previous owner, but has merely the best possessory right based on the inability of anyone else to eject him by legal means.[3]

Succession may be either singular or universal.

> In a singular succession . . . the same legal relationship passes from one subject to another: in a universal succession, the subject of the legal relationship remains the same. The essence of universal succession is that it is not strictly speaking a *succession* but a *continuation*. . . . It is in this sense that universal succession is said to be a succession to a personality and singular succession a mere succession to a right.[4]

The sale of a motor car is an example of singular succession: on the other hand, if A succeeds to the totality of rights held by, and duties binding on B, that is an instance of universal succession. There are few, if any, perfect examples of universal succession in actual legal systems. The trustee in bankruptcy acquires many of the rights of the debtor and is bound to some extent by his duties, but the bankrupt retains his personal rights (e.g. marital powers) together with some of his property (e.g. clothes, bedding, and tools of trade), and the trustee is not bound by a duty to pay all the debts but only to divide such assets as there may be proportionately among the creditors according to the priority of their debts, Personal rights are not normally transferred, though in some Australian aboriginal tribes when a man dies his younger brother takes over all the rights which the deceased possessed over his wife.[5] Another case that is sometimes termed universal

[1] 'In Bracton's eyes the necessity for a livery of seisin is no peculiarity of the land law': Pollock and Maitland, *History of English Law*, ii. 179.
[2] *Supra*, § 98.
[3] Cf. *Taylor* v. *Twinberrow*, [1930] 2 K.B. 16; *Fairweather* v. *St. Marylebone Pty. Co. Ltd.*, [1962] 2 All E.R. 288; but this is not so, of course, under *Torrens*-type land title registration systems.
[4] R. Sohm, *Institutes of Roman Law* (trans. Ledlie), 505.
[5] A. R. Radcliffe-Brown, 20 *Iowa L. R.* (1935), 286 at 287.

succession is the passing of the estate to the heir in Roman law; but this will be discussed in the next section.

§ 121. Succession on Death

There are many theories concerning the evolution of succession on death and the development of the will. Our knowledge is as yet too scanty to tread with sure steps, and it is unwarrantable to assume that each race has passed through the same unilinear evolution. 'So long as it is doubtful whether the prehistoric time should be filled, for example, with agnatic *gentes* or with hordes which reckon by "mother right" the interpretation of many a historic text must be uncertain.'[1] Is family ownership the cause or the result of intestate succession?[2] No answer can be dogmatically given for primitive times.

Intestate Succession. Presumably intestate succession was prior to the origin of the last will and testament. Maine suggests as an analogy that the family was a corporation, or that the individual head of the family was a corporation sole whose rights and duties descended to the successor.[3] 'If the family was the owner of the property administered by a paterfamilias, its rights remained unaffected by the death of its temporary head.'[4] But care must be exercised in using the refined notions of advanced jurisprudence as analogies for primitive law.

There are many factors that may be considered when the law decides its rules of inheritance.[5] The law must consider the class of person most likely to be dependent on a testator, and also the type of relative whom an average property owner would be likely to favour. The rules of any one period will be determined largely by the structure of the family at the time. A patriarchal family will emphasize succession through males, those who practise mother right prefer succession through females. Modern systems favour *cognatio* or blood relationship at the expense of relationship through marriage, with one obvious exception—succession between husband and wife. Descendants are usually preferred to other blood relatives in accordance with the natural desires of man. But the estate may go to the eldest son (primogeniture), or be equally divided between sons, or be equally divided between sons and daughters, or be given to the

[1] Pollock and Maitland, *History of English Law*, ii. 237; A. S. Diamond, *Primitive Law*, 237.
[2] Pollock and Maitland, op. cit. 247.
[3] Maine, *Ancient Law*, ch. vi.
[4] Holmes, *The Common Law*, 343.
[5] T. E. Atkinson, 20 *Iowa L. R.* (1935), 185; Bentham, *Principles of Morals and Legislation.*

youngest son (ultimogeniture). Probably primogeniture arose, not so much from the desire of the father to keep the estate an undivided whole, as from the demand of the king or lord that the land should be under a strong hand—but in the feudal era there were not strict rules of inheritance, for each heir must make the best bargain he could with his lord.[1] However, primogeniture is practicable only in an ordered community: in a lawless one, it may be dangerous to allow the young son to take title—hence a tendency for the eldest male kinsman to assume control. This is termed *tanistry*. The rationale of ultimogeniture is said to be that the youngest son is most likely to be dependent, since an older child has probably already been settled in life by an advance from the father.[2]

One important factor is that either primogeniture or ultimogeniture keeps the estate of the deceased as a unit, whereas division among all the children soon leads to difficulties in an agricultural community, as the units of land become too small for subsistence. But where primogeniture exists, the elder may be forced to charge the land to provide for his brothers and sisters; where there is equal division, one child may buy out the others, again charging the land—this time for the purchase price.[3] Whatever be the system in force, the difficulty is to provide for all the children out of an estate normally designed as a single working unit.

How far should the law go in tracing kinship?[4] At Rome the Twelve Tables laid down that the nearest agnate took and in default the members of the same *gens*. It is often urged today that the law should set a narrow limit, especially as the growth of individualism has weakened the feeling of family solidarity. Uncertainty increases litigation if the law attempts to trace kinship too far, and some argue that the State should succeed in default of ascendants or descendants. But so long as there is power to make a will, most people will prefer to benefit a remote relative, a friend, or a charity in which they are interested, rather than let the money go to the coffers of the State.

Testate succession. It is impossible to be dogmatic concerning the origin of the will.[5] At Rome probably the first attempt to give the

[1] Pollock and Maitland, op. cit. 260–4.

[2] Ultimogeniture existed in many parts of Germany: Pollock and Maitland, op. cit. 280–1. For a criticism of the orthodox theories as to the causes of primogeniture and ultimogeniture, see H. Cairns, 20 *Iowa L. R.* (1935), 266.

[3] The position of the half-blood has led to many different solutions varying from equal rights with the whole blood to total exclusion.

[4] E. M. Meijers, 20 *Iowa L. R.* (1935), 341.

[5] Probably priestly exhortations played a large part—the desire of the Church

succession to one not within the family was by actual adoption. A further step was the actual 'sale' of the inheritance to the prospective heir—in Roman law by *mancipatio*. Possibly at the early stage the testator was then bereft of all his possessions and, like King Lear, was compelled to live on the charity of his beneficiary. Such a will was, of course, irrevocable. But the *mancipatio* soon became a mere formality, carried out only in order to give validity to the expression of the testator's wishes, and it was then accepted that the will became operative only on death. So long as the terms of the will were spoken, secrecy was impossible, but with the invention of writing it became the custom to seal the document and thus keep if from prying eyes. By slow degrees we reach the modern will which is secret, posthumous in operation, revocable, and ambulatory. The first two attributes have been explained. Today, since a will is only a signed and attested document, Brown may make a new will every day if he so desires—the irrevocable nature of the early *mancipatio* has disappeared. Ambulatory means that the will binds all property in the hands of the testator at his death, even if it was acquired only after the will was made. This seems, today, an obvious and reasonable characteristic of a will, but our ancestors found it difficult to see how a man could bind the disposition of property which he did not yet own.

There are several rules in Roman law which seem to show the influence of the early clan ownership of property. Firstly, there are relics of universal succession. Until the *beneficium inventarii* was granted by Justinian, the heir was liable in full for the debts, but thereafter his liabilities were confined to the assets received. Again, the primary purpose of the will was to nominate an heir or heirs in whom the succession would vest as a whole. If the heir did not accept, the whole will fell to the ground. The Roman maxim put it that inheritance was a succession to the entire legal position of the deceased.[1] There were, of course, certain rights that were not inheritable—usufruct was extinguished, a right to bring an action for *iniuria* lapsed unless *litis contestatio* had taken place.

Secondly, in a sense the *suus heres* was succeeding to property to which he had, as it were, a potential right. Hence the growth of rules to protect his interest. A *suus heres* must be expressly disinherited in the will. If a son was born after the will was made, the will was void.

to receive death-bed bequests would force the law to decide whether the claims of expectant heirs could be defeated: Pollock and Maitland, op. cit. 312 et seq.; Holdsworth, *History of English Law*, ii. 91; Cairns, 20 *Iowa L. R.* (1935), 266.

[1] 'Hereditas est successio in universum ius quod defunctus habuit.'

If a son felt he had been unjustly disinherited, he might bring the *querela inofficiosi testamenti* on the plea that the testator must have been insane to make such a will. If there were too many legacies the son might refuse to accept under the will, in which case the will would fall to the ground and the son would then receive his share according to the rules of intestate succession.[1]

By contrast the English rules seem very individualistic. Freedom of testation was carried so far that, for a death-bed whim, a testator might leave all his property to strangers and condemn his wife and children to penury. In 1900 New Zealand passed 'An Act to insure Provision for Testator's Families', and legislation in many parts of the Commonwealth now gives varying rights to a testator's family.[2] In England the law was changed in 1938 and the court was given power to award payment of a reasonable provision out of the net estate for a surviving spouse, an infant son, an unmarried daughter, or a child under a physical or mental disability.[3] The discretion which the Act confers on the court was severely limited, but doubtless it was thought wise to proceed slowly with the experiment.

In modern English law, if there is a will, the executor named therein calls in the assets and pays the debts. If the estate is insolvent, there are rules as to priorities—debts of the same rank are paid *pro rata*. Any surplus remaining after the estate is 'wound up' is distributed according to the directions of the will. By the use of the trust the testator may vest his property in trustees and direct them to pay the income to his beneficiaries, thus relieving them of responsibility. If there is no will, an administrator controls the estate and pays any remaining assets according to the rules of distribution on intestacy. The convenience of the personal representative is seen when we glance at systems the foundation of which is the existence of the heir as universal successor. Thus in French law the heir himself is liable for all the debts unless he specifically accepts only with the *beneficium inventarii*. This is justified by some French writers on the ground that it

[1] That is, when the *ius abstinendi* or right of refusal was granted.

[2] See B. Laskin, 17 *Can. B. R.* (1939), 181; Gray, ibid. 233; W. P. M. Kennedy, 20 *Iowa L. R.* (1934–5), 317; Mannie Brown, 18 *Can. B. R.* (1940), 261; and see e.g. Administration and Probate Act, 1958 (Victoria—no. 6191), Part V—Testator's Family Maintenance.

[3] The Inheritance (Family Provision) Act, 1938; G. W. Keeton and L. C. B. Gower, 20 *Iowa L. R.* (1935), 326; the Intestate's Estates Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 64) extended those provisions to intestate estates and also made a number of amendments to the Inheritance (Family Provisions) Act, 1938. The test is not whether the testator acted reasonably, but whether reasonable provision was made: *In re Goodwin (deceased)*, [1969] 1 Ch. 283.

is morally right for the heir to pay the debts of the testator even if the estate be insolvent, but cynics reply that the moral duty is effective only in cases where ignorance of the law caused a failure to take advantage of the *beneficium inventarii*.[1] Moreover, there are in French law few rules dealing with proportional payment of debts where the estate is insolvent—bankruptcy applies only to merchants. If there are several coheirs, a creditor of the deceased must sue each coheir for that proportion of the debt which corresponds to the heir's share of the inheritance; similarly debtors of the deceased must pay each heir only his due proportion of the debt. The courts have boldly filled many of these gaps in the code [2] but the law still seems very complicated when compared with the English system. The German Code also builds on the concept of universal succession, but there are not so many technical difficulties as in French law. It certainly is an 'imperative necessity in an economic system based largely upon credit that the debts survive the debtor'[3] and most systems recognize this; but is there any need to enlarge the fund available by making the heir liable in full unless he takes special steps to protect himself?

A legacy is an example of singular succession, and is a deduction from the estate left to the heir in favour of another. 'A legacy is a gift, chargeable only on a *heres*, usually of *res singulae*, having an assignable money value'—thus speaks Buckland for Roman law.[4] In English law the term 'legacy' is inapplicable to gifts of real estate, and the gift is not chargeable on the *heres* but is a direction in the will to the personal representative.

The institution of the will has been strongly attacked, even before the days of socialism.[5] Inheritance is said to be one of the chief causes perpetuating the unequal distribution of wealth. Whatever view be taken, there is no doubt that the modern State with its steeply graduated succession duties makes a noble (or ignoble, according to the scope of our expectations) attempt to redistribute property. In U.S.S.R. the first decree flatly declared: testate and intestate succession are abolished. This, however, cut across a deeply rooted

[1] M. Rheinstein, 20 *Iowa L. R.* (1935), 431 at 439.
[2] J. P. Niboyet, ibid. 416.
[3] Rheinstein, ibid. 468.
[4] *Text-Book of Roman Law* (2nd ed.), 334.
[5] Mirabeau wrote: 'What is a testament? It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law' (cited in *Rational Basis of Legal Institutions*, 453). Yet Mirabeau himself made a will.

sentiment, and in 1945 the rights of parents, brothers, and sisters were recognized—thus inheritance survives even in a communist regime.[1]

[1] V. Gsovski, 45 *Mich. L. R.* (1947), 291, 296; Simpson and Stone, *Law and Society*, 2000.

REFERENCES

ALLEN, C. K., 28 *Calif. L. R.* (1940), 421.
AMOS, M. S., and WALTON, F. P., *Introduction to French Law*, chs. iv, v.
AUSTIN, J., *Jurisprudence*, Lectures 47, 48.
CAMPBELL, A. H., 7 *Camb. L. J.* (1940), 206.
CHORLEY, R. S. T., 48 *L.Q.R.* (1932), 51.
COHEN, F. S., *Dialogue on Private Property* (1954), 9 Rutgers L. R. 357.
LASKI, H. J., *A Grammar of Politics*, ch. v.
MAINE, H., *Ancient Law*, ch. vi.
MAITLAND, F. W., *Collected Papers*, iii. 321.
NIBOYET, J. P., 20 *Iowa L. R.* (1935), 416.
NOYES, C. R., *Institution of Property*.
POUND, R., *Philosophy of Law*, ch. v.
Property, its Duties and Rights.
RHEINSTEIN, M., 20 *Iowa L. R.* (1935), 431.
ROEDER, M. A., 53 *Harv. L. R.* (1940), 554.
SCOTT, A. W., *Harvard Legal Essays* (ed. R. Pound), 419.
VINDING KRUSE, L. F., *The Right of Property*.
VINOGRADOFF, P., *Historical Jurisprudence*, ii. 197–228.
WEISER, F., *Trusts on the Continent of Europe*.
WESTRUP, C. W., *Introduction to Early Roman Law*, ii. *Joint Family and Family Property*.
WILLIAMS, T. CYPRIAN, 4 *L.Q.R.* (1888), 394.

XXII

THE CONCEPT OF POSSESSION

§ 122. Introduction

As with most words in the English language, the word 'possession' has a variety of uses and a variety of meanings. Reference to any reasonably comprehensive English dictionary provides sufficient illustration. As a noun from the transitive verb *to possess*, 'possession' is given as: the action or fact of possessing something or of being possessed. Depending on the context, the lexicographer may be found to give meanings such as the following: the holding of something as one's own; actual occupancy as distinguished from ownership; a territory subject to a sovereign ruler or state; the fact or action of a demon possessing a person or the fact of being possessed by a demon; the action of an idea or feeling possessing a person; the action of keeping oneself under control—as in self-possession.[1] The lexicographer, in attempting to assign the meaning of the word as used in English law, may well find himself saying something like the following: 'The visible possibility of exercising over a thing such control as attaches to lawful ownership; the detention or enjoyment of a thing by a person himself or by another in his name; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons. . . .'[1]

It should be clear at the outset, then, that different meanings may be ascribed to the word 'possession', depending upon context and use, and that the search for one 'proper' meaning for the word is likely to be a fruitless one.[2] It may be objected, however, that it is the concept of possession in the law that is of interest here, and not the varied uses to which the word 'possession' may be put in the English language. It may be, and has been, urged that there is a unitary concept of possession so far as the law is concerned, and that the analysis and explanation of that concept is the proper function of

[1] *The Shorter Oxford English Dictionary* (3rd ed.), vol. ii, 1550.

[2] 'The term *possession* is always giving rise to trouble. The meaning of possession depends on the context in which it is being used': per Lord Parker, *Towers & Co. Ltd.* v. *Gray*, [1961] 2 W.L.R. 553 at 557–8.

jurisprudence. It is not difficult to demonstrate, however, that the search for a unitary concept of possession in the law is one doomed to frustration, if it is assumed that every time the word 'possession' is used in legal reasoning it refers to or names that unitary concept. Further it is not difficult to demonstrate that the example of the lexicographer's definition of possession in the law given above is inadequate, misleading, and that it produces confusion in legal reasoning. Before examining the use either of the word or of the concept or concepts of possession in the law, it is proper to demonstrate that the word and concept are important in many aspects of the law as described or discovered in textbooks, statutes, or judicial pronouncements.

Possession, even without ownership, may have the utmost practical importance. Possession may create ownership, either by *occupatio*[1] (the taking control of a *res nullius*) or by the expiration of a period of acquisitive prescription.[2] Moreover, possession is prima facie evidence of ownership, and he who would disturb a possessor must show either title or a better possessory right. A chimney sweep who finds a ring may not be the owner of the ring, but his possessory right allows him to recover to the value of the stone set in the ring from a jeweller who refuses to return it after it is handed to him for examination.[3] In technical language, the *ius tertii* cannot be pleaded against a possessor. If Jones possesses a car and I, having no title, take it from him, it is no defence for me to prove that Jones is not the true owner. He may be a thief, but whatever the power of the owner to recover the car, Jones's possessory right is superior to mine.

In Roman law one who brought an action for *furtum* had to show that his interest had been honestly secured,[4] but in English law there is no theoretical[5] reason why a thief should not sue a second thief who takes from him the *res* in question, for even a wrongful possession is good against all but the true owner or one claiming through him or one claiming a prior possessory right. Some systems carry their theories so far that in a possessory action title is irrelevant. Thus, if I, as dispossessed owner, retake a chattel, the previous possessor may recover it from me by a possessory action—my only remedy is a real action based on my title. But here the law must effect a

[1] *Supra*, § 120.
[2] *Supra*, § 112. To use the language of English law, seisin is a root of title.
[3] *Armory* v. *Delamirie* (1721), 1 Strange 505. [4] *Dig.* 47. 2. 12. 1.
[5] Obviously in practice the first thief would not desire to call attention to his possession of the *res*.

delicate compromise, which rather confuses the theory of possession. It would be thought absurd in the English world if an owner had no right to retake the purse seized from him or to eject a trespasser who entered his house during his absence. Sometimes the solution is sought in the doctrine that possession seized by violence is not true possession, but this produces internal conflict with what is usually taken to be the central notion of possession, however convenient the result may be in allowing the owner to act effectively.[1] The problem when self-help should be allowable is always a difficult one. English law allows title to chattels to be set up as a defence in a possessory action[2]—if I retake my own chattel, I can defeat the previous holder's action of trespass by proof of my title.

In the light of such difficulties the question 'Why should the law protect possession as such, even though it may have been seized unlawfully?' became a favourite one for jurists and philosophers. Would it not be sufficient to protect only ownership or at least a possession that was lawfully justifiable? Three main reasons for the protection of possession were advanced. Firstly, it aids the criminal law by preserving the peace.[3] Interference with possession almost inevitably invites violence, not only in primitive times but even in the more civilized world of today. Order is best secured by protecting a possessor and leaving the true owner if there is one to seek his remedy in a court of law. Secondly, possession is protected as part of the law of tort. 'These rights of action are given in respect of the immediate and present violation of the possession of the bankrupt independently of his rights of property—they are an extension of that protection which the law throws around the person.'[4] And thirdly, possession is protected as part of the law of property. The law does not always know that the possession in question is unlawful. In times when proof of title was difficult and transfers of property required intricate formalities, it would have been unjust to cast on every man whose possession was disturbed the burden of proving a flawless title. Ihering's doctrine that in most cases possessors are the rightful owners may not be historically accurate, but it is convenient for the law to regard possession as well founded, at least until a superior title

[1] *Infra*, § 123.

[2] O. W. Holmes, *The Common Law*, 210. Holmes wrote that this has *always* been the position in English law, but Maitland, *Collected Papers*, i. 426, shows that it was not true in Bracton's time.

[3] Pol'ock and Maitland, *History of English Law*, ii. 30–46; Holmes, *The Common Law*, ch. vi.

[4] *Rogers* v. *Spence* (1844), 13 M. & W. 571 at 581.

is shown to exist. English law provides illustrations of each of these reasons for the protection of possession. Thus disseisin was regarded as a crime. While an owner who had been wrongfully dispossessed of *land* might retake possession peaceably, the Statutes of Forcible Entry made it an indictable misdemeanour to use force.[1] The tort of trespass turns upon interference with another's possession; but an *owner* is not liable in tort (even if he may be criminally responsible under the Statute referred to) if he uses only reasonable force in retaking his land.[2] So far as recaption of *chattels* is concerned, so long as an owner uses only reasonable force, he is liable neither civilly nor criminally.

The peculiar historical evolution of the English law of property has given increased point to the protection of possession. Ownership in English law may almost be described as the ultimate or best right to possession.[3] Hence 'the law protects seisin because the person seised is owner till someone else proves a better right to seisin; and therefore to ask why the law protects seisin amounts to asking why the law protects ownership'.[4] Possession is a 'root of title', and all possession is regarded as just till it is shown to be otherwise. Whatever may be the case in other systems, no student of English law can neglect the importance of possession, for the learning of seisin and possession covers a great part of the law of property.[5]

Many other speculative questions may be, and have been, pursued with respect to the notion of possession. Is possession limited to the control of material things? Can A possess a fishery? If B pollutes the stream, can A bring trespass, the gist of which is an interference with possession? Roman law at first denied that there could be possession of a mere *ius* such as a servitude, but later writers used the term *quasi-possessio*. English law treated certain incorporeal rights as analogous to possessory rights over material things, provided there was a power of excluding others from the enjoyment of the right.[6] Many theorists would confine the use of the word possession to contexts where material things were involved and, instead of speaking of a possessory right to an *incorporeal res*, would refer to the *de facto* use and enjoyment of the content of a right, without having a legal claim

[1] 5 Rich. II, st. 1, c. 7.
[2] *Hemmings* v. *Stoke Poges Golf Club*, [1920] 1 K.B. 720.
[3] *Supra*, § 115. [4] Holdsworth, *History of English Law*, iii. 95.
[5] The story is well told by Pollock and Maitland, *History of English Law*, ii. 46 et seq.
[6] Pollock and Wright, *Possession*, 35; *Nicholls* v. *Ely Beet Sugar Factory Ltd.*, [1936] Ch. 343 at 347 et seq.

thereto.[1] But the cost of consistency with theory is a clumsy circumlocution, and the convenience of speaking of possession, e.g. of a servitude, is so great that the term 'possession' tends to be used more widely.

It is necessary now to demonstrate that, in spite of the importance of the general notion of possession as indicated by the brief discussion above, the search for an exhaustive and exclusive definition of possession along the lines illustrated at the beginning of this chapter is doomed to failure. Few parts of English law have been so influenced by Roman law doctrines, and in particular, by nineteenth-century German views on Roman law, as has the law of possession.[2] The story of the last hundred years or so can be told in terms of a struggle between convenience and theory—theory seeking to discover a unitary concept in the interests of consistency and harmony, and the judges seeking to dispose of particular cases so as to achieve justice in each case, on the one hand, and to establish rules for the just disposition of other cases on the other. One thing is clear; and that is that 'English law has never worked out a completely logical and exhaustive definition of "possession" '.[3]

§ 123. The Struggle of Convenience and Theory

Why should such a notion as possession be surrounded with complexity?[4] One reason is that there is an inevitable and continuing conflict between the logic of the law and the demands of convenience in particular cases. Law in its early stages is fluid, and later a theory is invented as a means of rationalizing decisions that have already been reached. Many of the fundamental problems of the law of possession are not clearly examined until the 'classical period' in a nation's legal history, when analytical genius, discontented with the law as a collection of rules, attempts to discover a logical structure around which the rules may be grouped. If such a theory is discovered in the law of possession and wins acceptance, then rules that cannot be reconciled with it are dubbed 'logical anomalies' or

[1] A. H. Campbell, 7 *Camb. L. J.* (1940), 222–3.

[2] O. W. Holmes, *The Common Law*, 206–13.

[3] *U.S.A.* v. *Dollfus Mieg et Cie S.A.*, [1952] A.C. 582 at 605—and see D. R. Harris, 'The Concept of Possession in English Law', *Oxford Essays in Jurisprudence* (1961), 69. Harris presents the thesis that 'the English decisions preclude us from laying down any conditions, such as physical control or a certain kind of intention, as absolutely essential for a judicial ruling that the man possesses something'.

[4] Much of the material in this section was published in 1 *Res Judicatae*, (1935), 187, and the editor of that journal is thanked for his permission to republish.

'historical exceptions'. The law is not static, however, and the pressures of practice tend to create further exceptions, which sometimes eat away the theory itself. There may even be two or more theories of the law, each battling for supremacy.

In one sense possession began as a fact—the fact of physical control. Before there was law there was possession. That fact could produce consequences. Felix Cohen asked the question, to a student posing as a reasonable wolf in a society consisting of wolves and sheep, 'Now, suppose you had to decide whether to kill a sheep yourself or to take mutton out of the jaws of other wolves who have made a kill. Let's assume, in spite of Kipling, that the wolves are not concerned about law or ethics. What considerations might lead you to respect the first occupancy of your fellow wolves and to go out after your own mutton?'[1]

Whatever it may be possible to say of the pre-law situation,[2] it is clear that, once law arises to protect possession by rules, then its primary concern is with the relations between persons (legal units[3]) in the legal system with respect to things; and not primarily with the relations between persons and things. If this is so then not merely the nature of the thing concerned, and what is done or may be done to it, are important, but also the nature of the person or persons concerned, their relationships *inter se*, and the consequences of the rules provided or of the remedies for their breach. This will be illustrated more fully in a later section.

Without doubt most legal systems have built upon the notion of physical control in developing rules which have the term 'possession' as a necessary part of their expression. The concentration upon the notion of physical control attracted special attention to the relations of persons to things. In the refinement of rules in the development of English law a number of terms came to be accepted, and some clarification of those terms is desirable.

Thus it is said we may have the following relations of a person to a thing:[4]

(*a*) Custody—where the holder either lacks full control or else has

[1] *Dialogue on Private Property* (1954), 9 Rutgers L.R. at 386.

[2] And there, even among wolves, it seems likely that no such notion as possession would be necessary merely to describe the relations between a wolf and a thing but would become necessary only when the relations between wolves or the wolf in possession and other predators were to be considered.

[3] See Ch. XVI *supra*.

[4] All writers do not use these terms in the exact sense set down.

no *animus* to exclude others, for example, a customer examining a ring in the presence of the jeweller.[1]

(*b*) Detention—full physical control in fact which for some reason is not regarded as possession in law.

(*c*) Possession—legal possession. In most cases the legal notion of possession is built on the popular notion of physical control, but each legal system has 'anomalous' cases either where a person in full physical control in fact is denied possession in law, or where one who does not have physical control in fact at all is accorded the rights of possession.

(*d*) Ownership.[2]

This table gives a more definite meaning to the terms 'custody' and 'detention' than is usual. Sometimes the two terms are used as synonyms. *Constructive possession* is a phrase that is often used in the books, but there are so many different approaches that the term is best left unused.[3]

As the praetor at Rome began to protect possession, it became necessary to refine the notion. Buckland thinks that in the classical era possession was regarded primarily as a matter of fact, however hard it might be to reconcile this with the artificial notions already springing up. As Paul said: 'The same possession cannot be in two persons any more than you can be considered to stand in the place in which I am standing, or to sit in the place in which I am sitting.'[4] A *captivus* on his return to Roman soil automatically reacquired the rights which he had lost by being taken prisoner, but, since possession was regarded as a matter of fact, it vested in him only when actual control was obtained.[5]

The theory of the nineteenth-century Romanists was mainly concerned with the attempt to discover a logical method of distinguishing between detention and possession. At Rome the possessor had two

[1] A person who is given by the owner permission to eat his lunch in a car and listen to the radio is not to be deemed to be in possession of the car, since he was given the key only to open the door and not for the purpose of driving the car: *Hollingsworth* v. *Bean*, [1970] V.R. 819.

[2] *Supra*, § 115.

[3] Salmond, *Jurisprudence* (12th ed.), 276, treats constructive possession as covering those cases where the law grants possession to one who is not in actual physical control. Clerk and Lindsell, *Torts* (11th ed.), 458 n., write that a person has constructive possession: (*a*) when he has lost possession and no one else has acquired it; (*b*) when his servant is in charge of a *res*. Pollock and Wright, *Possession*, 25–7, confine it to cases where there is a mere right to recover possession.

[4] *Dig.* 41. 2. 3. 5. (The translation is that of F. de Zulueta in his edition of *Dig.* 41. 1. and 41. 2. to which the author acknowledges his debt.)

[5] *Dig.* 41. 2. 23 pr. and 1.

practical advantages—he had a right to the protection of the praetor's interdict, and, if he could show good faith and *iusta causa* he could acquire ownership on the expiration of the necessary period of time.[1]

Savigny maintained that the distinction between detention and possession follows from a proper analysis of the latter concept and built his doctrine on Paul's text, '*apiscimur possessionem corpore et animo, neque per se animo aut per se corpore*'.[2] The classical theory, therefore, is that possession is made up of two elements: firstly the *corpus* or element of physical control; secondly the *animus* or intent with which such control is exercised. Savigny thought that since the detentor and possessor have the same physical relation to the *res*, the differences between them must be found in the mental element. The intent, which distinguishes a possessor, is the *animus domini*—the desire to hold for oneself and not on behalf of another. This theory explains why the tenant, the borrower, and the agent did not have possession in Roman law, for they did not intend to hold in their own right. The compilers of the *Digest* seem to have emphasized the importance of the element of *animus*—indeed some of the texts seem to go to extraordinary lengths.[3] On the other hand, Savigny's theory was faced with the difficulty that in certain cases Roman law gave a non-owner possessory rights:[4] these examples Savigny explained away as anomalies which he termed instances of derivative possession.

Ihering adopts a more objective theory. 'A man possesses who is, in relation to the thing, in the position in which an owner of such things ordinarily is, *animus* being merely an intelligent consciousness of the fact.'[5] Ihering's theory can explain exactly those cases which Savigny found difficult, but, on the other hand, it cannot account for those cases where the law refuses possessory rights to those who are in effective physical control. The anomaly on his view is that not every detentor is a possessor and he seeks to explain these 'exceptions'.[6]

[1] The Romanists talk of: (*a*) *detentio* or *possessio naturalis*; (*b*) *possessio* or *possessio civilis* which was hardly distinguishable from *possessio ad interdicta*; (*c*) *possessio ad usucapionem*. But the terminology is by no means fixed. A complication is introduced by the fact that the praetor would protect only possession that had been acquired in certain lawful ways—*nec vi, nec clam, nec precario*.

[2] *Dig.* 41. 2. 3. 1.

[3] Whether these references to *animus* are interpolated or not is another question. Paul, in particular, emphasizes the element of *animus*.

[4] e.g. the pledgee, precarist, the stake-holder, and one who held under *emphyteuta*.

[5] Buckland, *Text-Book of Roman Law* (2nd ed.), 198, summarizing the theory of Ihering. Savigny's theory triumphed in the first draft of the German Civil Code, but in the final draft the term 'possession' was applied even to those who held for another, and the distinction between mediate and immediate possession was introduced.

[6] e.g. he argued that many tenants in the early days were probably of servile status. See E. Ehrlich, *Fundamental Principles of the Sociology of Law*, 381.

Does Paul's analysis of *animus* and *corpus* satisfactorily explain the law? Holdsworth thought that, in addition, Roman law required a cause or special reason why possession should be protected, the exact limits of possession varying with the needs of the moment; 'but unfortunately for the interpretation of (Roman) texts, they have fallen into the hands of German legal philosophers, who have constructed from them logical theories which never wholly fit the actual rules, because those rules were, like the rules of English law, made to fit the illogical facts of life.'[1] Some of these complicating factors are now discussed.

(*a*) Firstly, in Roman law the notion that proprietary capacity was essential to possession became firmly established and this cut across the notion of possession as mere physical control. The rule that those in the *potestas* of another could not possess led to a certain divorce between actual control and legal possession, thus creating confusion in the texts.[2] A master possessed what was held by his slave, the theoretical solution being that the master had the *animus* and the slave provided the *corpus*. Since the slave was himself possessed by the master, it was not a very violent extension to say that the master possessed a *res* in the hands of a slave who was himself possessed.[3] But as acquisition through a slave became more and more common, it became inconvenient to require the master to have a specific *animus* directed to every *res*,[4] and it was laid down that the master possessed whatever was acquired by the slave in connection with the *peculium*. As acquisition through those not within the bonds of the family was gradually allowed, convenience dictated an even broader rule and so some texts boldly state that the agent provided both *animus* and *corpus*.[5] This was a case where the classical rule was almost eaten away by exceptions.

(*b*) Secondly, we note the influence of the mode of acquisition of possession on the concept of possession itself. If it is assumed that the essence of possession is control, the question whether possession has been lawfully acquired or not may be relevant when the law considers whether it should protect that control, but, if we are determining

[1] *History of English Law*, vii. 467.

[2] Paul, h.t. 1. 4, writes that a wife possesses what was given to her by her husband, although the gift was forbidden by law since a *matter of fact* cannot be invalidated by law. Ulpian, h.t. 29, illustrates the two views.

[3] Paul, h.t. 3. 12.

[4] The early rule required either previous authorization or subsequent ratification by the master.

[5] Cf. h.t. 34. 1.

whether the taker has in reality acquired possession, the lawfulness of its inception should be irrelevant. The thief acquires possession, although his taking is a crime. In practice, however, there is an inevitable tendency for 'the right to possession to acquire importance at the expense of possession itself'[1]—'possession borrows a great deal from right . . . possession is not merely a matter of physical fact but also of right'.[2] At Rome one of the most important practical results of possession was the protection afforded by the interdict of the praetor. The praetor laid down that he would not protect the possession of one who had acquired it *vi, clam aut precario*. According to logical analysis one who takes by force or steals secretly acquires possession; but, since the praetor would not protect such a holding, there was a tendency, instead of saying that the praetor would protect only certain forms of possession, to limit the definition of possession itself to control which had not commenced in certain unlawful ways. This was an illogical, though convenient, policy. Ulpian considered that one who has lost possession by violence should be considered as still in possession.[3] If my house is seized in my absence, I retain possession until I know of the intrusion and have had a reasonable time in which to eject the trespasser.[4] Clearly this doctrine cannot be carried too far or possession would mean only control that has been lawfully acquired. The strict doctrine is that of Gaius that any loss of *corpus* involved loss of possession. To reconcile the texts, we can only suppose that Gaius' doctrine was applied to movables and that, where immovables were concerned, the rules were broadly interpreted for the benefit of the owner. In the post-classical era, if a third party seized land held by a tenant the owner did not lose possession until he was aware of the intrusion and had failed within a reasonable time to assert his rights.[5]

Just as the law weights the dice against one who has seized secretly

[1] Pollock and Wright, *Possession*, 83.

[2] Papinian, *Dig.* 41. 2. 49 pr. and 1.

[3] h.t. 17 pr.

[4] Ulpian, h.t. 6. 1. Cf. *Browne* v. *Dawson* (1840), 12 A. & E. 624, where a schoolmaster after dismissal broke into, and held control of, his old rooms for eleven days, but it was held that nevertheless he had not acquired possession. Cf. Maitland, *Collected Papers*, i. 456: 'Practically for the last three hundred years and more, theoretically as well as practically for the last fifty years and more, we have had no action in which an ejected possessor could recover possession from the owner who ejected him: certainly this is a fact which deserves the consideration of all who are troubled with theories of possession' (written in 1888).

[5] The classical view was that the owner supplied the *animus* and the tenant the *corpus* and therefore that loss of *corpus* entailed loss of possession: Africanus, *Dig.* 41. 2. 40. 1; Paul, h.t. 3. 8; Pomponius, h.t. 25. 1; Buckland, *Main Institutions of Roman Law*, 111.

or by force, so it favours one who takes lawfully; even if we regard control as a pure matter of fact, one whose holding is lawful is less likely to be disturbed than one who has no title. Where one has a right to enter, entry into any part of the house gives possession of the whole, whereas the possession of a trespasser extends no further than it does in fact.[1] '*De facto* as well as *de iure* there is much to be presumed in favour of him who comes by title, nothing for him who comes by wrong.'[2]

(*c*) Thirdly, what may be called the legal concept of inertia plays its part. If possession is once proved to exist, it is assumed to continue until it is ended either by abandonment on the part of the owner, or by seizure by another. Savigny considered that possession continued only so long as physical power to deal with the *res* could be reproduced at any moment.[3] If all power to enjoy, now or in the future, is lost, possession ceases—e.g. if a ring is dropped into the sea. But a London citizen retains possession of his house even while he is absent in Paris, for he may return at will. Holmes suggests, however, that Savigny's statement is rather too absolutely phrased and gives the following example. The finder of a purse leaves it at his country house, while he languishes behind the bars of a prison. English law at least would treat him as in possession, even though he could not reproduce his physical power of enjoyment at the moment. If a burglar began to break in, the finder would be in possession until the thief had actually seized the purse.[4]

Roman law sometimes referred to these cases as being possession held *animo solo*. The possession of summer pastures was held to be retained *animo solo* during the winter, and the jurists went even further than Holmes in the example just cited, for they considered that seizure by a stranger did not end the possession of the previous holder until he was excluded on his return or acquiesced in the trespass.[5] Paul in one text writes that, since both *animus* and *corpus* are necessary for possession, both must disappear before possession is lost.[6] This, however, cannot be accepted as a general rule. If possession is lost merely by consent of the holder, then the notion of possession would not be that which we understand it to be. Apart from the exceptions introduced for convenience, the true rule is that

[1] Pollock and Wright, *Possession*, 79. Cf. Paul, h.t. 3. 1, and Celsus, h.t. 18. 4.
[2] Pollock and Wright, op. cit. 62.
[3] Savigny on *Possession* (trans. Perry), 253–4, citing Paul, h.t. 3. 13.
[4] *The Common Law*, 237–8. *Wuta-Ofei* v. *Danquah* (J.C.), [1961] 3 All E.R. 596.
[5] Pomponius, h.t. 25. 2. [6] h.t. 8.

loss of *corpus* involves loss of possession, whether the owner is aware of it or not. But is mere change of *animus* enough? Do I cease to possess the forged banknote in my pocket, merely because I think that I have thrown it away, when in reality I have thrown away a true note? Where the physical control is reduced to vanishing point, or exists only by a fiction of the law, a mere change of *animus* may be sufficient (e.g. a determination not to return to the summer pastures). But where there is real physical control, English law would normally require loss of that control before possession was regarded as ending.[1] The law is seeking a convenient solution of practical problems and does not make too sharp a separation of *corpus* and *animus*.

Just as the notion of *corpus* is modified for convenience, so is that of *animus*. The classical analysis would require a specific *animus* directed to the *res* in question and some Roman texts approve this doctrine—the possessor of land does not possess the treasure buried in the land, unless he is aware of its existence.[2]

§ 124. Illustrative Cases and Rules

To see how the common law stands, in the light of the theories influenced by the Roman law, it is necessary to review briefly some illustrative cases. These fall conveniently into separate groups.

Larceny cases

Larceny, of course, requires—(*a*) a taking—'without a claim of right made in good faith', (*b*) and the carrying away of something capable of being stolen, (*c*) without the consent of the owner, (*d*) and with the intent, at the time of such taking, permanently to deprive the owner thereof (the owner here includes any 'part-owner, or person having possession or control of, or a special property in, anything capable of being stolen').[3] The legislative form provided by the Larceny Act, 1916, was not intended to change the common law of larceny, but merely to consolidate it. Traditionally larceny had turned upon a notion of taking possession unlawfully and at the time of such taking to intend permanently to deprive the person entitled to possession of the thing concerned.[4]

[1] There is some authority for the view that possession cannot be lost even by wilful abandonment. See Pollock and Wright, *Possession*, 124, and *Johnstone & Wilmot Pty. Ltd.* v. *Kaine*, [1928] 23 Tas. L.R. 43.

[2] Paul, h.t. 3. 3.

[3] The Larceny Act, 1916, § 1; 6 & 7 Geo. V, c. 50.

[4] The Theft Act, 1968, has modified the law, but the old cases throw light on the theory of possession.

Reg. v. *Riley*[1]

In this well-known case the accused drove off amongst his own lambs, but without knowing it, a lamb belonging to the prosecutor. After he had discovered the error he sold the lamb with his own. He was convicted of larceny. The court rationalized the decision by relying on a notion of 'continuing trespass' based on the ground that the accused had undoubtedly made himself liable in trespass when he first drove off the lamb even though he did not know that he had the lamb at the time.

R. v. *Ashwell*[2]

In this case the accused had asked the prosecutor to lend him a shilling. In a poor light the prosecutor pulled from his pocket what he thought was a shilling and handed it to the accused. Later the accused discovered that he had been given a sovereign by mistake, but he none the less spent the sovereign and thereby converted it. He was convicted of larceny of the sovereign. In the last resort the conviction was affirmed by an equally divided Court for Crown Cases Reserved consisting of fourteen judges. The conviction involved a decision that the accused did not take possession of the sovereign until he knew it was a sovereign, although the judges who so held gave different reasons for saying that he had not taken possession until that time—at which time he took it *animo furandi*.

R. v. *Moore*[3]

The prisoner had picked up and converted to his own use a bank note which had been dropped on the floor of his shop. He converted the bank note in spite of the fact that he knew the owner of it could be found. It was held that he was rightly convicted of larceny—that is, that he had not obtained possession of the note while it was lying on the floor of his shop before he had discovered it, and further that the owner's possession was in some way extended, at least fictionally, after he had lost the note in the accused's shop.

Merry v. *Green*[4]

An action for assault and false imprisonment—the defence was that the assault and imprisonment were justified because the plaintiff had committed larceny. The relevant facts were that the plaintiff had purchased a bureau at an auction and subsequently discovered a purse in a secret drawer. The purse contained money and other valuables. The plaintiff appropriated that property to his own use. At first instance the plaintiff obtained judgment in his favour. On appeal the matter was sent back for a new trial because it was not clear from the evidence just what the terms

[1] (1853), Dears. 149.
[2] (1885), 16 Q.B.D. 190.
[3] (1861), Le. & Ca. 1.
[4] (1841), 7 M. & W. 623.

of sale of the bureau had been. In his judgment Baron Parke laid it down that if the auctioneer had sold the bureau with express notice that the purchaser was not gaining title to the contents of it, if there happened to be any, then the plaintiff's appropriation of the purse and other valuables could constitute larceny—that is to say that the mere delivery of the bureau did not necessarily carry with it delivery of possession of its contents, at least if it was made clear that the contents were not being sold with the bureau.

Cartwright v. *Green*[1]

A bureau was delivered to a carpenter for repairs. The carpenter discovered money in a secret drawer which he appropriated to his own use. It was held that he committed larceny by feloniously taking the money into his possession. In this case of course the carpenter was merely a bailee of the bureau but none the less by the ordinary rules would be held to have possession of it. It follows from the decision that he did not obtain possession of the money when he obtained possession of the bureau, but only at the time he discovered it and wrongfully formed the intention to convert it to his own use.

R. v. *Rowe*[2]

The accused had taken pieces of iron which he found on the bed of a canal when the canal was drained of water. The iron had fallen overboard from barges. The accused was convicted of larceny of the iron from the company which owned the canal—that it to say that the company had had possession of the iron merely because it was resting upon the company's land.

R. v. *Hudson*[3]

By mistake a department of the government posted the accused a letter in which was a cheque intended for someone else. The accused appropriated the cheque to his own use and it was held that he was guilty of larceny. Although the accused had received possession of the letter innocently, the view taken was that he could not have been said to have acquired possession of the cheque until he was aware of its existence and at the time he became aware of its existence he took it *animus furandi*.

Possession of drugs

Warner v. *Metropolitan Police Commissioner*[4]

The appellant collected two boxes which had been left for him at a café, and when he was stopped by the police, one of the boxes was found to

[1] (1802), 8 Ves. 405.
[2] (1859), 1 Bell. 93.
[3] [1943] K.B. 458.
[4] [1969] 2 A.C. 256.

contain drugs. His defence was that he thought both boxes contained scent. Clearly the accused had physical control of both boxes. The argument turned therefore on the *animus* necessary to constitute possession—must the accused be aware that drugs were in the box?

(*a*) At Quarter Sessions it was considered that mere control of the box was enough.

(*b*) Lord Morris in the House of Lords admitted that some *animus* was necessary. If a stranger hides something in your stable without your knowledge, you are not in possession of it:[1] but the appellant was in possession of the contents of the box, although he did not know precisely what they were. Lord Guest agreed, basing an argument on policy. It would be too difficult to secure conviction if the Crown had to prove specific knowledge of the contents. 'I am unable to see how, if I know that I have a parcel in my possession, I am not also in possession of its contents.'

(*c*) Lords Reid, Pearce, and Wilberforce required a more specific *animus*. 'Could it be right that if the appellant had taken possession of the parcel of scent and thereafter the drugs had been slipped in without his knowledge, he would be innocent . . . but that if the drugs had been slipped in without his knowledge before he took possession then he would be guilty?' This was the approach of Lord Reid. Lord Pearce stated: '. . . the difference between scent and tablets is a sufficient difference in kind to entitle the accused to an acquittal if on the whole of the evidence it appears that he may have genuinely believed that the parcel contained scent, and that he may not have had any suspicion that there was anything illicit in the parcel and that he had no opportunity of verifying its contents.'

Hibbert v. *McKiernan*[2]

The appellant had been convicted for the larceny of golf balls, the property of the secretary and members of a golf club. He had taken the golf balls, which had been abandoned by their original owners, while he was trespassing on the golf links owned by the members of the golf club. It was held that the appellant had been rightly convicted—that is to say that the golf balls he had taken had been, at the time of his taking, in the possession of the secretary and members of the club although no one knew where they were or how many balls might be at any time lying abandoned on the various parts of the links.

Ruse v. *Read*[3]

The respondent had been acquitted of larceny in the following circumstances. He had, while drunk, taken a bicycle from a public place, and it

[1] This seems to be one of the two points on which there was unanimity: the other was that, although there was misdirection of the jury, the appeal was dismissed as no reasonable jury could have accepted the appellant's story.

[2] [1948] 2 K.B. 142.

[3] [1949] 1 K.B. 377.

was accepted at first instance that at the time of taking he had no larcenous intent. When sober he found he had the bicycle and panicked. He consigned it by rail to a non-existent person at a railway station some distance away. The magistrates had held that he had no intention of permanently depriving the owner of his property and was incapable of forming such an intention at the time of taking the bicycle. On appeal it was held that the original taking of the bicycle had been a trespass and, although not then felonious, the subsequent misappropriation of the machine on the following day amounted to larceny and the respondent should have been convicted. *R.* v. *Riley* (*supra*) was followed.

R. v. *Harding*[1]

The Court of Criminal Appeal upheld a conviction for larceny of a mackintosh from the servant of the person who would, for other purposes, have certainly been held to be not only the owner but the possessor of the mackintosh. It was held that the servant had a 'special property' in the mackintosh so that she could properly be named as the prosecutor in a case of larceny.

Rose v. *Matt*[2]

The respondent, when purchasing some goods, deposited a clock which he owned, with the vendor, as security for the price of the goods he was purchasing. It was agreed between them that the vendor would be entitled to sell the clock if the respondent did not pay for the goods within one month. The respondent later returned to the vendor's shop and took the clock without paying the price of the goods. On appeal it was held that the respondent should have been convicted of larceny.

The finding cases

In all these cases the issues are civil and not criminal ones, and are between two of more persons claiming to be entitled to the benefits of possessory enjoyment of a chattel—the assumption being that, if there is a true owner, he cannot be found.

Bridges v. *Hawkesworth*[3]

The plaintiff found a parcel of notes on the floor of the defendant's shop. It was held that the plaintiff had acquired a good title to them, as against the defendant, as he was the first to acquire possession of the notes. The defendant had not previously acquired possession because he had not known of the notes' existence until after they were found by the plaintiff.

[1] (1929), 21 Cr. App. R. 166.
[2] (1851), 21 L.J.Q.B. 75.
[3] [1951] 1 K.B. 810.

Elwes v. *Brigg Gas Co.*[1]

The plaintiff, a tenant for life in possession, had leased an area of land to the defendant company for the purpose of erecting gas works. In the lease all mines and minerals were reserved to the lessor. The lessor retained certain supervisory rights over the gasholders and other structures to be built by the defendant company. In the course of the defendant company's excavation of the land a prehistoric boat was found some six feet below the surface. It was held that the plaintiff was entitled to the boat as against the tenant company. The judgment is an unsatisfactory one in that it does not make clear which of several possible grounds for the decision is the one to be relied on. It does, however, assert clearly enough that the plaintiff was in possession of the boat for one reason or another before it was found by the defendant company, and that it made 'no difference' in these circumstances that the plaintiff was not aware of the existence of the boat.[2]

South Staffordshire Water Company v. *Sharman*[3]

Sharman was employed by the plaintiffs to clean out a pool on land owned and occupied by the plaintiffs. He found certain gold rings in the mud at the bottom of the pool. It was held that the plaintiff company was in first possession of the rings, and that Sharman therefore had acquired no possessory title to them as against the plaintiff.

Willey v. *Synan*[4]

The boatswain of a ship found some coins on board during the voyage. When the ship arrived at port the coins were delivered to the collector of customs. In an action against the collector by the boatswain who found the coins, it was held that the boatswain had not made out his claim. On appeal two members of the court were prepared to hold[5] that the boatswain had never had possession of the coins because he had found them in the course of his employment and his finding of them put them in the possession of his employers.[6]

Hannah v. *Peel*[7]

The plaintiff, a soldier, found a brooch in a house where he was billeted. The house had been requisitioned at the beginning of the 1939–45 war and, it may be supposed, both at the time of and for some time before the finding of the brooch the house was in the possession of the Crown. The Crown made no claim to the brooch. The defendant was the owner of the house but he had never gone into physical occupation of it before it was

[1] (1886), 33 Ch. D. 562.
[2] At 568–9.
[3] (1896), 2 Q.B. 44.
[4] (1936), 57 C.L.R. 200.
[5] Rich and Dixon JJ.
[6] And see *McDowell* v. *Ulster Bank* (1899), 33 Ir. L.T. 225.
[7] [1945] 1 K.B. 509.

requisitioned for the army. It was held that the plaintiff was entitled to the brooch as against the defendant, the owner of the house—that is, the owner of the house had never been in possession of the brooch before it was found. In the course of the judgment stress was laid on the two points:

(*a*) that the brooch was on the surface and was not embedded in the land, and
(*b*) that the owner of the house had never at any stage gone into physical occupation of it before the brooch was found.

Grafstein v. *Holme & Freeman*[1]

An employee of a storekeeper found a locked box in the basement rubbish of the store premises. He brought the box to his employer who told him to put it aside on a shelf. Some two years later the employee opened the box and found that it contained some $38,000 in bank notes. It was held that the employer was entitled to the money, as against the employee who had found it, on the basis that the employer had, when the finding of the box had been communicated to him, taken lawful possession not only of the box but also of its contents. His possession of the money therefore was prior to any claim to possession that the finder may have made arising out of his discovery of the contents after opening the box. It is significant that the court came to this conclusion expressly without relying on any arguments which turned upon the master-and-servant relationship involved.

Armory v. *Delamirie*[2]

The plaintiff, a chimney-sweep's boy, found a jewel and took it to a goldsmith to find out what it was. The goldsmith refused to return it to him. It was held that as against the goldsmith the plaintiff was entitled to the jewel and he could maintain an action of trover against the defendant goldsmith.

Cases where possession follows title

It has already been noted that a person in possession is deemed to be the owner of the thing possessed save as against a person who can show a better title or who claims under a better title. Cases like *R.* v. *Rowe*, *Hibbert* v. *McKiernan*, *Elwes* v. *Brigg Gas Co.*, and *South Staffordshire Water Co.* v. *Sharman*[3] show that a person may be held to be in possession of a chattel merely because it is on land owned and occupied (possessed) by him.[4] It is clear of course that those

[1] (1958), 12 D.L.R. (2nd) 727.
[2] (1721), 1 Strange 505.
[3] All noted *supra*.
[4] Cf. *Hannah* v. *Peel* (*supra*).

cases rest upon a presumption, for it is obvious that the mere ownership and occupancy or possession of land does not necessarily carry with it the possession of chattels upon that land. If I drive my motor car upon the land of a friend possession of it does not pass to him while it is on his land. All those cases attribute possession to the owner of the land merely on the presumed non-existence of anyone with a better claim who, depending upon the circumstances, may have had and retained possession of it. Just as title may be attributed on the basis of possession, so may possession be attributed on the basis of title, and the following cases illustrate the kinds of relationships which may be involved.

In re Cohen[1]

Cohen and his wife had lived in a flat which was owned by the wife. After they both had died, a large sum of money was discovered hidden in various parts of the flat. There was no evidence as to the origin of the money, or as to when, or by whom, or for what purpose the money had been secreted. It was held that the lawful possession of the money must be attributed to the wife as the owner and one of the occupiers of the premises on which it was found, and that as between the estate of the husband and the estate of the wife it must be treated, therefore, as having been the property not of the husband but of the wife.

Ramsay v. *Margrett*[2]

In this case a wife agreed to buy from her husband some furniture and other chattels which were in the house occupied by both of them. She paid the purchase price agreed upon and her husband signed a receipt acknowledging the sale. The chattels concerned were not in any way moved from the positions in the house which they had previously occupied. In an action between the wife and an execution creditor of her husband's, it was held that the wife had possession of the goods (at least so far as the Bills of Sale Act, 1878, was concerned), that the situation of the goods was consistent with their being in the possession of either the husband or the wife and the law attributed possession to the wife who had legal title to them.

French v. *Gething*[3]

Furniture was given, by deed, by a husband to his wife, but remained in the matrimonial home undisturbed. A third person recovered judgment

[1] [1953] Ch. 88. Cf. *Moffatt* v. *Kazana*, [1968] 3 All E.R. 271; *Corporation of London* v. *Appleyard*, [1963] 2 All E.R. 834.
[2] [1894] 2 Q.B. 18.
[3] [1922] 1 K.B. 236.

against the husband and seized the furniture on a writ of execution against the husband alone. Under the Bills of Sale Act, 1878, a deed of gift, if the husband remained in possession of the furniture, was nothing more than an unregistered bill of sale and hence invalid. If the goods, on the other hand, were in possession of the wife then the judgment creditor would not be able to attach them. It was held that as the wife was the legal owner of the furniture, in the circumstances, she was the possessor of it also.

Landlord and tenant

It is trite law that it is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises concerned.[1] A tenancy relationship between landlord and tenant may be brought to an end in a number of ways other than by the mere expiration of the term. If the tenant surrenders possession to the landlord and that surrender is accepted, then the tenancy is at an end.[2] It should be noted it is not merely the right to possession but the delivery of possession itself that is comprehended by the rule and that only if the surrender of possession is accepted by the landlord does it work a surrender of the lease itself.[3] The tests of just what would be held to constitute an actual change of possession from tenant to landlord were the subject of litigation on a number of occasions and, *inter alia*, it was held that if the tenant returns the keys of the premises concerned and if the landlord accepts them with the intention of accepting and taking possession, then possession was effectively transferred.[4] But it was held that the landlord's consent to the delivery of the keys was essential to enable such a method of transferring possession to be treated as effective in law.[5] The central notion behind these cases was that the landlord had to be shown to be accepting and taking physical control over the premises once more to the exclusion of the tenant.

Under the early Rent Restrictions Acts in England[6] rents were controlled and the rights of landlords to evict tenants were restricted. If the landlord came into or obtained possession of premises which were controlled under that legislation, then the controls no longer applied. It was provided that the expression 'possession' should be

[1] H. A. Hill and J. H. Redman's *Law of Landlord and Tenant* (13th ed.), 11.
[2] Ibid. 473.
[3] *Cannan* v. *Hartley* (1850), 9 C.B. 634, n. (*a*).
[4] *Dodd* v. *Acklom* (1843), 6 Man. & G. 672; *Natchbolt* v. *Porter* (1689), 2 Vern. 112.
[5] *Cannan* v. *Hartley* (*supra*) at 648; *Furnivall* v. *Grove* (1860), 8 C.B. (N.S.), 496.
[6] See the Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 Geo. V, c. 32.

construed as meaning 'actual possession'. There are several reported cases concerned with the application of those provisions.[1]

Thomas v. *Metropolitan Housing Corporation Ltd.*[2]

It was held that the landlord had regained 'actual possession' when the tenant had dropped the key of the leased premises into the letter box at the office of the landlord's agent—even though the office was closed for the week.[3]

The case of *Wrightson* v. *McArthur and Hutchisons (1919) Ltd.*[4] provides an interesting comparison.

Certain goods, being set aside by the defendant as security for debt, were locked in a room in premises owned by and in the possession of the defendants and the key to that room was given to the plaintiff. It was held that on delivery of the key possession of the goods passed to the plaintiff and was subsequently retained by him although the goods remained upon the premises possessed by the defendants.[5]

Bailment

Bailment is a transaction that is *sui generis*. It often arises out of a contract, and in such a case the contractual terms may be all important—but analytically it falls under the heading of property. In the law of real property we distinguish between a contract which creates rights *in personam* and a conveyance which creates rights *in rem*. In the law of personal property the distinction is rather blurred, as the contract itself may transfer title. Bailment is really a transfer of an interest in property—the extent of that interest will depend on the nature of the bailment. In the gratuitous bailment revocable at will, the bailee's rights are subject to the pleasure of the bailor: in pledge, the pledgee has the right to retain the *res* till the debt is paid.[6]

[1] See e.g. *Jewish Maternity Society's Trustees* v. *Garfinkle* (1926), 42 T.L.R. 589; *Thomas* v. *Metropolitan Housing Corporation Ltd.*, [1936] 1 All E.R. 210; *Holt* v. *Dawson*, [1940] 1 K.B. 46; *Goodier* v. *Cooke*, [1940] 2 All E.R. 533. But note that the sections concerned were repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, § 3, and the Rent and Mortgage Interest Restrictions Act, 1939, § 2, Schedule 2.

[2] *Supra*.

[3] See the full discussion of these cases in Dias and Hughes, *Jurisprudence*, 316–21.

[4] [1921] 2 K.B. 807.

[5] Cf. *Ancona* v. *Rogers* (1876), 1 Ex. D. 285.

[6] Winfield, *Province of the Law of Tort*, 97.

That the bailee has a proprietary interest may be seen from the following considerations:

(*a*) Historically the bailee exercised nearly all the rights of ownership and as late as Blackstone it was thought that the bailor had only a chose in action.[1]

(*b*) The bailee has the remedies of trespass and trover against third parties, at least where the bailment is for a fixed term.[2]

(*c*) The bailee cannot at common law commit larceny of the *res* bailed,[3] and in some circumstances the owner may be guilty of larceny by taking the *res* from the bailee with intent to defraud.[4]

(*d*) The bailee has an insurable interest.

(*e*) Some bailees, such as the pledgee, have a common law (and in some cases statutory) right to sell on default.

(*f*) The common carrier, the innkeeper, and the artificer have a common law lien—which is a proprietary right.

Subject to the rights of the bailee the bailor retains his interest and the bailor may recover the *res*, even though the contract of bailment was illegal, provided that the bailor 'does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim'.[5]

In the last resort bailment rests on possession and upon the distinction between possession and title. Any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to directions antecedent or future of the other person.[6] It is important to remember that the gratuitous bailee at will, being in possession, may avail himself of possessory remedies such as trespass but that the bailor may also

[1] 2 *Comm.*, 453. J. B. Ames supported this view: 3 *Harv. L. R.* (1890), 313 at 345. This view is now rejected: *Bristol and West of England Bank* v. *Midland Rly. Co.*, [1891] 2 Q.B. 653.

[2] *Lotan* v. *Cross* (1810), 2 Camp. 464—*aliter* for gratuitous bailment at will.

[3] There is the exception of breaking bulk laid down in the *Carrier's Case* (1473), 64 Selden Society, 30. The other exceptions, based on fraud, really depend on the principle that fraud may negative the owner's consent to the passing of the property—this is based on the doctrine that no bailment is created.

[4] *R.* v. *Wilkinson* (1821), R. & R. 470; *Rose* v. *Matt*, [1951] 1 K.B. 810.

[5] *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*, [1945] K.B. 65 at 71. This decision raises difficulties which are discussed by C. J. Hamson, 10 *Camb. L. J.* (1949), 249.

[6] Pollock and Wright, *Possession*, 163. And see G. W. Paton, *Bailment in the Common Law* (1952).

avail himself of those remedies although he is not in possession but has merely a right to possession.

Miscellaneous cases

Ancona v. *Rogers*[1]

Goods owned by A were put by her agent in rooms in the house of B—with B's permission. The rooms were locked by A's agent and he took away the key. It was held that A was in possession of the rooms.

The Tubantia[2]

A salvage company had located and marked a wreck with buoys, and had spent large sums diving and cutting open the holds of the sunken ship. Work was suspended during the winter, to be resumed in the summer. The company was held to be in possession of the wreck.

Young v. *Hichens*[3]

Plaintiff had drawn his sean and net around a large number of fish but had left an opening of about forty feet which he was about to close with a 'stop' net. He had two boats in the opening with men splashing the water to frighten the fish away from the opening. It was held that at that stage of the operation the plaintiff had not reduced the fish into his possession.

Moors v. *Burke*[4]

Where legislation[5] provided that if any person is in actual possession of goods suspected of being stolen that person may be . . . etc., the facts were that Burke, who was employed on the wharves where he had the right to use a clothes locker, was found to have goods suspected of being stolen in his locker. He was held not to be in 'actual possession' of the goods because he shared the locker with another and so could not be said to have exclusive control of the goods concerned while they were in the locker.

Sloan v. *McGowan*[6]

Some trunks were deposited by the defendant in a warehouse for storage. The trunks contained goods which were suspected of being stolen. The trunks were locked and the defendant had retained the keys. The storeroom where they were contained goods deposited by other persons as well. It was held that the defendant was not in actual possession of the trunks within the meaning of the section of the Police Offences Act referred to in the previous case.

[1] (1876), 1 Ex. D. 285.
[2] [1924] P. 78.
[3] (1844), 6 Q.B. 606, 115 E.R. 228.
[4] (1919), 26 C.L.R. 265.
[5] Police Offences Act, 1915 (Victoria), § 40.
[6] [1926] V.L.R. 227.

Johnson v. *Kennedy*[1]

Some wheat suspected of being stolen was found on premises jointly occupied by a husband and wife. The wife claimed that some of the wheat was hers and the husband claimed the remainder. It was not clear which wheat was claimed by either. It was held that neither husband nor wife was shown to be in 'actual possession' of the wheat, or any part of it, within the meaning of the Police Offences Act section referred to above.

M'Attee v. *Hogg*[2]

Section 21 of the Salmon Fisheries (Scotland) Act, 1868, made any person who buys, sells, or exposes for sale, or has in his 'possession' salmon taken within a particular time, liable to a penalty. 'The allegation . . . is that these men were in possession of certain fish at a time when it was illegal to have them in possession. Of that they were convicted. . . . Take this case: Suppose five men went down together to the river to take fish and caught two, and were met when on the way up with the fish, would not all five men be in possession of the fish although some of them may never have touched them? They certainly would.' Per the Lord Justice-Clerk (Lord MacDonald), at p. 69.[3]

Collector of Customs (N.S.W.) v. *Southern Shipping Co. Ltd.*[4]

A consignment of tobacco was delivered to the defendant company for shipment out of the State of New South Wales. The defendant put the tobacco in a store, on the wharf from which shipment would be made, owned by the Maritime Services Board. The store was locked and the keys were lodged in the customs office which was itself locked overnight—so that the keys to the store were not available to the defendant except in an emergency. During the night (of Easter Saturday/Sunday) the store was broken open and the tobacco was stolen. Sec. 60 (1) of the Excise Act 1901–52 (C'wealth) casts certain liabilities upon persons who have . . . 'the possession, custody or control of excisable goods' . . . It was held (*inter alia*) that defendant did not lose possession of the tobacco when it was locked in the store and the keys locked in the customs office.

From those illustrative cases and rules, a surprising number of propositions about possession can be extracted—for example:

(i) Possession of a chattel is not acquired when mere physical control is taken; such acquisition waits upon knowledge by the taker of the nature of the thing acquired: see e.g. *R.* v. *Ashwell*; *R.* v. *Hudson.*

[1] [1922] V.L.R. 481.
[2] (1903), 5 F. (Ct. of Sess.) 67.
[3] Quoted by Burrows, *Words and Phrases Judicially Defined* (1944), iv. 309.
[4] (1962), 36 Aust. L.J.R. 15 (High Court of Australia).

(ii) The owner and possessor of land may be in possession of a chattel on his land in spite of the fact that he does not know the nature of the thing or even that it exists: see e.g. *Elwes* v. *Brigg Gas Co.*; *R.* v. *Rowe*; *South Staffordshire Water Co.* v. *Sharman.*

(iii) The owner and possessor of a shop is not in possession of chattels on the floor of his shop until he knows of their presence there: see e.g. *R.* v. *Moore*; *Bridges* v. *Hawkesworth.*

(iv) The owner of a house, who may well have been in possession of the house for the purpose of taking action against a trespasser, may not be in possession of a chattel found on the premises if he has never physically occupied the house: *Hannah* v. *Peel.*

(v) The owner and possessor of land may not be in possession of chattels on his land even though he owns those chattels—another person, not on the land, may be in possession of them: *Ançona* v. *Rogers*; *Wrightson* v. *McArthur & Hutchisons.*

(vi) The finder of a lost chattel obtains possession of it, and hence title to it as against those who have no claim to it prior to his: *Armory* v. *Delamirie.*

(vii) A finder of a chattel who finds in the course of his employment does not obtain possession of it—his master does: *Willey* v. *Synan.*

(viii) As between two or more persons who are in apparent physical control and enjoyment of the use of chattels, the owner of the chattels is in possession of them: *Ramsay* v. *Margrett*; *French* v. *Gething.*

(ix) As between two or more persons apparently in physical control and enjoyment of the use of land (which is owned by one of them) and of chattels upon that land, where ownership of the chattels is in doubt, the owner of the land is in possession of the chattels and hence is presumptively the owner of them: *Re Cohen.*

(x) To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others: *The Tubantia*; *Young* v. *Hichens.*[1]

(xi) But possession may be acquired of a thing, by transfer from another in possession, without any change in the physical control of the thing concerned: *Ramsay* v. *Margrett*; *French* v. *Gething.*[2]

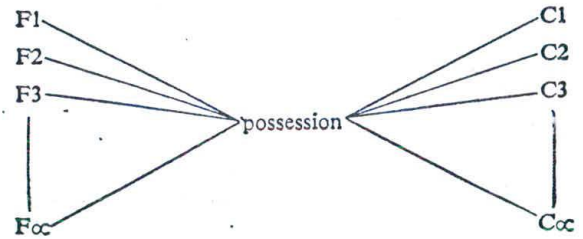
This list could be extended almost indefinitely.

[1] And cf. *Pierson* v. *Post* (1805), 3 Caines 175 (Supreme Ct. of New York); *Littledale* v. *Scaith* (1788), 1 Taunt. 243 n.; 127 E.R. 826; *Hogarth* v. *Jackson* (1827), M. & M. 58, 173 E.R. 1080; *Hamps* v. *Darby*, [1948] 2 K.B. 311.

[2] Cf. *In re Stoneham*, [1919] 1 Ch. 149; *In re Ridgway* (1885), 15 Q.B.D. 447; *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57.

§ 125. Analysis of Possession

It should be obvious that the concept of possession in the law is not a simple concept which can be satisfactorily described in terms of facts grouped into essential and differentiating criteria for the purposes of definition—at least not when the law is seen as a process for regulating relations between persons and for resolving disputes between them. Holmes saw one important aspect of the complicating factors concerned when he said: 'The word "possession" denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation. Contract, or property, or any other substantive notion of the law, may be analysed in the same way, and should be treated in the same order. The only difference is, that, while possession denotes the facts and connotes the consequences, property always, and contract with more uncertainty and oscillation, denote the consequence and connote the facts.'[1] But he produced, none the less, an over-simplification which, having shed some light, obscured further investigation. Thus one might describe 'possession' as a word which serves as a useful symbol to refer to the link between diverse conditions of fact and equally diverse consequences in the law—as Ross does with the concept of ownership.[2] A diagrammatic illustration can be given as follows:



(Where F = conditioning fact and C = legal consequences)

Then possession merely stands for the systematic connection that F1 as well as F2 - - - Fc entail some or all of the legal consequences C1 - - - Cc. As a technique of presentation this is expressed then

[1] *The Common Law*, 214–15.
[2] A. Ross, *On Law and Justice*, 171.

by stating in one series of rules the facts that 'create possession', and in another series the legal consequences that 'possession' entails.[1]

Some jurists, frustrated in the search for a conceptualized[2] group of facts which would take account of F1 – – – F∝, which Holmes had assumed to exist, turned to look for some unifying similarity in the legal consequences to be discovered in C – – – C∝. If it were possible to generalize the totality of legal consequences and find perhaps the 'essence' of the notion of possession in that generalization, then such a search might succeed in satisfying the ordering mind of the jurist. But even this is not possible, for the systematic connection between F1 – – – F∝ is not with the totality of C1 – – – C∝, but with some number of C's less than that totality. That is, there is not merely a diversity of F's defying the search for an essence, there is a diversity of C's also and the question is open at both ends. Thus the remedies that are said to be open to possessors are sometimes open to persons who are not in possession—e.g. the gratuitous bailor at will, the servant who has mere custody of her master's mackintosh.

Further, the systematic connection is circular in nature, because although the legal consequences are said to flow from the establishment of the conditioning facts, the characterization of the conditioning facts as constituting possession or not may well vary with the legal consequences. That is sufficiently established by comparing the trends of the larceny cases summarized above, the finding cases, the cases which go to the establishment of title, and the landlord and tenant cases, one with another. Again a man may be held to be in possession for one purpose where, for another, he would not be held to be in possession although the facts proved were unchanged. Consider, for example, the situation of the defendant in *Moors* v. *Burke* (*supra*) if he had been, on the facts shown, suing, for trespass to chattels, someone who had damaged the goods in his locker, or the position of the defendant in *Wrightson* v. *McArthur & Hutchisons* (*supra*) if that company had been proceeding against a person for trespass to the goods which had been contained in the locked room.

Some insight is gained by such a presentation as Ross outlines, but it does not go far enough. As Kocourek[3] demonstrates, the F's are conceptual in nature, and, lying behind them again, are extra-legal facts—the raw facts seen from outside the legal system as it were, which give rise to relations which must be regulated by the legal system.

[1] To adapt Ross's statement from ownership to possession.
[2] To use Ross's word.
[3] *Jural Relations*, ch. xx.

It is often said that: 'Possession is a fact to which the law attaches certain consequences.'[1] In the light of the preceding discussion it can be seen that such an assertion presented in the form of definition leads to confusion, for it invites definition of an Aristotelian kind by identifying the 'fact' by reference to essence and differentia, and the search for those is a fruitless one. At the same time, in priority of history and of logic, the fact comes before the law. A typical set of facts which called for rules of law to regulate relations arising out of those facts, provided the core notion around which the various uses of the word 'possession' in rules of law tend to group themselves. Thus, when a *res* which has never been in the physical control of any person is first 'taken' into physical control by some person for himself[2] in circumstances where resistance can be expected if others attempt to interfere with that physical control, we see something which in the ordinary use of English would be called 'possession' of the thing—and possession has been created. When, however, in a legal system rules are provided to protect such a possessor in his possession, very quickly something more is added than the mere attachment of legal consequences to the 'fact' of possession. Legal relations, rights, duties, powers, immunities, etc., are established between the possessor and all other persons.

When legal relations are established, in general they continue and are supported by the system which established them unless and until some change occurs in the facts or the law which is thought sufficient to disturb them. It is not surprising, therefore, to find that the facts which will be held to create possession for the first time[3] need not be shown to continue for possession to be held to continue—for once established it is the *right to possession* which becomes important so far as legal relations are concerned. If I leave my car unlocked outside my host's house while I dine, I am not in physical control of it nor can I be expected to resist interference with it, yet I do not lose possession of it in the eyes of the law (my legal relations are not changed with respect to my possession of it) even if I have left it upon my host's land. So the change of facts which will be held to bring about loss of possession is not the mere discontinuance of the facts which created possession in the first place. Loss of possession involves a change in pre-existing legal relations with respect to a thing and

[1] As in the second edition of this work at 453.
[2] As with the wolves and the mutton mentioned at p. 558 (*supra*).
[3] See e.g. *Littledale* v. *Scaith* (1788), 1 Taunt. 243 n., 127 E.R. 826; *Hogarth* v. *Jackson* (1827), M. & M. 58, 173 E.R. 1080; *Pierson* v. *Post* (1805), 3 Caines 175.

raises different questions from the creation of possession of a thing with respect to which there have been no pre-existing legal relations.[1]

Similarly the transfer of possession from one person to another may be effected by changing the legal relations of persons with respect to the thing, by means permitted by the legal system, without in any way changing the physical conditions affecting the thing or the persons concerned.[2]

Just as with the concept of ownership[3] then, the way out of the confusion engendered by the struggle between convenience and theory already outlined is to recognize that possession in the law always involves legal relations between persons. Where those relations are in dispute there will be various values, sometimes competing, to be considered when establishing the precise relations to be recognized or enforced by the legal system, and when fixing the tests by which the relations concerned are to be recognized. No doubt, almost always, the basic values suggested by Felix Cohen[4] will be involved: simplicity, certainty, promotion of the community's economy, economy of effort in administration, acceptability as consonant with a general sense of fairness. But the precise rules, which include possession in their expression, developed in different parts of the legal system are affected by further complicating factors, for different purposes are pursued in the development of different rules and those purposes affect the development of the rules themselves.

A mere glance at the cases and rules summarized in the preceding section reveals that the tests for recognizing possession vary in response (*inter alia*) to the pressures of different purposes being pursued in different parts of the law. Thus in the larceny cases there is the desire to see that people who take things to which they have no justifiable claim (who have the minds of thieves)[5] shall not escape retribution.[6] In cases like *Moors* v. *Burke*,[7] there is the desire to limit

[1] If, as seems obvious, possession once gained can be lost or abandoned absolutely (i.e. not to another person), then there can be a series of 'creations' of possession with respect to the one thing, but each 'creation' involves the establishment of fresh possessory relations where there were none immediately before the act of 'creation'—see *The Tubantia*, [1924] P. 78, but cf. *Johnstone & Wilmot Pty. Ltd.* v. *Kaine*, [1928] 23 Tas. L.R. 43.

[2] See *Ramsay* v. *Margrett* (*supra*), *French* v. *Gething* (*supra*).

[3] *Supra*, § 115.

[4] *Dialogue on Private Property* (1954), 9 Rutgers L.R. 357.

[5] *Hibbert* v. *McKiernan* (*supra*) per Goddard C.J.

[6] In contrast with a 'system-made pressure' of not so long ago when there was a tendency to find some technical ground to prevent very harsh punishment being inflicted for a minor transgression: see Kenny's *Outlines of Criminal Law* (17th ed.), § 221, pp. 238–9.

[7] *Supra*, 575 n. 4.

the harsh application of a statutory rule which cuts across traditional notions affecting the administration of justice in the criminal law. In the landlord and tenant cases there are varying pressures from times when there is a special need to protect the interests of tenants to other times when it is felt that landlords have been too restrictively treated by the law.[1]

In the finding cases the task facing the courts is really to allocate rights to physical control and enjoyment of things where no such control existed before in the parties concerned. The real nature of the task is obscured by the search for a pre-existing 'possessory title', and the assumption that the thing must belong to one or another of the parties prohibits a solution which may in some cases be the most desirable: an allocation of the future rights among those parties in shares.[2]

To the objective observer there is a further complicating factor. In most cases the court does not have all the facts before it, but only those facts which are known to the litigating parties and are thought by them to be relevant to their claims in the light of the legal authorities. Thus a variety of persons in different proceedings could be held to be in possession of a thing, without the actual extra-legal facts being changed at all, depending upon the nature of the litigation, and upon the information disclosed to the court about the relevant physical facts and about the legal relations affecting the persons concerned.

This can be demonstrated by supposing any number of possible sets of facts under any one of which different persons could be held to be possessors. For example, suppose A is in lawful possession of a large purse which he has in his pocket. The purse and contents are owned by B but B is not at the relevant time entitled to possession of them. B is married to C and is living with him in a flat owned by C. A, on visiting B and C one evening, because the purse is bulky and puts his clothes out of shape, hides the purse under his hat in C's cloakroom. On this information is there any doubt that in an issue as to possession, between a finder of the purse and A, A would be held to have been all the time in possession of it? As between C and a stranger who finds the purse, if information about A and B is not

[1] And further complicated by awareness of the special interests of persons in a position of near helplessness—e.g. the wives of tenants. See *Middleton* v. *Baldock*, [1950] 1 K.B. 657; *Errington* v. *Errington*, [1952] 1 K.B. 290; *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466; R. E. Megarry, '*The Deserted Wife's Right to Occupy the Matrimonial Home*', 68 *L.Q.R.* (1952), 337, 379.

[2] See Kocourek, loc. cit.

disclosed, C will be held to be in possession of it. If all suddenly die and the purse is found, then, if the only information disclosed is that C owned the flat, C will be held to have had possession of the purse. If in those circumstances the only information disclosed is that B owned the purse, then B will be held to have been in possession of the purse—and so on.

In the light of the preceding discussion, the discovery that the word 'possession' wears varying shades of meaning in different legal contexts should not surprise nor greatly disturb the student of law. The compulsive search for one unitary 'concept' of possession[1] or for one proper meaning of the word 'possession' is a profitless one.[2] The elucidation of the precise meanings conveyed by the word 'possession' may well be best pursued by the method urged by Professor Hart.[3] Thus given a rule that 'Delivery' means 'voluntary transfer of possession from one person to another',[4] to elucidate the term 'possession' or the expression 'transfer of possession' one should identify the conditions under which such a statement as 'A *transferred possession* to B and so effected delivery' is a true or valid statement in the light of the rules and authorities applicable within a given legal system.[5]

There are very many rules which use the word 'possession', however, and an account of the law of possession which limited itself to a series of precise statements as to the conditions under which all the possible uses of the word would be valid or invalid, would be so detailed and unwieldy as to be useless to all but practitioners faced with particular cases and searching for precise authority in a wilderness of single instances.[6] 'It is the task of legal thinking to conceptualise the legal rules in such a way that they are reduced to systematic order and by this means to give an account of the law in force as plain and convenient as possible.'[7] Where the law of possession is concerned, this task still awaits its master.

[1] Except perhaps as a move for sweeping law reform in the interest of tidiness and simplicity alone.

[2] 'Preoccupation with the search for some common feature is apt in either case to divert us from the important inquiries which are (1) what for any given legal system are the conditions under which possessory rights are acquired and lost; (2) what general features of the given system and what practical reasons lead to diverse cases being treated alike in this respect.' H. L. A. Hart, *Definition and Theory in Jurisprudence* (1954), 70 *L.Q.R.* 37, at p. 44.

[3] Loc. cit.; and see D. R. Harris, 'The Concept of Possession in English Law', *Oxford Essays in Jurisprudence*, ch. iv.

[4] Sale of Goods Act, 1893, s. 62—repeated in many Acts throughout the common law world, e.g. s. 3 (1) of the Goods Act, 1958 (Victoria—no. 6265).

[5] And see § 4 and § 18 *supra*.

[6] And then only if superbly indexed.

[7] A. Ross, *On Law and Justice*, 171; and see Hart, *supra*.

Even if, at any one point of time, the only completely accurate way to elucidate all the different uses of the word 'possession' in the law were to provide the unwieldy account indicated above, to do so and to deny the value of any more general statement would be to throw the baby out with the bath water. The living law involves processes of change and development. At few points are those processes irrational or arbitrary. They turn upon general ideas, however vague, which provide direction for thought in the absence of more precise and authoritative directions provided by the legal system.

With perhaps only one general exception, the idea, however vague and imprecise, which colours and gives a family relationship to all the uses of the word 'possession' in the law, is the recognition of a relation between persons where one has taken or has control of a thing and is to be protected in his enjoyment of it unless more is shown. The general exception, of course, is that the legislator[1] may stipulate a meaning or use for the word which takes it out of the family relationship. This is frequently done and for a variety of purposes: e.g. it may be desired to give to certain persons not in any then accepted sense 'in possession' legal benefits which are ordinarily afforded possessors only. Usually, however, the warning signal of a fiction will be given and the legislator will say that the persons concerned are to be *deemed to be* in possession.

§ 126. Mediate and Immediate Possession

Plures eandem rem in solidum possidere non possunt.[2] Must this well-worn adage be modified by a recognition of mediate and immediate possession? Salmond writes: 'One person may possess a thing for or on account of someone 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*.'[3] Salmond instances three types of mediate possession: firstly, that acquired through an agent or servant; secondly, that held through a borrower, hirer, or tenant where the *res* can be demanded at will; thirdly, where the chattel is lent for a fixed time or delivered as security for the repayment of a debt.

[1] Whether judge or legislature—more often, these days, the latter.
[2] *Dig.* 41. 2. 3. 5.
[3] *Jurisprudence* (12th ed.), 282.

The distinction between mediate and immediate possession is in many ways a useful one and is explicitly recognized by German law.[1] In English law, however, in all the cases mentioned, possession is granted to one person and one person alone: the common law needs no theory of mediate and immediate possession. In the master and servant relationship the servant does not possess the master's goods received from him, though the servant does possess goods given to him by a stranger, until by some act he has appropriated them to his master. In the case of bailor and bailee it is the latter who has possession.[2] In the case of landlord and tenant the tenant has possession of the land. Maitland has pointed out the confusion that arose in early English law because of the difficulty of applying the strict terminology of Rome to the intricacies of the feudal system.[3] Who was *dominus*, and who had *possessio*? To adapt Roman theory to feudal conditions, some distinguished between the *dominium directum* of the lord and the *dominium utile* of the vassal, the *possessio civilis* of the lord and *possessio naturalis* of the vassal. In modern English law the doctrine of the exclusiveness of possession is saved by a rather narrow distinction—the landlord is seised or possessed of the freehold and the tenant possesses the land.

It has already been noted[4] that it is an essential characteristic of a lease that the tenant should have exclusive possession. It is difficult to reconcile all the cases dealing with the distinction between tenants and licensees and between tenants and mere lodgers. In many of the infinity of possible sets of facts which can give rise to litigation, it is often difficult to decide whether or not the owner granted exclusive control to another—especially where neither party directed his mind to the notion of exclusive control at the time of the agreement.[5] The tenant's possession of the land is no empty figment: he desires and has the power to exclude the landlord during the currency of the lease, save in so far as a power of entry has been reserved. The landlord's interest in the freehold is evidenced by the existence of a written lease or the receipt of rent or both. A tenant has a sufficient possessory right to bring trespass against the landlord.[6] If furniture

[1] *BGB.* Art. 868. Cf. C.C., Art. 2228: 'Possession is the retention or enjoyment of a thing or of a right which we have or which we make use of, either ourselves or through another person who holds it or makes use of it in our name.'

[2] *Supra*, § 124.

[3] *Collected Papers*, i. 352.

[4] *Supra*, § 124.

[5] See e.g. the cases noted in H. A. Hill and J. H. Redman's *Law of Landlord and Tenant* (13th ed.) at 12–15 and 18. The courts treat the question as to whether exclusive possession was granted or not as one of fact.

[6] *Gordon* v. *Harper* (1796), 7 T.R. 9.

leased with the house is converted, the landlord cannot bring trover, for he has not a right to immediate possession; if they are stolen, he cannot describe the goods as his in an indictment for larceny.[1]

Confusion of terminology may lead to genuine misunderstanding. Plaintiff agreed to sell the defendant an orchard, described as being in occupation of A, and promised that the purchaser should have 'possession' on the day appointed for completion. The defendant refused to complete unless the tenant was ejected, but the court found against him on the ground that there was a broad distinction between possession and occupation.[2]

Difficulties have already been noted, however, in the adoption of a theory that the common law always regards possession as exclusive. The law sometimes allows possessory remedies to those admittedly not in possession.[3] Thus where there is a simple bailment determinable at will, either the bailor or the bailee may maintain trespass against a stranger. The theory that the bailee does not acquire possession in such a case does not help, for on that basis the bailee would be unable to sue in trespass. Similarly a servant has been allowed to sue for trespass to the goods of his master.[4]

Again, as has been seen,[5] the larceny cases give rise to similar difficulties. It is well established that an indictment may lay the 'property' of the goods in the real owner, a bailee or a servant—and this use of the term 'property' is practically equivalent to possession.[6] Hale places the rule on a reasonable basis—the felon may be indicted for stealing the goods of either the bailor or the bailee, and 'it is good either way' for the property is still in the owner and the bailee has possession.[7] But the language of the books has not always been as uniform as this. When a parcel was stolen from a stage coach, Hotham B. allowed the property to be laid in a servant driving the coach, but he did so on the practical grounds that it would be

[1] *R.* v. *Belstead* (1820), R. & R. 411; *R.* v. *Brunswick* (1824), 1 Mood. 26.

[2] *Lake* v. *Dean* (1860), 28 Beav. 607. And see the awkward case of *Fairweather* v. *St. Marylebone Property Co. Ltd.*, [1962] 2 All E.R. 288 (H.L.).

[3] We can hardly say that *anyone* with a right to immediate possession can bring trespass, for that conflicts with too many established rules. 'It is difficult to see how there can be a forcible and immediate injury *vi et armis* to a mere legal right': Pollock and Wright, *Possession*, 145. If, in general, a wrong to a mere right of possession were sufficient for trespass and theft, why is conversion by a bailee not trespass and theft? (op. cit. 146).

[4] *Moore* v. *Robinson* (1831), 2 B. & Ad. 817. Winfield, *Text-Book of the Law of Tort* (4th ed.), 309, suggests that this case would probably not be followed today, as it depended on the view that the master of the ship was a bailee.

[5] *Supra*, § 124.

[6] Pollock and Wright, op. cit. 139.

[7] *Pleas of the Crown*, i. 513; ii. 181; approved by Parke B. in *Manders* v. *Williams* (1849), 4 Ex. 339 at 344–5.

inconvenient to require the names of all the owners of a stage coach to appear in the indictment.[1] It is authoritatively stated that this case depended on special considerations,[2] but in 1929 the Court of Criminal Appeal carried the doctrine even further.[3] The prisoner forced a maid to deliver to him her master's coat and it was held correct to lay the property in the servant. This decision has been severely criticized. If the maid has possession of her master's coat which had not been delivered to her but was hanging in the hall, then logically a servant should have possession of goods delivered to him by the master—yet it is well known that the rule is otherwise. Does this case sweep away the 'six hundred year old distinction' between a servant's custody and possession?[4] It can be explained only by saying that, when it is a question of determining whether the prosecutor has the property, the court allows even custody to be treated as possession; whereas when it is a case of theft by the servant, the law is stricter. It is certainly disconcerting, after having emphasized that the servant has only custody of the master's goods delivered to him by the master, to explain in the next breath that when it comes to indicting a thief, the law allows the servant to be regarded as in possession.

These difficulties merely reveal that some of the rules of law as authoritatively stated may be mutually inconsistent in some of their detailed applications and so need to be embroidered with exceptions, and that 'possession' may be used in different contexts for different purposes and with different meanings. They do not force us to adopt the classification of 'mediate' and 'immediate' possession.

Prescription. Is it necessary to use the concept of mediate and immediate possession to explain the operation of the rules of prescription as between landlord and tenant, bailor and bailee? Salmond suggests that

> 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 . . . prescription will continue to run in his favour. . . . For all the purposes of the law of prescription mediate possession in all its forms is as good as immediate. . . . 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.[5]

[1] *R.* v. *Deakin* (1800), 2 Leach 862.
[2] Pollock and Wright, op. cit. 139.
[3] *R.* v. *Harding* (*supra*, § 124).
[4] Note in 46 *L.Q.R.* (1930), 135.
[5] *Jurisprudence* (12th ed.), 284, 286.

Another way of explaining the same rules is to emphasize that the tenant possesses the land and the landlord the freehold. The tenant, although he has the *animus* to exclude the landlord from the land during the term of the lease, has no intent to possess the freehold. The only way in which the landlord can show intent concerning, and physical control of, the freehold is to secure written evidence of his right (e.g. a lease) and to exact rent. If a stranger exacts rent, then he is showing an intent adverse to the interest of the freeholder and, in the absence of steps by the landlord, time may begin to run against the latter. If there is no lease in writing, and the tenant refuses to pay rent, he is showing not only an intention to enjoy possession of the land but also a desire to exclude the landlord from the freehold itself. If the latter neglects either to obtain written acknowledgement of his title, or to exact rent, then time may begin to run in favour of the tenant. Similarly, if I have seized land, time may continue to run in my favour if I place a tenant on the land, for the tenant's intent is confined to exclusive control of the land during the currency of the lease and is not directed to the freehold. The rules of English law are not as simple as is here suggested,[1] but they can be explained as easily without, as with, the doctrine of mediate and immediate possession.

Turning next to bailment, the rules are specific. The bailee has full possession but recognizes the title of the true owner. Conversion can take place only if the bailee does some positive act inconsistent with the title of the true owner. Technically prescription does not apply to this case, but only limitation of actions. The bailor may sue for conversion within six years of the act complained of, or, if he chooses, he may, even after the action in conversion is barred, make a formal demand for the return of the *res*, and on refusal by the bailee, sue in detinue.[2] The Limitation Act, 1939, has, however, changed this rule, and now where there are successive conversions time runs from the first, provided the chattel has not returned into the possession of the owner.[3]

In order to avoid misunderstanding, it is emphasized that it is not suggested that the distinction between mediate and immediate possession could not be useful in an attempt to impose some general order upon the variety of rules relating to possession. The only point the

[1] G. C. Cheshire, *Modern Real Property* (5th ed.), 821.
[2] *Wilkinson* v. *Verity* (1871), L.R. 6 C.P. 206; *Goulding* v. *Vict. Rly. Commissioners* (1932), 48 C.L.R. 157.
[3] Limitation Act, 1939, 2 & 3 Geo. VI, c. 21, § 3.

writer is making in this Section is that the rules of English law can be explained without such a doctrine.[1]

[1] Many cases can be cited in favour of Salmond's approach, e.g. the dicta of Crompton J. in *Marvin* v. *Wallis* (1856), 6 El. & Bl. 726. But this was in reality a case of constructive delivery of possession. The same applies to *Elmore* v. *Stone* (1809), 1 Taunt. 458. The point is discussed in *Dollfus Mieg Co.* v. *Bank of England* (1950), 66 T.L.R. 675.

REFERENCES

DIAS, R. W. M., and HUGHES, G. B. J., *Jurisprudence* (1957), ch. xi.
GOODHART, A. L., *Essays in Jurisprudence and the Common Law*, 75.
HARRIS, D. R., 'The Concept of Possession in English Law', *Oxford Essays in Jurisprudence* (1961).
KOCOUREK, A., *Jural Relations* (2nd ed.), ch. xx.
MAITLAND, F. W., *Collected Papers*, i. 329.
POLLOCK, F., and MAITLAND, F. W., *History of English Law*, ii. 30–46.
—— and WRIGHT, S., *Possession in the Common Law*.
RIESMAN, D., 52 *Harv. L. R.* (1939), 1105.
SAVIGNY, F. K. VON, *Possession* (trans. E. Perry).

XXIII

THE LAW OF PROCEDURE

§ 127. Introduction

One of the orthodox classifications is that which distinguishes between substantive and procedural law, but it is difficult to draw a clear line between them. One suggested test is that substantive law determines rights, procedural law remedies; this, however, is inaccurate.[1] Firstly, the whole law of remedies does not belong to procedure, and secondly, there are rights in the realm of procedure just as in that of substantive law. Thus, to take the first point, substantive law itself recognizes both antecedent and remedial rights, i.e. those which exist independently of wrongdoing and those that arise from the wrongful act or omission of another.[2] A power to recover damages is a remedial right, but it does not fall under the heading of procedure. If we adopt the view of those realists who deny that antecedent rights exist at all (since in effect the law consists only of remedies), then any definition of procedure which described it as covering all remedies would entail almost the total disappearance of substantive law. Secondly, the law of procedure creates rights—or more accurately claims, liberties, powers, and immunities—just as does the substantive law. There is a claim to demand an answer which a witness is under a duty to give, the privilege of a witness to refuse to answer a question which might incriminate. The distinction between substance and procedure must be sought elsewhere than in the division between right and remedy.

English usage sometimes speaks of practice and procedure, sometimes of practice in a wide sense as including 'all the proceedings by which a cause is brought to judgment and execution',[3] sometimes it distinguishes practice, pleading, and evidence. Procedure has been defined as the body of rules that govern the process of litigation:[4] practice as the rules 'that make or guide the *cursus curiae*, and regu-

[1] Salmond, *Jurisprudence* (11th ed.), 503. This passage is changed in 12th ed. 461.
[2] *Supra*, § 65.
[3] Per Willes J. cited Lord Chelmsford, *A.-G.* v. *Sillem* (1864), 10 H.L.C. at 768–9.
[4] Salmond, op. cit. 461.

late the proceedings in a cause within the walls or limits of the court itself'.[1] On this usage procedure is a wider term than practice: the former covers everything from the issue of the writ to execution, the latter only the proceedings in an actual trial. A Victorian court held that the phrase 'practice and procedure' covered the manner in which a decree for the dissolution of marriage is made and the period to elapse before it is made absolute.[2] To define *procedure* as court *process* is really a description of it in terms of itself, but it is difficult to discover any purely logical test that will make a clear-cut division. Thus the rules of evidence regulate the process of the court, but a power to make rules governing procedure has been held not to cover the rules of evidence.[3] Judges continually advert to the distinction between 'substance' and 'procedure', between 'right' and 'remedy', but they never venture upon a general principle which affords a test for deciding into which of these categories a given rule falls.[4] Indeed, some authors deem it the safer course to demonstrate the meaning of procedure by a wearisome enumeration of the particular rules which have been held to fall under that head. It is impossible to make valid generalizations, because in different systems of law the line is drawn now here, now there. Moreover, if we look at the course of history, we see that in the middle period substantive law is inextricably intertwined with procedural formalities. The method by which a right can be enforced naturally determines to some extent the nature of the right. At some periods procedure seems to become almost an end in itself and 'substantive law has at first the look of being gradually secreted in the interstices of procedure'.[5] Even in modern England although the 'forms of action are dead . . . their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling'.[6] Today we regard limitation of actions as belonging to procedure, but the barring of an action for conversion results in an important restriction of the true owner's power. Whether I possess a right of appeal or not is sometimes regarded as a question of substantive law, but the failure to carry out the necessary procedural formalities may destroy my right. If a right can be proved in only one way, it is easy (and almost

[1] Per Lord Westbury, *A.-G.* v. *Sillem* (1864), 10 H.L.C. at 723.
[2] *White* v. *White*, [1947] V.L.R. 434.
[3] *Wm. Cook Pty. Ltd.* v. *Read*, [1940] V.L.R. 214.
[4] Cheshire, *Private International Law* (6th ed.), ch. xviii. Cf. A. V. Dicey, *Conflict of Laws* (7th ed.), R. 204; per Lush L.J., *Poyser* v. *Minors* (1881), 7 Q.B.D. 329 at 333; note in 47 *Harv. L. R.* (1933), 315.
[5] Maine, *Early Law and Custom*, 389.
[6] Salmond, 21 *L.Q.R.* (1905), 43.

true) to say that the right does not exist unless that proof is available.[1] If an action can be brought on a certain type of contract only if it is in writing, then we are tempted to say that any contract not thus evidenced is void in substantive law. But this is not quite accurate, as is demonstrated by decisions in Conflict of Laws. In other cases, rules of substantive law masquerade as rules of evidence. Thus there is a conclusive presumption of law that no child under eight can possess the *mens rea* necessary for a criminal conviction—this is undoubtedly a rule of substantive law relating to the criminal liability of minors.[1]

Yet we cannot take the easy course of denying that there is any real difference between substance and procedure, unless we are willing to jettison many important rules. Thus in Conflict of Laws, matters of procedure are governed by the *lex fori* and matters of substance by the proper law of contract. An accurate delimitation of what falls under the head of procedure is necessary if injustice is to be avoided. If too wide a definition is given to procedure, a remedy may be refused on a contract which is valid by its proper law. In England the Statute of Frauds requires certain contracts to be in writing before an action can be brought. To prevent the statute being used as a protection for sharp dealing this section has been held to relate to procedure only. But what may be a reasonable rule for English contracts produces anomalous results when it is applied to a contract valid by its proper law, for it is impossible to sue in England unless the procedural requirements of the *lex fori* are observed.[2] Cheshire[3] approves the dictum of Cook[4] that the line between substance and procedure cannot be drawn in the same place for all purposes.

Again, Order 54 R. 23 of the Rules of the Supreme Court laid down that appeals in practice and procedure should lie, not to the Divisional Court but directly to the Court of Appeal—hence it was necessary to evolve definite rules by which the limits of practice and procedure could be determined. But, although in these two cases practical results flow from the definition of procedure adopted, it cannot be said that satisfactory tests have been evolved.

The drawing of precise distinctions is always a difficult matter for the law. Few would deny that there is a distinction between night and day, between minority and maturity, and yet in each case it is so

[1] Salmond, *Jurisprudence* (12th ed.), 463.
[2] *Leroux* v. *Brown* (1852), 12 C.B. 801.
[3] *Conflict of Laws* (3rd ed.), 829.
[4] *Logical and Legal Bases of the Conflict of Laws*, 189.

hard to determine the precise moment of transition that arbitrary rules have been created to determine the exact boundary line. In the definition of burglary night is defined as the period between 9 p.m. and 6 a.m., and minority ends at eighteen years. Unfortunately no statute has drawn definite lines to mark the boundaries of substance and procedure. The modern revolt against authority is leading many to reject the most useful classifications merely because they are difficult to formulate.[1] The legal distinction between substance and procedure is not an *a priori* one, but is pricked out by each system along the lines that appear expedient. Yet, although based on pragmatic tests, the division between substantive and procedural law is an essential one, as can be shown by a practical example. In a question concerning conflict of laws there is sometimes only one point of substance, but many problems in procedure. The convenience of leaving these questions to be determined according to *lex fori* shows the absurdity of rejecting the distinction between substance and procedure.

The practical problems which face a plaintiff are the choice of a court, a decision as to the most appropriate form of action, the issue of a summons to get his opponent before the court, and the most skilful use of the rules governing pleading and proof in the hope that he may secure judgment and, if necessary, execution. Once judgment has been given the question of the possibility of appeal will arise. Yet not all these problems can be regarded as falling under the head of procedure. Whether an action lies in equity or at common law, in England or in France, is determined by substantive law. The rules that mark the boundaries of contract and tort have in England been influenced by procedural requirements, but they can hardly be placed under the law of procedure. Forms of action are difficult to classify: the detailed rules belong to process, the broad distinction between trespass and case to substantive law. In the last analysis it is a question of convenience precisely where the line is drawn.

The functional test to which all procedural rules should be subjected is their practical efficiency in providing machinery for the prompt and reasonably cheap settlement of disputes on lines that do justice to both parties.[2] Jurisprudence has often failed to realize the practical importance of procedural problems. 'The substantive

[1] E. Ailes, 39 *Mich. L. R.* (1941), 392.

[2] For a comparative study of the rules of procedure in America and Germany, see E. H. Schopflocher, *Wisconsin L. R.* (1940), 234.

law which defines our rights and duties is, of course, important to all of us, but unless the adjective law of procedure is a working machine, constantly translating these obligations in terms of Court orders and actual execution, the substantive law might just as well not exist.'[1]

§ 128. Summons

In modern times the efficient powers of the State render comparatively simple the problem of forcing another to submit to the jurisdiction of the court; but in primitive law there was no judicial machinery which could be used to enforce the appearance of a reluctant defendant. Thus, at the time of the Twelve Tables, a claimant orally requested his opponent to follow him to the court and, in a case of refusal, a claimant could use physical force, unless a *vindex* could be found who would guarantee the appearance of the defendant.[2] So long as even a vestige remains of the theory that litigation depends on consent, the court is faced with difficulty even after a defendant has appeared, if he refuses to co-operate. What has solved this problem is the threat of judgment by default against a defendant who, after due notice, fails to appear or to take a necessary procedural step. Today, in a civil case, a defendant is not threatened with arrest or other dire penalty if he does not enter an appearance, but only warned that judgment may be given against him.

§ 129. Pleading and Practice

The first step, then, is to serve the defendant with a writ, notifying him of the claim that is to be made against him. A modern action may be divided into two parts: the procedural steps necessary before the trial opens and the actual trial itself. The details of every system vary greatly. In Rome a trial was divided into the preliminary procedure before the praetor and the final stage where the facts were found and judgment given by a private *iudex*. On the Continent today, sometimes the evidence is gathered and committed to writing in preliminary proceedings and the judge who ultimately tries the action may see none, or only a few, of the witnesses face to face. In England, in general, all evidence is given in open court.

[1] C. P. Harvey, 7 *Mod. L. R.* (1944), 42 at 49–50; and see J. Frank, *Courts on Trial*, where the late judge analyses the defects of the present system and advocates a series of reforms.

[2] H. F. Jolowicz, *Historical Introduction to Roman Law*, ch. xii.

The purpose of pleading is twofold: firstly, to eradicate (as far as possible) irrelevancy and to isolate the issues which are in dispute; secondly, to give reasonable notice to the other party of the claim against him so that he may prepare his reply. The rules of pleading should aim at ease of trial, reasonable cost, and justice to both parties. If the rules become too strict, the pitfalls of pleading may prevent the merits of the issue from being discussed: if the rules are too elastic, the result may be confused trials, unfair surprise, costly adjournments, and many appeals. To effect a delicate balance between precision and flexibility, between technicality and regard for the practical issues, is no easy task. An interesting contrast is provided by the rules of procedure in equity and the common law. Equity aimed at perfection and thus 'precluded itself from attaining the more possible, if more mundane, ideal of substantial justice'.[1] Eager to decide on the real merits of the case, the Chancellor allowed an intolerably slow procedure, advantage of which was taken by those who had no defence and merely wished to postpone the evil day of reckoning. Costs multiplied and sometimes exhausted the whole estate. On the other hand, the common law procedure was technical and archaic and frequently justice was defeated by skilful use of the rules of special pleading; but the rules were directed to a speedy decision of issues and costs were less burdensome than in equity

Those who have listened to a verbal quarrel between two neighbours know how far the discussion may range from the point which was the first matter of dispute. Even where the issue is fairly simple, such as the question whether a motor car driver was guilty of negligence, a trial would be long if every fact had to be proved. Hence the convenience of allowing the plaintiff to formulate his claim, the defendant to reply and ultimately for the parties to 'agree to differ' on one or more points. Firstly, in reply to a claim, a defendant at common law may traverse the allegations of the plaintiff, i.e. deny the truth of his assertions. This raises an issue of fact. Secondly, the defendant may confess and avoid, i.e. admit that the plaintiff's facts are true but assert that they are only half the story. A defendant sued for negligent driving may admit the negligence but plead that the plaintiff really brought about his own injury by contributory negligence; or, if sued for breach of contract, a defendant may admit the making of a contract and its breach, but plead facts which

[1] Holdsworth, *History of English Law*, ix. 373. For a critical survey of the modern problem, see S. P. Simpson, 53 *Harv. L. R.* (1939), 169.

rendered it impossible to perform the contract. Thirdly, instead of raising an issue of fact, the defendant may object in point of law—plead that, even if the plaintiff's story is true, no legal liability has been created.[1]

The defect of the old common law rules of pleading was that they were too narrow, and a party was forced to make an awkward choice since 'he could not both demur and plead, nor could he traverse any allegation to which he also pleaded by way of confession and avoidance'.[2] The rules had the merit of simplifying the contest by narrowly isolating the material issues, but in practice they frequently led to a decision on a technicality, the real merits of the case being unconsidered. The Judicature Commissioners in their report of 1868–9 advocated a system 'which combined the comparative brevity of the simpler forms of common law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence'.[3] This is the basis of the modern English rules of pleading.

In England today what may be called 'pre-trial procedure' is becoming increasingly important. The slow majesty of a trial with its rigid rules is neither necessary nor desirable in all cases, and actually, out of every hundred actions commenced by writ in the Supreme Court, only one comes to trial.[4]

§ 130. Proof

The problem of proof is always a difficult one. For a primitive court it is wellnigh insoluble owing to lack of ability to analyse the evidence, the prevalence of perjury, and the natural fear of any court which lacks an assured position lest some powerful member of the community should be offended by its decision. Hence comes escape from the judgment of man to that of God—the ordeal which has played such a great part in European legal history.[5] The ordeal by oath may be useful, if it is used where there is no evidence, or where the facts are exclusively within the knowledge of one party, but there is always the danger that a weak court may resort to it, even where

[1] The demurrer, as it was termed.
[2] W. B. Odgers, *Principles of Pleading and Practice* (17th ed.), 128.
[3] Cited Holdsworth, *History of English Law*, ix. 407.
[4] Master W. Valentine Ball, 51 *L.Q.R.* (1935), 22–3.
[5] A. S. Diamond, *Primitive Law* (2nd ed.), ch. xxx.

there is evidence, in order to avoid either the difficulty of deciding or the danger which may result from a decision against a popular figure.[1] Compurgation (or wager of law) was theoretically available in England in the actions of debt and detinue till 1833—the party, on whom lay the burden of proof, took the oath together with twelve witnesses who swore that he was to be believed. This naturally gave an opening for 'licensed perjury', which was frequently used to defeat just claims.

There were forms of ordeal other than the oath—the red-hot iron, water, swallowing the consecrated bread—and their exact operation still puzzles us today. The effectiveness of some forms depended on the existence of a feeling of guilt; for example, fear dries the mouth and renders it more difficult to swallow a dry morsel of bread. But a psychological explanation cannot be applied to all; thus in the ordeal by water, two different theories appear in history: according to the first the accused was guilty if he floated (the water-god rejected the guilty) and innocent if he sank; the second acquitted the prisoner only if he floated. One wonders whether the unfortunate prisoner did not suffer in either case on the first theory. Such evidence as there is shows that many escaped the ordeal, though today we would think that the ordeal by hot iron would be difficult to pass if rigorously administered.[2] A recent case in the Privy Council shows that the 'witch doctor' is not averse from aiding the test of heaven by deft manipulation of a harmless substance and arsenic,[3] and probably those who administered the ordeal were not always impartial or unaffected by the result. The ordeal was not confined to criminal cases.

In modern times proof is made by means of the production of evidence—which term 'as used in judicial proceedings, means the facts, testimony and documents which may be legally received in order to prove or disprove the fact under inquiry'.[4] Evidence may be either oral (words spoken by a witness in court), documentary (the production of admissible documents), or material (the production of a physical *res* other than a document). A witness's description of a

[1] Diamond, op. cit. 383.

[2] 'Such evidence as we have seems to show that the ordeal of hot iron was so arranged as to give the accused a reasonable chance of escape': Pollock and Maitland, *History of English Law*, ii. 596. C. K. Allen, *Legal Duties*, 262, asks: 'How was it arranged? By corruption of the officiating clergy? Thaumaturgy always has its commercial aspects. Perhaps this was in the mind of William Rufus when, after fifty men sent to the ordeal of iron had all escaped, he waxed satirical about the judgments of heaven.'

[3] *Fakisandhla Nkambule* v. *R.*, [1940] A.C. 760.

[4] S. L. Phipson, *Evidence* (9th ed.), 2; cf. J. H. Wigmore, *On Evidence* (3rd ed. 1940), vol. i, § 1; R. Cross, *Evidence*, ch. i.

murder which he witnessed is oral evidence; a blackmailing letter which the victim sent to the prisoner is documentary evidence; the knife with which the murder was committed is material evidence.

The task of a claimant is to prove such facts in issue as are necessary to his claim and of which he bears the burden of proof. Direct evidence proves the existence of a given thing or fact either by the production of the thing or by the oral evidence of a witness (or the admissible declaration of a person not before the court), who has seen the thing or observed the fact.[1] But, if only direct evidence could be accepted, courts would be seriously handicapped. In the criminal law, the more serious the crime, the less likely is direct evidence to be available because of the precautions which the criminal will take. In the civil law it is unlikely that such an act as adultery can be proved by direct evidence. Thus a rule that no cardinal was to be convicted of adultery save on the evidence of seven eyewitnesses meant, in effect, immunity for the cardinal.[2] Hence circumstantial evidence is admitted—other facts are proved from which the existence of the fact in issue may either be logically inferred, or at least rendered more probable. To prove that a prisoner consumed five double whiskies during the afternoon is not direct evidence that he was drunk at four o'clock when he drove negligently, but it aids in rendering the fact of drunkenness more probable. There has been much dispute concerning the relative weight of direct or circumstantial evidence, but the truth is that either form may be of very little or very great cogency. The direct evidence of witnesses may be most conflicting, sometimes because of perjury, sometimes through honest mistake. Thus in the *Tichborne Case*, where a butcher claimed to be a long-lost baronet, 212 witnesses appeared for the Crown and 256 for the defence. Four large groups gave the following evidence: (1) the claimant is not Roger Tichborne; (2) he is Arthur Orton; (3) he is not Arthur Orton; (4) he is Roger Tichborne.[3] On the other hand, circumstances may mislead or false clues may have been laid by the wrongdoer to cast suspicion on another.[4]

Admissibility. In general, the law uses the general test of logical relevance in determining what is admissible, but it excludes certain forms of evidence which would be used by the layman in reaching a

[1] J. H. Wigmore, op. cit., §§ 24 and 25.
[2] C. S. Kenny, *Criminal Law* (17th ed.), 481 n. 5.
[3] Ibid. 431, discussing *Reg.* v. *Castro* (1874), L.R. 9 Q.B. 350.
[4] Kenny, op. cit. 432: 'as when Joseph's silver cup was placed in Benjamin's sack, or when Lady Macbeth "smeared the sleeping grooms with blood".'

conclusion. 'Relevant' means what logically is probative (i.e. will aid in proving the desired conclusion), 'admissible' what is legally receivable in a court of law.[1] Logically, any evidence should be allowed which directly proves or disproves the fact in issue, or else proves facts rendering the existence of facts in issue more probable or improbable. When we say that one fact is evidence of another, we mean merely that it furnishes a premiss or part of a premiss from which the existence of the other fact is a necessary or probable inference, and 'judicial evidence is for the most part nothing more than natural evidence restrained or modified by rules of positive law'.[2] The English rules are stricter than those of other systems in ruling out certain types of evidence, this being due partly to the fact that the jury was so extensively used as the fact-finding body and judges feared that the jury might place undue weight on certain types of evidence which are notoriously untrustworthy. Thus hearsay is excluded,[3] since the person who made the original remark cannot be cross-examined and it is well known that a story 'grows in the telling'. The average man in determining whether to suspect another of a crime examines carefully his past record and character, but English rules exclude, in general,[4] proof that the prisoner had previously been convicted of crime in order that the jury may not 'give a dog a bad name and hang him'. Again, the average man considers the opinions of others as well as their testimony concerning facts which they observed, but English law generally debars a witness from expressing mere opinion unless he possesses expert knowledge on the point at issue.

Method and burden of proof. In every mature system there are technical rules concerning the method by which certain facts should be proved. Of some facts no proof need be given since they are assumed to be within the judicial knowledge of the court—in English law, however, this class is limited to facts so notorious that to require proof would be merely a waste of time. Thus there is no need to prove

[1] S. L. Phipson, *Evidence* (9th ed.), 57; cf. J. H. Wigmore, op. cit., §§ 9, 10, 12, and 28.

[2] W. M. Best, *Evidence*, § 34, cited Phipson, op. cit. 50. But in some cases the law may admit evidence that logically seems irrelevant.

[3] There are exceptions, e.g. certain types of dying declarations; and see Z. Cowen and P. B. Carter, *Essays on the Law of Evidence* (1956), ch. i. See also the Civil Evidence Act, 1968, and the Criminal Evidence Act, 1965, where the problem of business and computer records is dealt with.

[4] But similar facts may be proved to rebut a defence of ignorance, accident, mistake, etc.: *Makin* v. *A.-G. for N.S.W.*, [1894] A.C. 57; and see Cowen and Carter, op. cit., ch. iv.

the imputation of the term 'frozen snake' in a libel action.[1] But of other facts evidence must be given—in general, the burden of proof lying on him who in substance asserts as part of his plea the affirmative of any issue. 'Omnia praesumuntur pro negante.'[2] 'Ei qui affirmat non ei qui negat incumbit probatio.' This is an ancient rule founded on the common-sense approach that the proof of a negative is extraordinarily difficult and should not be forced on a person without very strong reasons.[3] In a civil case a reasonable preponderance of probability is sufficient for a verdict,[4] but in a criminal case the Crown must prove the guilt of the prisoner beyond reasonable doubt.[5] The Court of Appeal in *Ginesi* v. *Ginesi*[6] laid down that the same strict proof is necessary in the case of a matrimonial offence as in a criminal case. The Australian High Court rejected this view. Dixon J. stated that *Briginshaw* v. *Briginshaw*[7] was 'a well-considered decision based on as complete an examination and survey of the subject as we could make. So much cannot be said of *Ginesi* v. *Ginesi*.'[8] The present position of English law is uncertain, as can be seen from the judgments of the Court of Appeal in *Bastable* v. *Bastable*.[9]

In English law the influence of the jury may be seen in the fact that the 'day in court' is a typical feature of English procedure. If the jury is to be used as the fact-finding body, then all the evidence must be rehearsed before it, and it is obviously better for the jury to see the witnesses than merely to use records of their testimony. In some continental countries the examination of witnesses may proceed by easy stages, and the judge who conducts the final trial may not see many of the witnesses, being satisfied with a transcript of their evidence. If a witness lives in a town other than that where the trial is taking place, expense is saved by arranging for his examination in the local court. But although such methods of examining witnesses may shorten the actual trial, the serious disadvantage is that the trial judge has not necessarily seen all the witnesses in the box and has not had the opportunity of drawing from their demeanour inferences as to the

[1] *Hoare* v. *Silverlock* (1848), 12 Q.B. 624 at 633.
[2] Cf. Paul, *Dig.* 22. 3. 2.
[3] Cf. Visc. Maugham, *Constantine Line* v. *Imperial Smelting Corp.*, [1942] A.C. 154.
[4] Per Willes J., *Cooper* v. *Slade* (1856), 6 H.L.C. 746 at 772; *Helton* v. *Allen*, [1940] A.L.R. 298.
[5] In *Sodeman* v. *R.*, [1936] 2 All E.R. 1138, the J.C. accepted the view of the High Court that, while the Crown must prove the guilt of the prisoner beyond a reasonable doubt, a prisoner who pleads insanity does not have to satisfy this heavy burden but need only prove his case on a preponderance of probability.
[6] [1948] P. 179. [7] A previous decision of the High Court: (1938), 60 C.L.R. 336.
[8] *Wright* v. *Wright* (1948), 77 C.L.R. 191 at 211. [9] [1968] 1 W.L.R. 1684.

truth of their statements. The day in court illustrates the dramatic value of a trial. Vyshinsky emphasizes that an important aim of the public administration of justice is to inculcate discipline.[1]

A court may leave each of the parties to prove his own case, acting merely as an impartial umpire to see that the 'rules of the game' are observed, and taking no active part in the discovery of the truth. This is sometimes called the 'contest' or 'sporting' theory of justice. Or the court may regard its duty as being the discovery of the truth; thus the Soviet Court is regarded as 'an active governmental agency which investigates, tests and decides in accordance with the policies of its government; the parties, defence as well as prosecution, are there merely to assist the court in establishing the truth. But it is the *court* and *not the parties* that carries on the judicial inquiry.'[2] Earlier Russian writers frankly regarded the provincial court as an instrument of class vengeance upon the enemies of the State—which is far removed from the contest theory which lays down that the task of the judge is to secure the observance of every rule of procedure and evidence (whether it be in favour of one side or the other), and to stress that the guilt of the prisoner must be proved beyond all reasonable doubt. Vyshinsky claims, however, that under the Stalin constitution, adversary procedure has been adopted as a constitutional principle.[3] Thus the contest theory emphasizes that the defence must have equal rights with the prosecution, and that a barrister should be allowed to defend even those accused of crimes against the State. This seems axiomatic in England, but the position is not so in all countries.[4] Where the inquisitorial method is adopted, the court regards itself as responsible for discovering the truth. This theory led in the past to torture as a means of extracting a confession,[5] but in most countries torture has now disappeared. Too close a co-operation between the prosecution and the court detracts from that impartiality which should mark the judge.[6]

[1] *Law of the Soviet State*, 517.
[2] J. Zelitch, *Soviet Administration of Criminal Law*, 210.
[3] *Law of the Soviet State*, 519.
[4] For a discussion of Russian theories, see Zelitch, op. cit. 251 et seq.; J. N. Hazard, *Law and Social Change in the U.S.S.R.* (1953); *Soviet Codifiers Release the First Drafts* (1959), 8 *Am. J. Comp. Law*, 72; H. J. Berman, *Soviet Law and Government* (1958), 21 *Mod. L. R.* 19; *The Comparison of Soviet and American Law* (1959), 34 *Ind. L. R.* 559.
[5] It has been suggested that, once the jury was in use, there was less temptation to use torture, for what jury would believe a confession obtained by such means?
[6] M. Ploscowe, 29 *Minn. L. R.* (1945), 376, emphasizes this point with regard to French criminal trials.

While in criminal cases English law favours the contest theory,[1] in civil cases powerful inquisitorial processes are available to the litigant. These were first developed by Chancery and were probably borrowed from canon law.[2] A defendant is forced to reply on oath to such interrogatories as a Master allows and must make an affidavit of, and produce, such documents as are relevant. These weapons are now available in common law actions. On the Continent we see the same apparent paradox as in England, but with exactly the opposite results—for while the court directly seeks the truth in criminal cases, in civil cases it leaves the parties to their own devices. In England the position is not really so paradoxical, however, for the 'inquisitorial processes' are moved by the litigant. The court does not really initiate or directly pursue the search for truth; its role remains one of deciding the issues joined by the parties.

The task of proof is rendered easier (whatever the theory on which the court acts) by the use of legal presumptions. A legal presumption is an inference which the law directs should be drawn from a specific fact.[3] Thus if it is shown that a child is under eight years of age, English law directs the conclusion to be drawn that he is incapable of *mens rea* and therefore cannot be convicted of a crime. This particular presumption is conclusive, that is, it is forbidden to introduce rebutting evidence to show that the child was possessed of malice. Other legal presumptions provide merely prima facie evidence, i.e. the presumption is regarded as sufficient proof of the fact unless and until it is rebutted by other evidence.[4] From legal presumptions there should be distinguished mere presumptions of fact, 'inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect'.[5] There has been much dispute whether the application of *res ipsa loquitur* raises a legal presumption of negligence or only an inference of fact which the tribunal may reject even in the absence of explanation by the defendant.[6]

[1] The prisoner has the right to be silent, to make a statement not on oath, or to give sworn evidence and thereby be subject to cross-examination: see the discussion by A. R. N. Cross and R. H. Field in 11 *J. Soc. Public Teachers of Law* (1970), 66, 76.

[2] M. S. Amos, *The Future of the Common Law*, 33; R. M. Jackson, *The Machinery of Justice in England*, 59.

[3] J. F. Stephen, *Evidence*, Art. 1.

[4] Conclusive presumptions are sometimes termed *praesumptiones iuris et de iure* and rebuttable ones *praesumptiones iuris sed non de iure*.

[5] S. L. Phipson, *Evidence* (9th ed.), 4; cf. Wigmore, op. cit., § 249.

[6] *Barkway* v. *S. Wales Transport*, [1950] A.C. 185. The wittiest comment is cited by W. L. Prosser, 37 *Calif. L. R.* (1949), 183 at 232: '*loquitur, vere; sed quid in inferno vult dicere?*'; *Dorset Yacht Co.* v. *Home Office* (C.A.), [1969] 2 All E.R. 564; *Ludgate* v. *Lovett* (C.A.), [1969] 2 All E.R. 1275; *Colvilles Ltd.* v. *Devine*, [1969] 2 All E.R. 53. The Australian High Court rejects the view that the onus of proof, or indeed of

The presumption of innocence is an illustration of a rebuttable presumption. Although we flatter ourselves that it is a traditional ornament of English law, the doctrine is rather more modern than is usually supposed.[1] Allen states that it is only when society is strong enough to put away fear that it can afford to give suspected persons treatment that is really generous.[2] Savage treatment of prisoners may be due to the desire to preserve a weak social structure rather than to the love of cruelty for its own sake.

Competency. Not all witnesses are competent. Even if the evidence which John wishes to give is legally admissible, he may be prevented by a rule of law from appearing as a witness in that particular suit. At one time English law went so far in its distrust of biased evidence as to debar nearly all those who were most likely to have direct knowledge of the necessary facts—e.g. neither the party to a civil case nor his wife could give evidence on oath. But the law came to recognize that, while interest may create bias and so affect the *cogency* of evidence, wholesale exclusion is likely to do more harm than good and, accordingly, the rules were recast in the nineteenth century.[3] Competency should be distinguished from compellability. In general, all competent witnesses are compellable—i.e. they can be punished for refusal to answer a relevant question which has been allowed by the court. But there are exceptions.[4] Thus a witness may be willing but not competent (for example, one with an intellect so defective that he cannot understand the nature of the oath); or competent but not compellable; or competent but protected from answering a particular question on the plea of privilege.

Cogency. Once the evidence is received there is the difficult problem of analysing it and determining its weight. There are legal rules which act as a check, but the task of sifting truth from falsehood, of inferring the known from the unknown, is determined mainly by the common sense, experience, and subtlety of the tribunal. 'To the hungry furnace of the reasoning faculty the law of evidence is but a stoker.'[5] The fallibility of human testimony is a well-recognized fact today. Apart altogether from perjury and the unconscious twist

explanation, is cast on the defendant: *Government Insurance Office of N.S.W.* v. *Fredrichberg* (1968), 118 C.L.R. 403.

[1] C. K. Allen, *Legal Duties*, 253; and see *Esso Petroleum Ltd.* v. *Southport Corporation*, [1956] A.C. 218 (and in the Court of Appeal where the onus was placed on the defendant, [1954] 2 Q.B. 182).

[2] Op. cit. 272.

[3] See Phipson, op. cit., ch. xl; cf. Wigmore, op. cit., §§ 575–87, 600–20.

[4] The wife is not compellable in some cases, but the detailed rules cannot here be stated.

[5] J. B. Thayer, *Preliminary Treatise on Evidence* (1898), 271.

to our recollection which bias gives, great inaccuracies exist even in the evidence of disinterested third parties. When a witness makes a simple statement—'the prisoner is the man who drove the car after the robbery'—he is really asserting: (*a*) that he observed the car; (*b*) that the impression became fixed in his mind; (*c*) that the impression has not been confused or obliterated; (*d*) that the resemblance between the original impression and the prisoner is sufficient to base a judgment not of resemblance but of identity.[1] Scientific research into the nature of the eye has shown how comparatively easy it is for vision to be mistaken,[2] lack of observation and faulty memory add to the difficulties. Experiments by criminologists have shown the high percentage of error in the reports of a class of students witnessing an unexpected incident.[3] Borchard, in discussing sixty-five established cases of error in criminal convictions, points out that many of these arose from faulty identification and that in eight of the cases there was not the slightest resemblance between the real criminal and the person who was falsely convicted.[4] In one case, on the evidence of six girls, sitting on the steps of a factory, a man was convicted of indecently exposing himself from the window of a train travelling at thirty miles an hour. On appeal, tests were carried out in the locality and it was shown to be impossible to make any identification whatever from the place where the girls were sitting.[5] In the hands of an experienced practitioner, cross-examination is a valuable weapon to sift out the truth, but it cannot always be relied on to defeat either a skilful perjurer, or one who has formed a wrong conclusion as to what he saw and with honest stubbornness sticks to his story. In certain cases in the criminal law where evidence is likely to be unreliable, there must be corroboration and in others the court must warn the jury of the danger of convicting in the absence of it.[6]

In previous ages, torture was regarded as an aid to the discovery of the truth, in spite of the well-known and natural propensity of men

[1] Per Evatt J., *Craig* v. *The King* (1933), 49 C.L.R. 429 at 446; Barry J., 11 *A.L.J.* (1938), 314.
[2] J. Hodgson, 7 *Medico-Legal and Crim. R.* (1939), 108.
[3] R. H. Gault, *Criminology*, 380.
[4] *Convicting the Innocent.*
[5] Barry J., op. cit. See also L. R. C. Haward, 'A Psychologist's Contribution to Legal Procedure', 27 *Mod. L. R.* (1964), 656.
[6] Thus corroboration is necessary in trials for perjury: the jury must be warned where the witness is an accomplice and in certain sex offences. Traditionally corroboration was necessary in treason but the Treason Act, 1945 (8 & 9 Geo. VI, c. 44) amended the Treason Act and made trials for treason similar to trials for murder. It therefore became necessary no longer to have more than one witness to an act of treason to produce a conviction. That Act was passed shortly before the infamous Joyce (Lord Haw Haw) was brought back to England, after being captured on the Continent at the end of the 1939–45 war, to stand his trial for treason.

to say anything to end the almost intolerable agony. Today, scientific devices are being advocated. The 'lie-detector' has sprung into prominence, if not into universal acceptance,[1] and psychologists claim a high percentage of accuracy for the use of word-association tests designed to discover the emotional reactions of the prisoner.[2] Scopolamin is a drug which induces a state almost of unconsciousness, but leaves the subject able to answer questions, although unable to fabricate or invent.[3] But none of these devices is yet sufficiently proved to be able to be used with any confidence in a court of law.[4]

The most striking advance in the problem of proof today is the significant evidence which can be drawn by science from material things. The increase in knowledge of the physiologist and the pathologist, the physicist and the chemist has led to astounding results being achieved from meagre clues. The use of the so-called invisible rays has, for example, made easier the detection of forgeries,[5] and the truths of scientific achievement are more wondrous than the fabled exploits of fiction. The use of expert evidence is essential in many cases; e.g. in what Ormrod J. described as the first occasion in which a court in England had been asked to determine the sex of an individual, nine doctors of high standing gave evidence, and it was agreed by counsel on both sides that articles in learned journals could be used without formal proof.[6]

How far is the jury a competent body to determine the cogency of evidence? This question is often debated, and opinions range from lyrical praise of this palladium of our liberties to sneering references to its propensity to favour a pretty woman or to mulct a railway company in damages. In cases of serious crime most English writers

[1] The theory of the lie-detector is that, when a guilty suspect is asked a question concerning the crime, his emotional reaction will be different from that which occurs when he is asked an irrelevant question. The emotions affect breathing, blood-pressure, and heart-beat, and the contrivance attempts to measure the difference between the reaction to the irrelevant question and that which concerns the crime. See P. V. Trovillo, 29 *J. Crim. Law and Crim.* (1939), 848.

[2] Thus A. R. Luria tested criminal suspects and believed it was possible, with a fair measure of success, to detect consciousness of guilt by psychological tests: H. Cairns, *Law and the Social Sciences*, 204.

[3] Cairns, op. cit. 216.

[4] It would seem that in cases of disputed paternity, the court should pay attention to scientific proof that the defendant could not possibly be the father, on account of his blood group, yet in the *Chaplin Case* the verdict was given in defiance of the evidence: S. B. Schatkin, 32 *Virg. L. R.* (1946), 890; but times are changing rapidly and verdicts of that kind are less likely now or in the future—see L. R. Bowen, *Blood Tests and Disputed Parentage*, 18 *Mod. L. R.* (1958), 111.

[5] C. A. Mitchell, 3 *Medico-Legal and Crim. R.* (1935), 3; Laurie, 4 ibid. (1936), 208. For an account of the *Ruxton Case*, where it was necessary to identify the dismembered remains of two bodies, see R. Crichton, 4 ibid. 144.

[6] *Corbett* v. *Corbett* (*otherwise Ashley*), [1970] 2 All E.R. 33.

favour the retention of the jury, though a minority would modify the requirement of unanimity by allowing a majority decision. In civil cases opinion is more divided. Perhaps the main argument in favour of the jury is that it ensures the participation of citizens in the administration of justice—this tempers the law by the views of the common man and educates the common man in the views of the law.[1] Another argument, often advanced by members of the Bar, is that nothing controls the personal idiosyncracies of judges in their conduct of trials so effectively as the presence of a jury which must judge the issues of fact. Leaving theoretical arguments aside, we find that the use of the jury is declining both in criminal and civil cases. In certain indictable cases a summary court may try the case summarily if the prisoner consents, and in 1935 only one-eighth of the indictable cases were tried by jury. In civil cases in the King's Bench Division the proportion of jury cases was only slightly higher and since that time has dwindled away to a minute percentage as almost all actions for personal injuries are tried without juries, while in the County Court it sank to 0·006 per cent.[2] Traditionally the verdict of the jury must be unanimous, but both in civil and criminal cases, majority verdicts have been introduced by statute in many jurisdictions.[3]

On the whole, the English laws of evidence require a very high standard of proof and few desire that in criminal cases there should be a substantial change in the rules. In civil cases, however, the rigid rules of evidence greatly increase the cost of an action and sometimes cause delay.[4]

§ 131. Appeal

Once a plaintiff has secured judgment he may proceed to execution if the judgment is not satisfied, unless execution is stayed because of an appeal. No court is perfect, and the possibility of review is a valuable safeguard of justice. *Adolf Beck's Case* showed the necessity for a right of appeal in criminal cases, and the Court of Criminal Appeal

[1] A. I. Vyshinsky, *Law of the Soviet State*, 506–7; for France, see M. Ploscowe, 29 *Minn. L. R.* (1945), 376.

[2] R. M. Jackson, 1 *Mod. L. R.* (1937), 132, 177. For general discussion of the value of trial by jury, see Jackson, 6 *Camb. L. J.* (1938), 367; H. Mannheim, 53 *L.Q.R.* (1937), 99, 388; M. D. Howe, 52 *Harv. L. R.* (1939), 582; Evatt J., supplement to 10 *A.L.J.* (1936–7), 49; Sir Patrick Devlin, *Trial by Jury* (1956); G. Williams, *The Proof of Guilt* (2nd ed. 1958).

[3] See D. M. Downie, 44 *A.L.J.* (1970), 482; Criminal Justice Act, 1967, s. 13.

[4] For a critique of the general machinery of English law, see C. Mullins, *In Quest of Justice*; R. M. Jackson, *The Machinery of Justice in England*.

was established in 1907. To create a right to one appeal is reasonable; to allow three courts in an ascending hierarchy to decide a matter seems an excess of caution; but to have a hierarchy of four or more courts seems to be based only on a desire to aid the legal profession.[1] A commentator in the *Law Quarterly Review* asks whether English legal procedure is as satisfactory as it is frequently claimed to be, in the light of the fact that the decision of a preliminary point, whether Scottish or English law applied, cost thousands of pounds, as the matter was argued in three courts from October 1966 to March 1970.[2] In continental courts there is usually only one appeal, sometimes two, but rarely more.[3]

When there is an appeal it should be possible to find the legal basis on which the lower court acted. The actual decision will be a matter of record (e.g. that the defendant pay the complainant £120), but on the return of an *order nisi* in one case, the affidavit of each party differed greatly as to the evidence given in the original proceedings. When application was made to the magistrate, he confessed that he did not remember and had kept no notes.[4] The higher court was therefore reduced to following the rule of practice that the affidavit which best supported the decision of the court should be accepted.

Appeal may take various forms. It may be an entirely new trial of questions of fact,[5] or it may be limited to questions of law.[6] The appeal may be as of right or only by leave of the court which gave the judgment or of the higher court. In English law only the parties can appeal—no state official (who is not a party) has the power to refer what he regards as an erroneous legal decision to a higher court. The court which hears the appeal may have the power, if it disagrees with the decision of the lower court, to enter final judgment, or it may be

[1] Under the Rating and Valuation (Apportionment) Act the local rating authorities draw up preliminary special lists: the local Assessment Committee hears objections; there is then an appeal through Quarter Sessions, the Divisional Court, and the Court of Appeal to the House of Lords: Mullins, *In Quest of Justice*, 382. In *Bell* v. *Lever Bros.*, [1932] A.C. 161, the appellant succeeded although only three judges out of nine were in his favour. The English Administration of Justice Act, 1969, permits in certain cases an appeal direct to the House of Lords.

[2] 86 *L.Q.R.* (1970) at 291, referring to *James Miller and Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.*, [1970] 2 W.L.R. 728.

[3] R. C. K. Ensor, *Courts and Judges*, 13. Russia allows one appeal: A. I. Vyshinsky, *Law of the Soviet State*, 520.

[4] *Buzatu* v. *Vournazos*, [1970] V.R. 476.

[5] As when Quarter Sessions try an appeal from a court of summary jurisdiction: 4 & 5 Geo. V, c. 58, § 37 (1).

[6] Thus an appeal lies from the Court of Criminal Appeal to the House of Lords only if the certificate of the Attorney-General be obtained that an important principle of law is involved: 7 Edw. VII, c. 23, § 1 (6).

confined to sending the case back to the original court for decision on the lines laid down. The Court of Cassation in France is not an ordinary appellate court according to English notions. Its real function is not to hear an appeal between the parties but rather to decide an abstract question of law. This is shown by several factors: firstly, questions may be referred to it either by the parties or by the *procureur général*, whose task it is to watch for weak decisions or to refer points on which there is little authority to the superior court. Secondly, if a case is referred, otherwise than by the parties, any decision reached has no effect on their rights, the task of the court being limited to the statement of a principle of law. Thirdly, if a case is referred by the parties, even then the court does not deliver final judgment, but, if it disapproves of the legal principle on which the original court based its decision, it refers the case, not to the original court, but to another of the same rank. Moreover, this lower court may refuse to apply the principle adopted by the Court of Cassation in which case the matter is reconsidered by the plenary chamber of the latter court. If we add the fact that reference to the Court of Cassation does not act as a stay of execution, then certainly we would agree that this rather clumsy procedure is not designed to encourage appeals from private persons.[1] The real function of the court is to advise on abstract questions of law rather than to effect a final adjustment between two particular parties. But the advantage of the system is that a formulation of legal principle on a doubtful point may be obtained otherwise than at the expense of two unfortunate litigants, whereas in England a conflict of decisions in lower courts may long leave the law doubtful, because no hardy warrior has hazarded his fortune by appealing to the higher courts. An experiment well worth watching has been going on for some time in the State of New South Wales where, pursuant to the Legal Assistance Act, 1943–57,[2] Government funds are made available to defray the costs of appeals in appropriate cases where doubtful points of law are involved.

[1] R. C. K. Ensor, *Courts and Judges*, 44 et seq.
[2] Act no. 17 of 1943 as amended by Act no. 63 of 1957.

REFERENCES

AJ-ES, E. H., 39 *Mich. L. R.* (1941), 392.
BALL, W. V., 51 *L.Q.R.* (1935), 13.
COHN, E. J., 8 *Mod. L. R.* (1945), 97.
DEVLIN, SIR PATRICK, *Trial by Jury* (1916).
DIAMOND, A. S., *Primitive Law*, ch. xxx.
HARVEY, C. P., 7 *Mod. L. R.* (1944), 42.
HODGSON, S., 7 *Medico-Legal and Criminological R.* (1939), 108.
JACKSON, R. M., *The Machinery of Justice in England.*
KENNEDY, W. B., 8 *Mod. L. R.* (1945), 18.
MULLINS, C., *In Quest of Justice.*
SIMPSON, S. P., 53 *Harv. L. R.* (1939), 169.
WIGMORE, J. H., *Evidence* (3rd ed. 1940).
WILLIAMS, G., *The Proof of Guilt* (2nd ed. 1958).

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