BOOK III

SOURCES OF LAW

VI

THE SOURCES OF LAW

§ 39. Meaning of the Term Source

The term *sources of law* has many meanings and is a frequent cause of error unless we scrutinize carefully the particular meaning given to it in any particular text. The philosophical school treat under the heading of the source of law some of the deepest problems of legal philosophy. Thus Gurvitch says that the question of the source of law is only one aspect of the general study of the validity of law.[1]

A formal source of law is defined by Salmond as that from which a rule of law derives its force and validity;[2] the material source is that from which is derived the matter, not the validity, of the law. The formal source of the law is the will of the State as manifested in statutes or decisions of the courts. An example of a material source is custom; the rule which the judge fashions into law may be drawn from the life of the community, but what gives it legal force is not the custom but the solemn determination of a court. However, this approach depends upon the particular definition of law which Salmond adopts.[3] If law is regarded as being created by the will of the State, then that is the formal source of law. If law is the command of the sovereign, then the sovereign is the formal source.

But, if we adopt a different definition, we may well reach the conclusion that the formal source is elsewhere. If law is valid because it is the embodiment of natural law or of absolute justice, then the source of law is the ideal we have laid down. If law is valid because it is the product of an inner sense of right, then that sense of right is the source

[1] *L'Expérience juridique*, 229.
[2] *Jurisprudence* (9th ed.), § 44. (In the 12th ed., 109, the relevant wording is changed.)
[3] *Supra*, § 23.

of law; this is the view of the historical school. Del Vecchio regards the source of law as being in the nature of man.[1] If law is valid because it is the product of custom, then the habits of the people are the source of law. Writers who adopt these views do not regard the State as the source of law.

The division of sources into formal and material is usually accepted, however difficult the actual application may be. But Dr. Allen has entered a protest:[2] and so many different theories have now been woven around the term 'source' that it is better to use other terminology and to ask: What is the secret of the validity of law? Whence comes the material from which law is fashioned?[3] What are the historical or causal influences which explain why the law is now as it is seen to be?[4]

In the modern state the law is normally created by the formal act of legislation or the decision of a court, or else by the act (whether legislative or judicial) of a subordinate person or group of persons acting within the limits of delegated authority.[5] The material sources are very comprehensive, since they include anything that may be drawn into the process of creation. Thus an English judge may adopt a principle from an ancient Roman text or a modern American case, from a text-book of law or a custom of the community.

It is necessary to remember that the formal validity of law, as seen from within any particular legal system, will be tested by rules of recognition provided by that legal system itself. '. . . when it is said that "statute" is a source of law, the word "source" refers not to mere historical or causal influences but to one of the criteria of legal validity accepted in the legal system in question. Enactment as a statute by a competent legislature is the *reason* why a given statutory rule is valid law and not merely the *cause* of its existence.'[6] It is also necessary to distinguish between a legal system as a whole, and the rules which are said to be law within a particular legal system.

[1] *Le Problème des sources* (Inst. int. de phil. du droit), 21.
[2] *Law in the Making* (7th ed.), 1–5.
[3] These questions are discussed above in Chs. IV and V.
[4] H. L. A. Hart, *Concept of Law*.
[5] *Infra*, § 75, for a discussion of the precise distinction between legislation, judicial decision, and administration.
[6] H. L. A. Hart, *Concept of Law*, 246.

VII

CUSTOM

§ 40. Origin and Limits of Custom

The origin of custom is a question that has been little studied until comparatively recent times. Prior to the birth of modern anthropology, the beginnings of the community were sought by abstract speculation and not by field investigation of primitive communities.[1] Savigny in 1814 emphasized the necessity of historical study: Maine wrote brilliantly on primitive communities, being stirred by his knowledge of the East to undertake comparative studies.[2] This stimulated English jurists to a more realistic study. What is amazing is that, although Maine wrote before modern anthropology was created, his work still remains fruitful. Further research has revealed errors both in his appreciation of Roman law and the Eastern communities, but the broad outlines of his contribution remain of real value.

Towards the end of the nineteenth century, anthropology became a field study and our knowledge of primitive man has greatly increased. In this century the work of Malinowski[3] and H. I. Hogbin[4] has shown that the Pacific provides a field for comparative study. The work of D. F. Thomson[5] and T. G. H. Strehlow[6] among the Australian aborigines is based on long residence with the tribes. We are still, however, only on the fringe of the problem. What has been achieved is scientific analysis and a realization that the problem must be attacked after putting away our modern prejudices. It is as yet too early to pronounce dogmatic generalizations concerning the origin of custom and its relationship to law.

Maine's theory of legal evolution was that first came Themistes, the judgments of inspired kings[7]—next came custom which was really created by the judgment, and finally the code which ends spontaneous development and forces the judge to rely on fictions and equity. But the slightest actual investigation of primitive communities proves that

[1] The classical study is that of C. K. Allen, *Law in the Making* (7th ed.), chs. i and ii.
[2] *Ancient Law* (1861); *Early Law and Custom* (1883).
[3] *Argonauts of the Western Pacific*; *Crime and Custom in Savage Society*.
[4] *Law and Order in Polynesia*.
[5] *Economic Structure and the Ceremonial Exchange Cycle in Arnhem Land*.
[6] *Aranda Traditions*.
[7] *Ancient Law*, ch. i.

custom is anterior to kings and courts.[1] Indeed, custom is coeval with the very birth of the community itself.

Habit,[2] sentiment, desire to satisfy public opinion and vanity—these play their part in the primitive community and they have not lost their force in the modern world. But these alone will not solve the problem why custom is followed. Primitive communities naturally must have their criminal law—certain offences must be stamped out. But there is also the equivalent of civil law—though whether we should use that term may be a matter of debate. Any community, however primitive, demands co-operation. It is the recognition of mutual obligation that is the driving force—if one does not fulfil his duty, he is excluded from the community. Religious beliefs also play a part. 'The *kipua* of Ontong Java are believed to punish, not actual breaches of obligation, but failure to reach a socially approved standard of performance.'[3] Collective religious ceremonies help to provide belief in a body of tradition and in the unity of the tribe. Sorcery is often used in an anti-social way, but it is also one of the weapons for enforcing the observance of customs. Supernatural sanctions are often feared by primitive man, but they are not automatic and sometimes a counter magic is available which is believed to avert the consequences of the breach of a tabu.[4] This illustration shows that there is no spontaneous and slavish adherence to the rules of custom, as some writers have thought. The savage is occasionally desirous of escaping his obligations just as is civilized man.

Suicide cannot be called a legal sanction, but it is sometimes the result of outraged public opinion. Malinowski relates that a youth who committed misconduct with a girl denied to him by the rules of exogamy, was so taunted in public for the incest that he put on festive attire and committed a ceremonial suicide by jumping from the top of a palm tree. In this case, in spite of the general horror of incest, public opinion had not been stirred till the youth's rival made accusation and aroused public indignation.[5]

An interesting analysis is that of Llewellyn and Hoebel in dealing with the Cheyenne Indians.[6] Their postulates are that we have three essential elements in any community: the group, the existence of divergent desires within the group, and claims made by some members

[1] P. Vinogradoff, *Collected Papers*, ii. 420.
[2] D. F. Thomson, *Economic Structure in Arnhem Land*, 34, stresses the influence of tradition.
[3] H. I. Hogbin, *Law and Order in Polynesia*, 289.
[4] B. Malinowski, *Crime and Custom*, 80–1.
[5] Ibid. 78–9.
[6] *The Cheyenne Way*, ch. x.

against others or against the group. If the group is to remain a community, the resulting problems must be met. The authors rightly emphasize that the terms *custom* and *mores* are not accurate enough to deal with the problem. Firstly, even in a primitive community we soon reach a distinction between what is done and what ought to be done. Secondly, there is sometimes a conflict between the family, the band, the military society, and the tribe. Each may have its own norms which must somehow be reconciled with those of the group. It is not a mere conflict between the individual and society. Thirdly, the word custom sometimes lends a seeming solidity to practices which are still in the way of being established. The two main factors in the dynamics of a legal order, Llewellyn and Hoebel find to be drift and drive, the first an unconscious development, the second a conscious individual demand. It is the latter element that causes the growth of law, for this produces the problems which society must solve.[1] The 'trouble spots' are the source of law, but we get a false view both of ancient and modern law if we concentrate exclusively upon them.[2]

Custom is useful to the lawgiver and codifier in two ways. It provides the material out of which the law can be fashioned—it is too great an intellectual effort to create law *de novo*.[3] Psychologically, it is easier to secure reverence for a code if it claims to be based on customs immemorially observed and this is true even though historically the claim cannot be substantiated. There is inevitably a tendency to adopt the maxim 'whatever is is right'—what has been followed in the past is a safe guide for the future. Bracton and Beaumanoir used the buttress of custom when dealing with the difficulty felt as to the power of a single judge to lay down the law.[4] From time to time individual claimants voice demands which either are not covered by existing rules or run counter to them. The crucial question is how those demands are dealt with in the community. If such a matter is dealt with in a way which establishes a new rule then a new community practice may be germinated.

[1] Borrowing horses without permission was permissible among the Cheyennes if a security was left: but it caused trouble, so a new rule was made by the Elk soldiers prohibiting borrowing without asking (*The Cheyenne Way*, 127–8).

[2] B. Malinowski, *Crime and Custom*, 73, points out that anthropology has been retarded by emphasis on the sensational.

[3] It is not suggested that codes are merely formulations of existing custom—sometimes the driving force is to abrogate old customs, or to choose the custom of one district and apply it to a wider realm. The very incompleteness of some early codes shows that they were not intended to state all the law—they presupposed a mass of accepted customs: W. Seagle, *Quest for Law*, 111.

[4] T. F. T. Plucknett, *Concise History of the Common Law* (4th ed.), 221 n.

Custom is not always based on abstract justice—the obvious example of slavery illustrates this. Savigny's view that custom springs from an inner sense of right cannot be substantiated. It is often asked whether conviction generates practice, or practice conviction.[1] If we emphasize too much the first alternative, this suggests that the community logically faces its problems and devises self-consciously the best rules. This is a false picture—the growth of much custom is not the result of conscious thought, but of tentative practice. When a problem arises—strife between two members of the community—then an answer must be found: but tact, a sense of the merits, and an appreciation of the strength of each faction play a greater part than any desire to find a rule that is logically justifiable. But once a rule is adopted, practice generates conviction. To primitive man as to the child, what has been done is the thing that ought now to be done.

The mark which distinguishes custom in the legal sense from mere convention is the *opinio necessitatis*, the recognition that there is authority behind it.[2] In the modern state the custom, if legally recognized, has behind it the court and an apparatus of coercion. In primitive communities we do not find authority necessarily organized in the institutional sense. We must ask, 'what is the ultimate power in the group to settle conflicts or to prescribe rules'? It may be the old men, the military group, the priests, or merely a general consensus of opinion. But the *opinio necessitatis* can come into existence only when the community in some way throws its force behind the particular rules. No exhaustive study exists of the psychological factors which create the *opinio necessitatis* in the primitive community.

Custom in its early stages is somewhat vague—it can be made into an effective rule of law only if the practice is hardened and made definite. This can occur only by the slow work of the courts, as technical rules are fashioned out of the raw material afforded, or by legislation, since writing inevitably sharpens the vague outlines of custom.

Custom is not necessarily immemorially old. All customs must have begun at some time and Azo regarded a custom as *long* if it was ten years old, *very long* if thirty years, and *ancient* if forty.[3] Custom, therefore, is more flexible than is sometimes supposed. The test of

[1] C. K. Allen, *Law in the Making* (7th ed.), 83.

[2] W. Seagle, *Quest for Law*, 33, makes the problem rather too easy when he states that custom is obeyed merely because it is the custom. 'Custom must be conceded to be sovereign if it is to discharge its social function.'

[3] T. F. T. Plucknett, *Concise History of the Common Law* (4th ed.), 291.

immemorial observance which English law now applies to special custom is a mark of modern and not primitive law.

The task of the law is so to adjust behaviour that the group can remain a group and can spend its energies on more vital matters than internal strife.[1] But the more complex society becomes, the less effective is custom: the test of custom is continued observance and customs *ex hypothesi* cannot be suddenly created to meet a new problem. Again, the most effective way to prevent disputes is to lay down rules in advance—custom is useful for situations that have already occurred, but cannot create a rule to deal with a future difficulty.

In Roman law we find little light. There are titles that deal with the topic, but they are very obscure.[2] Nevertheless, there is sufficient discussion to reveal that custom did play a considerable part in the evolution of the law. It was even thought that custom could effectively abolish a statute. Julian is cited by the Digest as approving this view on the ground that it is immaterial whether the people expresses its will tacitly by conduct or by a formal statute.[3] It is unlikely that Justinian regarded this as applying to his own laws. There are some traces in Scots law of the same theory, though it seems to be limited to statutes passed prior to the Union with England.[4]

§ 41. The Common Law Approach

Blackstone distinguished general custom which became the common law from particular custom which affected only a particular class or the members of a particular locality. It was the traditional view of English writers that the common law was but general custom. We cannot literally accept this view in the sense that the judges were a mere instrument for recording rules already established. But the whole course of pleading assumed the vitality of custom. Thus common carriers were first charged on the custom of the realm, until finally it was not thought necessary to plead the custom.[5] But for the establishment of itinerant justices, it is possible that the types of local custom would have been more diversified. These justices did much to create a uniform common law.

[1] K. N. Llewellyn and E. A. Hoebel, op. cit. 290.
[2] Dig. 1. 3; C. 8. 52; C. K. Allen, *Law in the Making* (7th ed.), 80 et seq.
[3] Dig. 1. 3. 32. 1; W. W. Buckland and A. D. McNair, *Roman Law and Common Law*, 15.
[4] W. M. Gloag and R. C. Henderson, *Introduction to the Law of Scotland* (2nd ed.), 3–4. The argument was advanced to Neville J. in *Luby* v. *Warwickshire Miners' Association*, [1912] 2 Ch. 371, but rejected.
[5] *Pozzi* v. *Shipton* (1838), 8 Ad. & E. 963.

The mark of special custom is that it is confined to a particular class or a particular locality—it is, therefore, an exception from the general law of the land. The tests for the existence of custom are fully treated by Allen.[1] The following are the most important: (*a*) the custom must not conflict with any fundamental principle of the common law; (*b*) the custom must have existed from time immemorial, which by a legal convention is set at 1189; (*c*) it must have been continuously observed and peaceably enjoyed; (*d*) it must be certain; (*e*) it must not conflict with other established customs; (*f*) finally, it must be reasonable.

Is a custom which satisfies the tests law before it has been adjudicated upon by a court, or does it become law only when it receives the judicial stamp of approval? However we answer, we run into difficulties. If judicial approval is necessary, then a custom which is so universally recognized that it is never questioned cannot be a rule of law. If we state that the decision of a court is unnecessary, then who is to decide on the application of such tests as reasonableness? Those who define law in terms of the sovereign cannot admit any other source of law. But Allen believes that with exceptions which 'do not seriously affect the guiding principle, if a custom is proved in an English court by satisfactory evidence to exist and to be observed, the function of the court is merely to declare the custom operative law. In other words, the custom does not derive its inherent validity from the authority of the court, and the "sanction" of the court is declaratory rather than constitutive.'[2] Most of the tests certainly relate to proof of the existence of the custom, but the last (that of reasonableness) gives to the court a discretion in recognizing the custom.[3] On Allen's own admission, if the court thinks that a custom was unreasonable in its origin, or that today it conflicts with a fundamental principle of the common law or with doctrines of public policy, it must be disregarded.

Lord Cranworth, however, wrote that 'when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom'.[4] In

[1] *Law in the Making* (7th ed.), ch. ii. [2] Op. cit. 130. [3] Op. cit., Appendix.
[4] *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H.L.C. 692 at 701–2. Compare *North and South Trust Co.* v. *Berkeley*, [1971] 1 All E.R. 980, where an alleged custom relating to brokers was held unreasonable.

Wolstanton Ltd. and A.-G. of Duchy of Lancaster v. *Newcastle-under-Lyme Corporation*,[1] the House of Lords held unreasonable an alleged custom for the lord to get minerals beneath the surface of copyhold or customary freehold lands without making compensation for subsidence and damage to buildings, on the ground that the lands of the copyholder might be made practically useless, although he would still be liable to pay rents and perform stipulated services. The custom was of an oppressive character and more probably founded in wrong and usurpation than in the voluntary consent of the copyholders.[2]

It is sometimes suggested that a custom is law before adjudicated upon by a court because, if approved, it will have retrospective effect. But this applies to all judicial decisions on the common law, whether founded on custom or not. If the Court of Appeal lays down a particular doctrine, and ten years later the decision is overruled by the House of Lords, was the doctrine law between those two dates? The usual English view is that it was not. The House of Lords, according to the accepted fiction, merely lays down what is, and always has been, the law. From the point of view of citizens concerned with the practical application of the law by a hierarchy of courts, of course, this can appear to make pure nonsense.[3]

Mercantile law, perhaps, provides one of the most interesting examples of custom. Can a custom of modern origin have effect in changing the law? In *Crouch* v. *Crédit Foncier*,[4] it was decided that a mercantile custom to treat debenture bonds payable to bearer as negotiable instruments was invalid, as it was a custom of recent origin and not of immemorial antiquity. However, in *Goodwin* v. *Robarts*,[5] Cockburn C.J. refused to treat the law merchant as fixed and stereotyped. Salmond himself considered that the first decision represented the most logical view, the second the more convenient. In fact, very little of the law merchant has existed from time immemorial—certainly the concept of negotiability in its full development is more recent than 1189. Are we not dealing in this case with general custom? It is true that the law merchant once applied only to a special class,

[1] [1940] A.C. 860.
[2] At 878.
[3] e.g. see *Re Waring (deceased)*, *Westminster Bank Ltd.* v. *Burton-Butler*, [1948] Ch. 221; and note the interesting possibilities raised by a case like *Doyle* v. *Vance* (1880) 6 V.L.R.(L) 87. In that case the full court of the Supreme Court of Victoria held that there could be strict liability for damage caused by a trespassing dog. Inferior courts in Victoria may well be bound to follow that decision, yet it would be overruled if it came before a higher tribunal.
[4] (1873), L.R. 8 Q.B. 374.
[5] (1875), L.R. 10 Ex. 337.

but it is now part of the law of the land.[1] Do the tests of special custom, which derogates from the common law, apply to general customs (i.e. the common law)? Clearly, the common law in its modern form has not existed from time immemorial. Indeed, as early as Henry IV, it was laid down that existence from time immemorial was not necessary for a general custom, *car comen ley de cest realme est comen custome de realme.*[2]

The problem is best discussed by looking at the history of the law relating to negotiable instruments. The rules were first evolved by custom—a special custom applicable only to those trading with merchants abroad. Gradually the same rules were applied to inland bills in trading transactions, and finally the law was extended to cover all transactions whether trading or not.[3] We see here the progress from special custom to the common law itself. Hence the test of immemorial user is not relevant. 'We cannot think that if a usage is once shewn to be universal, it is the less entitled to prevail, because it may not have formed part of the law merchant as previously recognised and adopted by the Courts.'[4]

Another use of custom in English law is with reference to contract. It may often be assumed, if there are no specific clauses in the contract to the contrary, that the parties intend to contract on the basis of the usages of the trade. Thus general usage has been held enough to create a general lien. 'Everybody knows, that, by the common law a man may detain the commodity on which he has bestowed labour or money. But this is a claim of a larger lien, and those who seek to establish such a lien must shew a course of dealing so general and uniform that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage.'[5]

[1] H. E. Salt in *Cambridge Legal Essays*, 279, suggests it is a confused analogy to apply the rules of particular custom to the law merchant.
[2] 2 H. IV. 18 cited F. A. Greer, 9 *L.Q.R.* (1893), 153 at 157.
[3] F. A. Greer, 9 *L.Q.R.* (1893), 167; *Bromwich* v. *Loyd*, 2 Lutw. 1582.
[4] *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337 at 356, per Cockburn C.J.
[5] *Bleaden* v. *Hancock* (1829), 4 Car. & P. 152 at 156, per Tindal C.J.

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VIII

THE JUDICIAL METHOD

§ 42. Introduction

Whether a community lives in rural simplicity or in modern complexity, whether it pins its faith to case law or to a code, the judicial method plays an important part in the development of law. A study of the technique used by judges raises some of the most fundamental problems in jurisprudence, and in the English-speaking world no other part of the theory of law has provoked such a voluminous literature. Both the strength and weakness of the common law are revealed by the case method, but in a short chapter it is only possible to raise those general issues which are of most importance for jurisprudence.

§ 43. Law, Logic, and Science

How far can the task of the judge in developing the law be described as scientific? Or is it an art? It is convenient to approach this problem by a consideration of the theory of the logical plenitude of law. In a broad sense this theory means only that a judge cannot refuse to decide a case on the ground that there is no precise authority in point.[1] Electricity may raise new problems for the law of tort, but a court cannot dismiss a plea merely because there are no precedents dealing with this useful but dangerous force. In this particular instance old rules (either of negligence or strict liability) may be adapted to reach a solution; in other cases no existing rule may be applicable. Smart builds a tower so that he can broadcast the races which his neighbour conducts, and Smart's style is so graphic that many people prefer to listen to his commentary than to pay for admission to the race-course. His neighbour sues for the resulting loss.[2] No court is entitled to refuse to adjudicate merely because counsel can cite no authority on 'all fours'. The court may dismiss the plaintiff's request

[1] Thus Art. 4 of the French Civil Code lays down that a judge who refuses to decide a case on the ground that the law is silent or obscure is guilty of a denial of justice. This doctine may be called the prohibition of *non liquet*: H. Lauterpacht, *Function of Law in the International Community*, 60 et seq.

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

for a remedy, but even then a legal answer is given to the problem, for Smart has a legal right to continue the broadcasts. There is a great difference between deciding that there is no legal *answer* to the problem and decreeing that the defendant's conduct creates no right to a legal *remedy*. Understood in this sense, the theory of the logical plenitude of the law states the undeniable truth that law is not a mere collection of detailed rules, but an organic body of principles with an inherent power of growth and adaptation to new circumstances. In truth it does more than that, it does not state but it does assume that law is not only an organic body of principles but is a rational system for the exercise of authority by human beings. The theory then that all questions are capable of being disposed of according to law, even if it may be that the law requires that the precise question be not answered by a court, is not only logically justifiable but historically true; for we cannot conceive of the whole body of the common law descending from heaven and containing, even implicitly, the developed modern distinctions. Had *stare decisis* been interpreted in a narrow fashion as meaning that no decision could be given unless a clear precedent could be discovered, it is clear that our modern common law could not have been created.[1]

But we need only give a slight twist to our doctrine of the logical plenitude of law to make it a narrowing force. If we postulate that all problems can be solved purely by logical deductions from the actual rules in force,[2] we are depriving the law of all power to develop, and the dead hand of the past will crush its growth. An acute critic has shown the difficulties that have arisen in private international law from the tendency to treat certain dogmas as ends in themselves.[3] Law can develop only by perpetually drawing new values and solutions from the life of the community: this is achieved partly through the development of new law and partly through standards and principles which are implicit in particular branches of the law (e.g. reasonableness or public policy).[4]

In the golden age of rationalism men wished to construct a legal system analogous to Euclidean geometry, the basis of which is the assumption of self-evident truths or axioms and the deduction by

[1] The advance of technology provides many new problems for the law. Thus in international law, liability for space craft has become an important issue: see Bin Cheng, *Current Legal Problems* (1970), 216.

[2] This doctrine is sometimes attacked as the 'jurisprudence of conceptions' or 'mechanical jurisprudence'.

[3] W. W. Cook, *The Logical and Legal Bases of Private International Law.*

[4] *Supra*, § 35.

rigorous logic of the whole system from this base. The axioms of justice were to be discovered, and when a particular dispute came before the court for decision, the judges could say: 'Come, let us calculate.' If there was dissent, then the opinion of either the majority or the minority must contain within it a logical fallacy. It needs no argument today to convince the reader that the judicial method is not as simple as this. The difficulty of securing agreement as to the ends of law has already been discussed,[1] and if the ends of law cannot be rigidly determined, the argument for a 'legal geometry' is left without a foundation. Moreover, modern developments have shown that such a view of geometry was incorrect. Euclidean axioms are not 'self-evident' truths but convenient hypotheses, and it is possible to construct a useful and self-consistent geometry on the postulate (*inter alia*) that parallel lines always meet.[2] The practical test is which type of geometry is more suitable for a particular purpose.

The rules of formal logic are invaluable to the courts and the fallacies of an argument may sometimes be most easily exposed by casting it in the form of a syllogism.[3] Moreover, in systematizing the law, deduction from a general principle may serve to show the real source of a rule. But the syllogism is a method of demonstration rather than of discovery. From the two premisses 'All jurists are dull', 'Alfred is a jurist', we can draw the conclusion that 'Alfred is dull'. But the conclusion does not reveal to us any new truth, since it is implicitly contained in the premisses which have been assumed. The syllogism provides us only with a convenient method of stating conclusions which we have already reached.

The attempt to reduce law to a definite number of legal rules and to make the judicial task one of pure deduction alone has led to a reaction. The judge does not always find his general principle ready-made —frequently it may be implicit in a line of cases and the utmost subtlety may be necessary to discover it. Hence the worship of induction has become popular. Instead of starting with a general rule the judge must turn to the relevant cases, discover the general principle implicit in them, and then deduce from it the rule applicable to the case in hand. The outstanding difference between the two methods is

[1] *Supra*, § 36.

[2] For example, see the non-Euclidean geometries of N. I. Lobatschewsky and G. F. B. Riemann, discussed by J. H. Poincaré, *Science and Hypothesis*, 35 et seq.

[3] Cf. per Griffith C.J., *Scott* v. *Cawsey*, 5 C.L.R. 132 at 141; Simonds J., *Lewis and Co.* v. *Bell Property Trust*, [1940] 1 Ch. 345 at 350. J. Stone provides the most acute modern survey, *Province and Function of Law*, chs. vi, vii, though it suffers from taking a rather narrow view of logic: F. C. Hutley, 1 *Annual L. R.* (*W. A.*), 172.

in the source of the major premiss—the deductive method assumes it, whereas the inductive sets out to discover it from particular instances.[1] Hence there arises today an emphasis on the logic of discovery, and the drawing of an analogy between the task of the judge and that of the natural scientist. The latter, with a particular knowledge gained by many experiments, frames a provisional hypothesis (which he hopes will describe the facts), and then tests that supposition by making further experiments in order to assess the accuracy of the deduction drawn from it. It is argued that the judge frames a provisional rule to deal with a particular case; in further decisions the formulation of the rule is tested by application to new facts and perhaps it is adapted, modified, or restricted until finally the rule appears as a satisfactory tool of judicial technique. At best, however, this is only an analogy, as can be seen from the discussion of the function of the judge where there is no authority in point.[2] The scientist is seeking to *describe what is*, and objective tests may be used to discover the accuracy of the description. But the judge must *prescribe what ought to be*, and once we introduce the element of value there may be legitimate differences of opinion which cannot be decided by objective experiments.[3] In developing the standard of care to which motor-drivers ought to conform by applying to it the subtleties of the doctrine of contributory negligence, there is no easy test which a judge can use, for he is not trying to describe what motorists actually do, but what in contemplation of law they ought to do. As is shown in the next section, dissent in appellate courts, where there is no binding authority, is frequently due to differing notions as to the interests that the law should protect.

Moreover, a scientist is free to modify any theories which he finds inaccurate—his loyalty is to scientific truth and not to tradition. He is not bound to worship the golden idols of the past if they have feet of clay, but while a judge may not revere he is bound to follow such precedents as are binding upon him.[4] The common law doctrine of binding precedent has prevented final courts from engaging in tentative experiments and from correcting the mistakes of the past.

Thus the law of torts has two broad divisions, liability for negligence

[1] J. Dewey, 10 *Cornell L. Q.* (1924), 17, cited Jerome Hall, *Readings in Jurisprudence*, 343.

[2] *Infra*, § 46.

[3] Cf. J. Dickinson, 29 *Col. L. R.* (1929), 285 at 287–8; H. J. Laski, 2 *Politica* (1936), 115.

[4] *Leon* v. *Casey* (1932), 48 T.L.R. 452 at 455. Judges dislike having to give judgment against the merits on a technical point: *Rentit Ltd.* v. *Duffield*, [1937] 3 All E.R. 117.

and strict liability. In determining the boundary line between the two, the courts have not relied on logical deductions or *elegantia iuris*: the attempt has been rather to base rules on expedience and social custom. One who creates an abnormal risk should be strictly liable for any injury thereby caused. The legal formulation of this broad principle is that strict liability applies where there is an abnormally dangerous user of land.[1] To collect water within a reservoir subjects to strict liability,[2] but to install water-pipes in a house does not.[3] Gas mains in the street or high-tension electric cables are caught by the rule, but domestic electric wiring and gas-pipes are not.[4] Thus the application of this broad legal standard of unnatural user is a nice question of policy rather than the result of deduction from an accepted formula. If we emphasize the fact that 'burning off' an estate is beneficial in a grazing community because it reduces the risk of bush-fires at the peak of the hot season and because it is the best way to produce good pastures, we may (as some Canadian courts have done) regard this as a natural user of land;[5] if we emphasize the danger to others involved even in careful 'burning off' we may apply the doctrine of strict liability (as the Australian High Court has done).[6] In one sense courts are trying to evolve a reasonable hypothesis just as does the scientist, but the nature of the activity of each is fundamentally different.

In the present century the abuses created by attempts to treat the solution of legal questions as if they were theorems in geometry has led to a reaction, and (as is often the case) the reaction has gone too far. Holmes J. epigrammatically pointed out that 'the life of the law has not been logic: it has been experience',[7] and torn from its context[8] this has been used as a justification for the slogan 'trust life

[1] *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330.

[2] This is a convenient phrase used in the American Restatement—there is actual liability only if damage follows and no particular defence can be proved.

[3] *Rickards* v. *Lothian*, [1913] A.C. 263 at 280–1.

[4] *Collingwood* v. *Home and Colonial Stores Ltd.*, [1936] 3 All E.R. 200.

[5] See J. T. Robinette, 11 *Can. B. R.* (1933), 88 at 99.

[6] *Hazelwood* v. *Webber* (1934), 52 C.L.R. 268. In this case, however, the 'burning off' was done in midsummer.

[7] *The Common Law*, 1. Lord Simonds, *Gilmour* v. *Coats*, [1949] A.C. 426 at 449, emphasizes that the common law approach is so empirical and historical that it is not possible to argue logically from the category of educational trusts to that of religious trusts. 'Moreover, it is not always possible for the law to be logical. It has to evolve practical and workable rules in the light of experience': per Thesiger J., *S.C.M. (U.K.) Ltd.* v. *W. J. Whittall & Son Ltd.*, [1970] 2 All E.R. 417 at 431.

[8] Holmes J. showed a nice sense of the influence of the logical structure of law, and a consideration of his writings reveals his true position. Cf. *Collected Legal Papers*, 167 et seq.

rather than theory'. Gény, Ehrlich, Gmelin, and Pound all show the abuses of a narrow logical method.[1] Ehrlich points to the profound wisdom of German legend which typifies the devil as a sharp dialectician. Some urge that common sense should be made the source of law—for the purely logical approach we should substitute a dynamic or psychological point of view.[2]

But Hoernlé reasonably asks why should logic be blamed.[3] This is due to two causes: firstly, the 'geometrical view' of law was regarded as the typical logical approach; secondly, the Kantian attempt to use a rigid logic of the *a priori* to determine the permanent element of law led to a reaction against logic as such instead of a dislike of this particular method. But the law cannot dispense with a logical method if it is to have any claim at all to rationality. Can we think at all without following the rules of logic? 'Formally, thinking is good or bad according as the conclusion does, or does not, follow from the premisses.'[4] Materially, thinking may be bad because of a narrow or unskilful choice of premisses. Undoubtedly in the past the premisses from which rules have been deduced have been rather narrow, but instead of attacking logic it would be more reasonable to broaden the foundations of the law.[5] Science once suffered from the attempt to deduce rules from so-called self-evident truths, but its great advance came from the recognition that there is a logic of discovery as well as that of the syllogism. The argument really comes to this—that modern authors suggest that the judicial method requires a broader approach. The categories of law are not ends in themselves but tools that should be adapted to serve the purposes of law. To give up logic because of the excesses of a particular method, or to worship irrationality because of the mistakes of the past, would be as wise as to sacrifice our eyes because occasionally we see what is not there.[6] To suggest that the best law can be achieved without a *proper* use of logic is simply nonsense. Moreover, the realist approach tends to underrate the effect of the judge's desire for certainty and a rock of authority on which to base the decision. If there is no actual binding authority,

[1] The most accessible source is *Science of Legal Method* (The Modern Legal Philosophy Series), F. Gény, 42, E. Ehrlich, 84, J. G. Gmelin, 92, R. Pound, 208. Review by R. F. A. Hoernlé, 31 *Harv. L. R.* (1918), 807.
[2] K. G. Wurzel, *Science of Legal Method*, 297.
[3] 31 *Harv. L. R.* (1918), 807.
[4] 31 *Harv. L. R.* (1918), 807 at 810.
[5] K. N. Llewellyn, *The Common Law Tradition, Deciding Appeals.*
[6] Morris Cohen, *Law and the Social Order*, 177; F. C. Hutley, 1 *Annual L. R.* (*W. A.*), 172.

logical argument from legal principles helps to lighten the responsibility of decision. It is absurd to suggest that all judges wish to bend the law to their individual whims: what most desire is a reasonable escape from the agony of decision.

§ 44. The Facts and the Law

The task of the court in almost all actual litigation is to ascertain the issues in dispute between the parties and to determine those issues usually in favour of one or more of the parties to them and against the others. In the course of ascertaining and determining those issues the court must make such findings as to matters of fact as are relevant to the issues and as are permitted by the evidence adduced by the parties; and further, the court declares the rules or propositions of law which, in the light of the findings of fact and of the issues to be decided, justify the way in which the court resolves the issues. The distinction between fact and law is important in pleading and proof, the functions of judge and jury, appellate procedure, the theory of precedent, and the doctrine of *res judicata*.

At first sight the distinction between fact and law seems a simple one. Whether the fire that burned my neighbour's house started on my property is a question of fact: the rules that determine my liability raise a question of law. Bohlen has defined a fact as something which has happened or existed, including not only physical facts but also states of mind.[1] When did Smith die? Did Jones know of the existence of the lease? These are questions of fact. As opposed to the facts which describe what happened, law deals with the question of what ought to be done about those facts.

It would seem, then, that a court has two distinct processes: firstly to find the facts and then to apply the law. But this is a very superficial analysis, for the discovery of the facts and the law cannot be too sharply divorced. Even for science a fact is not a stubborn entity existing in the outside world, which of itself suggests the hypothesis which will describe it. Just as the relevancy of a particular fact is determined by the hypothesis which the scientist is investigating, so out of the tangled web of human affairs the law must decide what facts are material to the issue. In one sense we do not know what principles

[1] 72 *Univ. of Pa. L. R.* (1924), 112. J. B. Thayer writes: 'All enquiries into the truth, the reality, the actuality of things are enquiries into the fact about them': *A Preliminary Treatise of Evidence* (1898), 191. These references are cited by R. E. Paul, 57 *Harv. L. R.* (1944), 753.

of law are applicable until we know the material facts, but what facts are material in a given claim is determined by the framework of principles we call the law. To prove every fact would be futile, and the lawyer is guided in his proof by the particular rules that he thinks are applicable. When the client pours out his troubles to his solicitor, the first step is to discover the legal pigeon-holes in which the facts are to be placed. If the story is one of loss of reputation due to the verbal attack of a neighbour, then the lawyer brings to mind the rules of slander and searches for those facts which the law has declared to be essential to liability. The skill of the lawyer sifts the relevant factors from the mass of detail placed before him.

Moreover, it is not as easy to determine the meaning of the term fact as was suggested above. This has always proved a difficult problem for philosophy; and even in law, which is often content to ignore the problems of metaphysics, there are several uses of the term. Actually we can discover the meaning of the term *fact* only by examining the context in which it is used. Thus a question of fact is sometimes contrasted with a question of law, or a matter of fact with mere matter of opinion.

Firstly, the facts and the law are frequently contrasted. Even in this use there are several different shades of meaning:[1] indeed, 'fact and law are to some extent inextricable'.[2] There is no ultimate definition —much depends on the rules of the particular system in question. The question has been complicated by the division of functions between the judge and the jury. The general doctrine is that the jury must determine the facts and the judge the law. But there are many qualifications to be made before this statement can be accepted as accurate.

(*a*) The judge (in general) is not entitled to leave the case to the jury unless there is some evidence on which a reasonable man could decide for the plaintiff.

(*b*) Some questions of fact are determined by the judge. Presumably the existence of reasonable and probable cause is a question of fact, and yet it is the duty of the judge to decide this point in an action for malicious prosecution.

(*c*) The task of the jury is frequently to give a general verdict, e.g. finding a prisoner guilty of murder or a defendant of negligence.

[1] J. W. Salmond, *Jurisprudence* (12th ed.), 10; R. A. Brown, 56 *Harv. L. R.* (1943), 899; P. H. Winfield, 59 *L.Q.R.* (1943), 327.

[2] P. H. Winfield, op. cit. at 341; A. Farnsworth, 62 *L.Q.R.* (1946), 248.

Although the judge lays down the law, the jury must apply it to the facts and reach a conclusion that theoretically is a mixture of law and fact. When a jury decide that a plaintiff is guilty of contributory negligence, they must first determine what a reasonable man would do in the circumstances and then decide whether the particular plaintiff fell short of this test or not. The law is interested, not in the physical world as such, but in facts as seen by the law in relation to its particular frame of reference. It is true that in science also selection must be made, and that what are called facts are frequently the result of the application of a particular standard to a certain part of the material world. Thus we would regard the statement that a book is six inches long as a statement of fact, but, of course, this is discovered only by the application of a particular standard—the foot rule. It may be argued that this is analogous to the testing of human conduct by the criterion of the reasonable man. But there is one real difference—scientists have agreed on the acceptance of rigid standards and any argument concerning the length of a book may be easily tested. Human fallibility may cause error in carrying out difficult experiments, but there is no room for discretion as to what is really meant by the standard of the foot rule. When we analyse the criterion of negligence there is a large area of free play, for not all are agreed as to what action a reasonable man would take in the particular circumstances. Hence there is a blurring of the lines between questions of fact and of law which causes difficulty on appeal, for an appellate court is entirely free to correct an error of law, but is loath to upset a finding of fact by a jury unless it is one that could have been reached by no reasonable body of men. It has been wittily said that an appellate court is guided by its wish to uphold or reverse the particular decision: if it is desired to reverse the decision the court assumes jurisdiction because a point of law is involved; if it is wished to uphold the verdict it is treated as a particular finding of fact.[1] One writer remarks: 'The delusive simplicity of the distinction between questions of law and questions of fact has been found a will of the wisp. . . .'[2] If two persons both wrongly think that a flat is not subject to the Rent Restriction Act because of substantial alteration, is that a mistake of fact or of law? The difficulty of the problem is shown by a division in the Court of Appeal.[3] Denning L.J. distinguishes

[1] Cf. *The Heranger*, [1939] A.C. 94 at 101.
[2] N. Isaacs, 22 *Col. L. R.* (1922), 1.
[3] *Solle* v. *Butcher*, [1949] 2 All E.R. 1107; see also *Chandler* v. *Strevett*, [1947] 1 All E.R. 164 at 165.

primary facts (proved by witnesses or documents) from the conclusions or inferences deduced by a process of reasoning from them. If these conclusions can be as well drawn by a layman (properly instructed in the law) as by a lawyer, then they are conclusions of fact for the tribunal of fact: if, however, the conclusion to be drawn from the primary facts requires for its correctness determination by a trained lawyer, the conclusion is one of law, on which an appellate court is as competent to have an opinion as the tribunal of fact.[1] This is perhaps a working test—the difficulty being to determine when the inferences require determination by a trained lawyer. Later cases[2] more carefully limit the role to be played by courts of appeal, but they preserve the distinction between primary facts, and inferences to be drawn from them. The use of another formula does not remove the ambiguity inherent in the distinction between law and fact.

Secondly, fact and opinion are frequently contrasted. Whether a company has been prosperous in the past is a matter of fact, whether it will fulfil the expectations aroused by its prospectus is a matter of opinion. In the criminal law a person can be convicted of false pretences only if the pretence concerns a present state of fact—obtaining money by a promise to marry does not fall within this requirement as the pretence relates only to the future. Again, a witness is instructed that he must speak only of the facts—not give his mere opinions. In general, only one who has qualified as an expert witness can go beyond the facts. A witness in describing a motor-car accident should reveal what he actually saw, not what he imagined to happen. But the line is not easy to draw, as modern psychology and medicine show. The eye really sees very little and we infer the rest from a hasty glance. Even the most honest person finds it difficult to distinguish between what he actually saw just before a collision and the finished theory which his mind weaves out of the few blurred impressions imprinted on his retina. The eye-witness was once regarded as the best evidence—now learned doctors[3] write articles to show how the imperfect human sense may mislead even an impartial bystander with the result that he is quite convinced that he actually saw what did not take place.

[1] *British Launderers' Research Association* v. *Borough of Hendon Rating Authority*, [1949] 1 K.B. 462 at 471–2.

[2] *Watt* (or *Thomas*) v. *Thomas*, [1947] A.C. 484; *Benmax* v. *Austin Motor Co. Ltd.*, [1955] A.C. 370.

[3] 'The Credibility of the Eye-witness', by Dr. Hodgson in 7 *Medico-Legal R.* (1939), 108.

However difficult it may be to define the exact difference between law and fact, the distinction itself is fundamental for any legal system. Law consists of the abstract rules which attempt to reduce to order the teeming facts of life. Facts are the raw material on the basis of which the law creates certain rights and duties. We shall later divide facts into acts and events—the former being subject to human control and the latter designating those facts that occur without human intervention.[1]

§ 45. Precedent

A court may be bound by statute or by the decisions of superior courts. In England the courts are imperatively bound by decisions of higher courts in the same hierarchy;[2] the Divisional Court[3] is bound by its own decisions. Single judges of the High Court are not strictly bound by their brother's decisions but they will as an ordinary practice follow them.[4] Decisions of the Judicial Committee of the Privy Council are absolutely binding on many courts in the Commonwealth, but the House of Lords, the Judicial Committee, and many appellate courts in Commonwealth countries reserve liberty to overrule their own decisions.[5]

The position of the Court of Appeal (Civil Division) is probably that it regards itself as bound by its own decisions unless the previous decision was given *per incuriam*, was opposed to a subsequent decision of the House of Lords, or there were previous conflicting decisions of the Court of Appeal.[6] This allows rather more flexibility than might be imagined.[7] Lord Denning thinks that the Court of Appeal should be free to overrule itself,[8] but there is not yet a majority

[1] *Infra*, § 67.

[2] The House of Lords regarded itself as bound by its own decisions from 1898 to 1966, when the Lord Chancellor made a statement abrogating the old rule. See J. Stone, 69 *Col. L. R.* (1969), 1163, for a penetrating theoretical analysis of the Lord Chancellor's statement.

[3] *Huddersfield Police Authority* v. *Watson*, [1947] K.B. 842; W. H. D. Winder, 9 *Mod. L. R.* (1946), 257.

[4] e.g. per Devlin J. in *Alma Shipping Co., S.A.* v. *V. M. Salgaoncar E. Irmaos Ltda.*, [1954] 2 Q.B. 94.

[5] But the Judicial Committee and the Appellate Courts in Commonwealth countries who reserve such liberty seem to be loath to overrule their own decisions; see Note, 68 L.Q.R. (1952), 142 and e.g. *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales* (1953), 87 C.L.R. 49 per Dixon J. at p. 70, and *Attorney-General for New South Wales* v. *Perpetual Trustee Co.* (1952), 85 C.L.R. 237 per Dixon J. at pp. 243–4.

[6] *Young* v. *Bristol Aeroplane Co.*, [1944] 1 K.B. 718.

[7] R. N. Gooderson, 10 *Camb. L. J.* (1950), 432.

[8] *Gallie* v. *Lee*, [1969] 1 All E.R. 1062; *Hanning* v. *Maitland*, [1970] 1 All E.R. at 815.

decision of the Court of Appeal to this effect. With regard to the Criminal Division of the Court, the doctrine of *stare decisis* 'does not apply in its full rigour'.[1]

An interesting point is made by Russell L.J.:[2]

> This court is not omniscient in the law, nor are counsel, however eminent. We work under great pressure from the lists, and whilst not always ready to accept a concession on a point of law from the Bar it is not infrequent to do so, and moreover on a point essential to the decision of the appeal, without further investigation. We are attracted by a suggestion that the conceded point of law should be open to argument in another case, provided it is made plain that that should not be made the basis for the further suggestion that where an argument, though put forward, had been only weakly or inexpertly put forward, the point of law should similarly be open; for much uncertainty could thus be undesirably introduced.

The English doctrine of binding precedent differs from that of other systems, but it is a legitimate study for jurisprudence as one development of the judicial method. In most continental countries a long course of decisions may have very high persuasive authority, but no country pays to the single decision the deference of the English common law. Even in America, where the common law system was inherited, the doctrine of precedent is more liberal.[3]

The detailed rules actually adopted in England with respect to the binding nature of case law authority, and the difficulties encountered in their application, have been adequately set out elsewhere[4] and need not be elaborated upon here. The general theory and the recurring problems of theory and practice call for discussion however. Certain basic matters of terminology and of actual practice in the day-to-day work of the courts must be understood at the outset.

When it is said that a case is binding, what is it that binds?[5] It is often said that a previous case is binding only as to its *ratio decidendi*, and the *ratio* is distinguished from *obiter dicta* which do not bind.

[1] Per Widgery J., *R.* v. *Newsome*, [1970] 3 All E.R. 455. In particular a bench of five feels free to overrule a decision of a court of three: see also *R.* v. *Gould*, [1968] 2 Q.B. 65.

[2] *Joscelyne* v. *Nissen*, [1970] 1 All E.R. at 1223.

[3] *Univ. of Cincinnati L. R.* (1940), 203–355.

[4] Salmond (12th ed.), 141; C. K. Allen, *Law in the Making*, ch. iv; R. Cross, *Precedent in English Law* (1968). Although the courts sometimes discourage the citation of cases not reported by a barrister, a decision does not cease to be an authority merely because it is not reported in a recognized series: R. E. Megarry, 70 *L.Q.R.* (1954), 246.

[5] A. W. B. Simpson, *The 'Ratio Decidendi' of a Case and the Doctrine of Binding Precedent*, Oxford Essays in Jurisprudence (1961), 125. D. P. Derham, *Precedent and Particular Questions*, 79 *L.Q.R.* (1963), 49.

It is also said that the *ratio decidendi* of a case is the underlying principle or legal reason on which the result of the case depends. This is deceptively simple, as will be seen, and if combined with the proposition that it is only the *ratio decidendi* which has binding effect, then it leads to confusion and error. The classical view was that the *ratio* was the principle of law which the judge declared in his judgment to justify and explain his decision of the case. But it has been objected to that view that the ratio is the principle of law which links the ultimate determination of the case with the essential or material facts of it, and that the statement by the judge may or may not do that, or may be framed too widely or too narrowly.[1]

Ratio decidendi, literally, would refer to the 'reason of decision' or to the 'reason for deciding', but the use of the term to refer to the binding part of a case requires some attention to the actual terminology used in arguments about case law authority, for there has been much confusion. To begin with, *ratio decidendi* is almost always used in contra-distinction to *obiter dictum*. An *obiter dictum*, of course, is always something said by a judge. It is frequently easier to show that something said in a judgment is *obiter* and has no binding authority than it is to demonstrate that something said has binding authority. Clearly something said by a judge about the law in his judgment, which is not part of the course of reasoning leading to the decision of some question or issue presented to him for resolution, has no binding authority however persuasive it may be, and it will be described as an *obiter dictum*.

Other terms in common use must be made clear. The word 'decision' is used to refer to several different things. It is not a technical term of law with one fixed meaning. It may be used to mean the ultimate order the court makes to determine the case and on the strength of which one party or another may seek execution. Frequently it is used to refer to the whole case—instead of saying 'in a previous case', a lawyer may say 'in a previous decision'. Further it is commonly used to refer to the determination of a particular issue, and sometimes, more loosely, to refer to the reason for reaching such a determination. In the following paragraphs 'decision' will be used to refer to the decision of any issue in the course of judicial proceedings; 'order' will be used to refer to the final order made by

[1] A. L. Goodhart, 'Determining the *Ratio Decidendi* of a Case', in *Essays in Jurisprudence and the Common Law*, 1; all the American realists and most of the English and American text writers, e.g. J. W. Salmond, C. K. Allen, J. Stone, E. W. Patterson, and previous editions of this work.

the court and binding the parties to the proceedings; and 'judgment' will be used to refer to the reasons given by the judge to explain and justify his order.[1]

In *Re Hallett*[2] Sir George Jessel said: 'The only use of authorities, or decided cases, is the establishment of some principle which the Judge can follow out in deciding the case before him.' And again in *Osborne* v. *Rowlett*[3] he said: 'The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided.' That kind of general view has been expressed many times by judges and others. It is seen as erroneous the moment the day-to-day practices of the courts are examined, however attractive it may seem and however much flexibility it may produce when made the basis for argument in the highest appellate courts. To understand the way courts actually function from day to day, it is necessary to appreciate the difference between different kinds of authoritative statements of law found in reported cases, and also the difference in practice at different levels of the judicial hierarchy.

First, it simply is not true to say that the only thing binding in a case is the principle upon which it was decided. One case may provide binding authority for many propositions of law. Each judicial decision of a question or issue leading to the determination of the whole case, whether in interlocutory proceedings or at trial, may provide binding authority. Many such decisions will provide precise answers to precise questions. If the same questions arise in subsequent proceedings in a subordinate court, they will bind that court to decide the question in the same way. This invokes the very core notion of a precedent system: that questions ought to be decided today in the same way as they were decided yesterday simply because they were decided that way yesterday. It provides the great bulk of binding authority actually applied by legal practitioners and by trial courts at all levels in their work. It is too frequently ignored in theoretical legal writing, perhaps because its day-to-day use is somewhat humdrum, and perhaps because it does not involve so obviously the

[1] For a useful discussion of the use of the various terms in this area see J. L. Montrose, 'Language of, and a Notation for, the Doctrine of Precedent', 2 *Univ. of Western Australia Ann. L. R.* (1952–3), 301, 504. In *R.* v. *Ireland*, [1970] A.L.R. 727, Barwick C.J. treats the judgment as the order of the court. If the judges in an appellate court agree in allowing an appeal, it is irrelevant that their reasons for so doing are conflicting or even contradictory.

[2] (1879), 13 Ch. D. 696 at 712.

[3] (1880), 13 Ch. D. 774 at 785, and see the vigorously expressed views of C. K. Allen, *Law in the Making* (7th ed.), ch. iv.

intriguing intellectual problems with respect to change and development in the law which are encountered when the authority of principles or of more general propositions of law is in question.

The distinction between the binding nature of a decision on a particular question or issue and the binding nature of a principle 'upon which the case was decided'[1] runs right through the ordinary work of the courts, and it may be illustrated quite simply.

The Dog Act, 1958,[2] provides that if any 'horse, cattle or sheep' is attacked and injured by a dog, the owner of the 'horse, cattle or sheep' may claim compensation for the injury from the owner of the dog. Suppose X claims damages from Y because Y's dog has killed X's pedigree goat. X claims damages on several distinct legal grounds[3] and for one of them he relies on Section 26 of the Dog Act. Y argues that he cannot be made liable under Section 26 of that Act because goats are not included within 'horse, cattle or sheep' for the purposes of that Section.

Unless the court awards X damages on one of the other grounds advanced and refrains from deciding the question raised by Y's argument[4] its decision that goats are, or are not, comprehended by Section 26 of the Act will be treated as binding by subordinate courts in that jurisdiction, and so a precise answer to a precise question is made part of the law. It may be said that this is a mere matter of statutory interpretation; that the real problems of precedent arise where the common law is concerned and apart from statute. Two things need to be said in answer; firstly, that a very large number indeed of cases raise issues of statutory interpretation and their settlement is an important part of the work of the courts; and secondly, that there is an infinite number[5] of questions which may be raised in the course of human disputes and many of those which are not concerned with statutes, but with the common law alone, may be answered in just such a black-and-white way. Thus X may make his claim on the ground, *inter alia*, that Y is strictly liable for his dog's attack, in the same way that an owner may be liable in cattle trespass.

[1] Sir George Jessel (*supra*).

[2] Of the State of Victoria by Section 26.

[3] Under the common law: (*a*) seeking to prove that Y knew of his dog's dangerous propensities [scienter], (*b*) seeking to prove that Y directed the assault by ordering his dog to attack the goat [trespass], (*c*) by arguing that Y is strictly liable for the 'trespass' of his dog, as in cattle trespass—see *Doyle* v. *Vance* (1880), 6. V.L.R. [L] 87.

[4] The various possibilities here are discussed in the article by J. L. Montrose, 'Language of, and a Notation for, the Doctrine of Precedent' (*supra*).

[5] One mathematician has remarked that the number is infinity to the power of infinity.

If this is a case of first impression, the court may have to decide whether or not the cattle trespass rules apply to dogs. The yes or no answer to that question will prevent argument of it in subsequent cases in courts bound by the decision. This is a strict binding because it prevents consideration by a subordinate court of the reasons given by the higher court for deciding the way it did, however misconceived they may appear to have been, unless they are in clear conflict with some yet higher authority.

Much of the law at rest, as it were, can be seen to be comprised by decisions of that kind. Practitioners' textbooks are full of classified and indexed answers to just such specific questions. But, as has been said already, the number of such questions which may be raised is infinite; and if this were all to the doctrine of precedent the common law would indeed appear as a wilderness of single instances.[1]

Such precise decisions, however, will ordinarily be supported by a course of reasoning which establishes a general proposition of law which the court uses to explain and justify its decision. That proposition may properly be called the *ratio decidendi* of the decision, and it will be binding upon lower courts also, but its binding nature is of a different kind. For example, in the Victorian case of *Armstrong* v. *Hammond*[2] the court had to decide whether or not a private citizen could prosecute an offence under Section 20(3) of the Victorian Police Offences Act, 1957.[3] Section 190 of that Act designated certain officials as competent prosecutors for various purposes under the Act, and it was argued that only those officials could prosecute for an offence under Section 20(3). The full court of the Supreme Court of Victoria held that any member of the public could prosecute. That decision would clearly foreclose any repetition of that objection to a private prosecution under Section 20(3) in any other Victorian court, once Armstrong's case was brought to the court's attention, whatever the merits of the reasons given by the full court for the decision, unless those reasons were clearly inconsistent with authority from some yet higher court in the hierarchy.

The full court's decision was supported by a reason which may be stated as follows: The power of any member of the public to lay an information for an offence of a public nature is not to be taken as denied in the absence of clear and express legislative language.

[1] But a rather different wilderness from that conceived of by those who think of single instances as particular facts rather than as particular legal questions or issues.
[2] [1958] V.L.R. 479.
[3] Wilful damage to property.

That proposition is not of mere persuasive authority so far as other courts in Victoria are concerned. It is not an *obiter dictum*.[1] Only a little thought is needed to see that the binding nature of such a proposition is very different from the binding nature of the decision that anyone can prosecute under Section 20(3). The general proposition is binding in the sense that it cannot be questioned or denied, but must be accepted as a valid proposition of law by a subordinate court; but the question whether or not another Section or another Act of Parliament has taken away the general power to prosecute, is a specific question which cannot be answered by simple deduction from the general proposition. It will not just be a matter of 'doing the sums right'. It will require argument, the marshalling of reasons and authorities permitted or comprehended by the legal system, and the exercise of judgment.

The other matter which must be understood is the difference between the treatment of precedent authority at different levels of the judicial hierarchy. Most of the literature is concerned with the work of the appellate courts, and this is perhaps understandable as that work is the most important so far as the development of the written law to be applied by the courts and by practitioners is concerned. The overwhelming majority of actual legal disputes are disposed of, however, without ever reaching an appellate court.

It is basal to the common law system that a common law court will not give a decision unless there is a real dispute before it. Correlatively, it is basal that a judge's declaration of law will only be treated as binding authority when it is a necessary part of a course of reasoning which justifies the decision.[2] Not in all,[3] but in most cases, the issues can only be described by reference to facts as well as law. Immediately problems of language, definition, and classification infect the process and make room for indeterminacy. This is inevitable wherever a process of reasoning involves the application of general propositions to particular[4] situations. It should be expected, therefore, and it is so, that a general proposition of law on which a decision of a particular question depends, whether declared expressly

[1] *Deakin* v. *Webb* (1904), 1 C.L.R. 585 at 604–6; *Great Western Ry. Co.* v. *Mostyn*, [1928] A.C. 57.

[2] *Necessary* here in the sense that it is necessary to the course of reasoning—not *necessary* in that the dispute could not have been decided one way or another without it.

[3] Some quite abstract issues of law may be presented, e.g. on originating summons or on demurrer, where there is little room for argument about the relevant facts.

[4] Perhaps, in a complete analysis, unique situations.

by a judge or imputed by an observer by examining the issue and the decision only, may be stated either widely or narrowly—just as the questions presented for decision may vary infinitely in their precision or generality.

It is natural that an appellate court, conscious of its duty to declare the law and perhaps conscious of its role as a law maker, will look more closely to the precise statement of a rule or principle of law in the light of the reasons for it and of its desirable extension or limitation, than will a lower court less conscious of its law-making and law-declaring role and more conscious of the authority of courts which stand above it.

Thus in courts of summary jurisdiction, where the judicial function is not ordinarily carried on by highly qualified and experienced lawyers, and where the pressure of time is great, fine distinctions in answering questions about just what is binding in previous cases are seldom entertained. In these courts, and in other courts of inferior jurisdiction[1] where experienced lawyers sit on the bench but where procedure is simplified and the pressure of time is great, if a superior court has stated the applicable law in a certain way as part of the expressed reasons for coming to a decision in a previous case, then that statement will be treated as law and will be applied as such.

Where superior courts are concerned differences can be observed between the day-to-day work of courts of first instance and the work of courts of appeal—particularly ultimate courts of appeal. Most of the cases which come before courts for trial do not on their face raise disputes about the correct way the applicable law should be stated. They raise disputes about facts and events and about the way admittedly correct statements of law should be applied to resolve issues arising out of such facts and events. This is one of the reasons why busy practitioners who practise before such courts are heard to say they would rather have 'an ounce of fact than a ton of law'.

Judges sitting in superior courts deliver reasoned judgments supporting their decisions and, in cases which seem to be of importance to the law, those judgments will be reported in the law reports. The judge therefore is conscious of the fact that he is taking part in a law-declaring process at least, and he may be taking part in a law-making process. In these circumstances it is to be expected that the

[1] For example, County Courts, Courts of General or Quarter Sessions, District Courts, and other courts of intermediate jurisdiction by whatever name they may be called.

authorities will be examined much more closely to discover just what the correct statement of the law is, than is likely in inferior courts. But the tradition of the common law is strong that the judge is not consciously to initiate the making of law; that he has power to do what is required to decide the case before him but no more; that he is to declare faithfully in the light of the authorities what the law is. Further the judge sitting at first instance is greatly influenced by his respect for the courts higher in the judicial hierarchy and for the authority of their actual pronouncements. Consequently, such judges sometimes find themselves committed to what may be the difficult task of reconciling existing authorities, and of making sure that the statement of law to be applied in the case before them is one that is authorized by, and is not denied by, such authorities. A clear dilemma is not frequently presented to such a judge sitting alone. In most cases he will find a previous authority which binds or persuades him with a statement of law which he can apply to the case before him. He is able to say that if that statement is too wide or needs restriction then a court of appeal will correct him if he is wrong in applying it. So long as the statement of law concerned was expressed by the higher court as part of a course of reasoning leading to decision, he will not ordinarily examine whether or not it was stated too widely or too narrowly in the light of the issues and facts in the previous case.[1]

Where a court is invited to examine one of its own judgments, however, and in the higher courts of appeal, and particularly in ultimate courts of appeal, a different approach is evident. The lighter pressure of respect for expressed authority, and the consciousness that what is said to be the law will be accepted as such by lower courts and is not likely to be varied except by legislation, go far to explain the difference. There is a greater readiness to say that the statement of a rule of law expressed in a previous case was too wide or too narrow and was not binding in the form expressed, as not being required by the particular facts or issues in that earlier case.[2]

[1] Some celebrated examples of a judge analysing the statements of a court whose decisions bind him are to be found in the reports, e.g. per Scott L.J. in *Haseldine* v. *Daw & Son Ltd.*, [1941] 2 K.B. 343, but these examples serve rather to highlight the ordinary practice than to deny it. R. N. Gooderson, 30 *Can. B. R.* (1952), 892—distinction between *ratio* which a judge thought he was expressing and the *ratio* which a later court thinks he had power to lay down.

[2] e.g. the analysis of *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259 in *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, and see *Great Western Ry. Co.* v. *Mostyn (owners of S.S.)*, [1928] A.C. 57.

It is in these circumstances that the factors producing the indeterminacy of general propositions of law outlined above may be seen occasionally in full play. The degree of indeterminacy of course varies infinitely with the variation in precision with which different propositions of law are stated as well as with the variation in relation between the nature of the proposition and the facts and issues of the case which called it forth. Perhaps some of the more general propositions in the law of torts provide the most extreme examples of indeterminacy. Here words like reasonable, proximate, remote, direct, and indirect, etc., find their places in propositions of law laid down by appellate courts and said to be binding upon other courts.[1]

An example often taken to demonstrate the indeterminacy of precedent authority is the case of *Donoghue* v. *Stevenson*.[2] In that case a point of law was taken on appeal to the House of Lords from the Second Division of the Court of Session in Scotland.[3] It was common ground that there was no difference between Scots and English law affecting the point. The facts averred (but at the time of this appeal, of course, they were not established at any trial) were that the appellant suffered injury as a result of consuming part of the contents of a bottle of ginger beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The following facts were also averred: That the bottle of ginger beer was purchased for the appellant by a friend in a café; that the bottle was made of dark opaque glass so that the appellant had no reason to suspect that it contained anything but pure ginger beer; that the occupier of the café poured the ginger beer into the tumbler from which the appellant drank; that, after the appellant drank some of the ginger beer, her friend who had purchased the bottle then proceeded to pour the remainder of the contents of the bottle into the tumbler, at which point the presence of the decomposed snail was discovered; that the ginger beer was manufactured by the respondent to be sold as a drink to the public; that it was bottled by the respondent and labelled with a label bearing his name;

[1] See J. Stone, *Province and Function of Law*, ch. vii.

[2] [1932] A.C. 562. Another interesting example is *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt*, [1971] 1 All E.R. 150, where the J.C. distinguished the decision of the House of Lords in *Hedley, Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465.

[3] The Second Division had dismissed the action, holding that the averments disclosed no good cause of action. Procedurally this may be taken as indistinguishable, for present purposes, from taking a point of law to an appellate court on demurrer, or appealing against a decision to dismiss a cause of action by striking out a statement of claim as not disclosing a cause.

that the bottles were, after labelling, sealed with a metal cap by the respondent. As matters of law the appellant averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger beer was filled into them. She averred that he had failed in both these duties, and had so caused the accident.

The respondent objected that those averments did not disclose a cause of action. What he was saying, therefore, was that even if all the facts were accepted as true, including the allegation that the snail got into the bottle as a result of the negligent or careless conduct of the respondent, none the less the respondent owed no duty to the plaintiff and was not liable for the injuries suffered by her. He argued that if the respondent was guilty of a negligent breach of duty, then it was of a duty established by contract and owed only to those who were in contractual relations with him and not to members of the public who were, like the plaintiff, strangers to the contract under which the ginger beer was supplied by him. He sought to establish, on the authority of English cases, that a manufacturer is under no duty to persons with whom he is not in any contractual relation; and that there were only two exceptions to that general proposition: (1) where the article concerned is dangerous *per se* and (2) where the article is dangerous to the knowledge of the manufacturer. The House of Lords, by a majority, decided that the respondent did owe the appellant a duty of the kind asserted by the appellant and remitted the case to Scotland for trial. It can be said with accuracy, therefore, that the House decided that a manufacturer of ginger beer may owe a duty of care to consumers to take care in the manufacture of the article to be sold, but further questions arise when it is asked under just what conditions that duty arises and when may it be said to be broken.

Now here it can be seen that the House of Lords decided some quite specific questions of law and established a general principle. Thus it was decided that a manufacturer may owe duties of care with respect to the condition of his products, not being dangerous *per se* or dangerous to his knowledge, quite apart from the duty created by contract made by him with persons purchasing from him.[1] As a con-

[1] Under those contractual duties, of course, strangers to the contract, under established rules of law, could not claim benefits. Only parties to the contract or beneficiaries under some kind of trust created by the contract could do so.

sequence it was also decided that the cases of *Mullen* v. *Barr & Co. Ltd.* and *M'Gowan* v. *Barr & Co. Ltd.*[1] were incorrectly decided and were overruled. But what was the principle established? Clearly it was decided that a manufacturer of ginger beer owed a duty of care to the consumer to take care that the remains of decomposed snails did not get into his bottles which were intended to reach the consumer in the state they left the manufacturer. It would seem absurd to confine that proposition to ginger beer. But is it limited to foodstuffs? Or to things likely to result in danger to life, limb or health?[2] Is it limited to those articles with respect to which there is no *possibility* of intermediate examination by the retailer? Or is it enough that the article will reach the consumer subject to the same defect, there being no commercial *probability* of intermediate examination?[3] Does the now-famous general principle enunciated by Lord Atkin—'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question',[4] control in any binding way the answers to those questions?

Many decisions have been necessary to work out the real meaning and proper application of the 'principle'. In truth such a broad proposition provides only a direction for thinking, and the means by which the answers to specific questions, established authoritatively as rules of law, may be explained, classified, grouped together, and made the basis for further thinking in a developing and changing system of law. Between the wide statement of principle and the narrowest rational way of stating the rule applicable to decide the particular issue in *Donoghue* v. *Stevenson* lies a wide area in which authority, considerations of justice, fairness, and of the effective working of the legal system itself, must be subjected to the processes of human reasoning powers and insights, so that new cases as they arise may be decided consistently with established authority and with prevailing notions of justice.

Under the umbrella of a general principle, so to speak, one case

[1] [1929] S.C. 461.
[2] See *Old Gate Estates Ltd.* v. *Toplis & Harding & Russell*, [1939] 3 All E.R. 209.
[3] *Grant* v. *A.K.M.*, [1936] A.C. 85.
[4] [1932] A.C. at p. 580.

plots a point on the graph of the law of torts, but to draw the curve of the law we need a series of points. In many important cases there is a statement of principle much broader than is necessary if the precise issues in that case only are to be considered. If the decision is felt to be wrong the principle will be confined to cases raising precisely the same issue; if it is thought correct, the merest *obiter dictum* may have very great weight. A court if it approves the general doctrine expressed in a case, will apply it whether it is bound or not. The rigid determination of what is strictly binding in a previous case is necessary only where a court considers a decision unfortunate, or where there is an apparent conflict of such binding authorities. To suggest narrow limits to what is absolutely binding does not deny the tremendous influence of a broad general principle expressed in a judgment, if the lips that uttered it were worthy of respect—and *a fortiori* if it were uttered from a bench exercising strict authority over the courts subject to its influence.

Where courts are said to be strictly bound by their own decisions, it is perhaps understandable that freedom should be sought in a narrow delimitation of the strictly binding parts of authoritative cases. In Australia, wider theories have been enunciated by the High Court,[1] but since that court can overrule its own decisions, there is no great danger of premature rigidity.[2]

One criticism of a narrow theory of the strictly binding nature of precedent cases is that it may make the law a 'wilderness of single instances',[3] since legal issues and questions are potentially infinite in number and are infinitely various. It is the fear of such a wilderness that has led so many judges and legal writers to assert that cases are useful and authoritative only in so far as they lay down principles.[4] It has already been asserted that that view is misleading, if taken literally. But neither is its converse correct. At the highest level the narrow theory of strictly binding authority, outlined above, has been

[1] *Deakin* v. *Webb* (1904), 1 C.L.R. 585 at 605–6.

[2] The High Court is, save in certain constitutional cases, bound by decisions of the Privy Council, and if it adopts a wide theory with respect to the authority of its own judicial pronouncements, it should logically also apply the same theory to decisions of the Privy Council; and in fact an examination of its judgments, it is suggested, reveals that it does so—see, for example, the treatment by a majority of the High Court in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (1952), 87 C.L.R. 49 of the Privy Council's recommendations to Her Majesty in *Commonwealth of Australia* v. *Bank of New South Wales*, [1950] A.C. 235, where in strict theory the Privy Council's reasoning on the merits of the case was all *obiter dicta*.

[3] Griffith C.J., *Fraser* v. *Victorian Railways Commissioners* (1909), 8 C.L.R. 54 at 58.

[4] The vigorous assertions of C. K. Allen provide as nice an example as any—*Law in the Making* (7th ed.), 285 et seq.

thrust on English law by the need to distinguish inconvenient cases which there is no power to overrule. So far as the authority of *rationes decidendi*[1] is concerned there is no real danger of the English doctrine of precedent producing mechanical judges. It is impossible to draw a rigid line, *a priori*, between *rationes decidendi* and *obiter dicta*. The English language creates inevitable ambiguities and indeterminacies which are not present in sciences employing rigidly defined terms. There is no trick of method which can determine as a matter of inexorable logic the precise wording of a statement of law which binds, where what is concerned is a general principle providing the reason for a decision. The interpretation of precedent in this sense is an art rather than a science. Further so long as appellate courts render individual judgments flexibility is inevitably preserved, because of the logical impossibility in some cases of discovering a common *ratio*.[2] Lord Reid approves flexibility in final courts, for he points out the danger of single judgments—the true *ratio* appears better from a comparison of two or more statements in different words which are intended to supplement each other.[3] Moreover, even in appellate courts, there are cases where the appropriate precedents are not cited. Thus in *Broome* v. *Cassell & Co.*,[4] the Court of Appeal accused the House of Lords in *Rookes* v. *Barnard*[5] of not considering its own decisions.[6] Incidentally, the Court of Appeal took a very strong view, holding that *Rookes* v. *Barnard* was a decision *per incuriam* and directing lower courts to follow the law existing prior to the decision until the House of Lords had an occasion to reconsider the matter.

There is much wisdom in the speech of Lord Reid:

> Whatever views may have prevailed in the last century, I think it is now widely recognised that it is proper for the court in appropriate cases to develop or adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with lawyer's law and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as

[1] Here used in the sense of reasons expressed by the judges for their decisions.
[2] J. Stone, *Province and Function of Law*, chs. v and vi; G. W. Paton and G. Sawer, 63 *L.Q.R.* (1947), 461.
[3] *Gallie* v. *Lee*, [1970] 3 W.L.R. 1078 at 1081.
[4] [1971] 2 W.L.R. 853.
[5] [1964] A.C. 1129.
[6] At p. 869. Megarry J., *Hounslow* v. *Twickenham Garden*, [1970] 3 All E.R. at 340, refers to the 'melancholy list' of relevant decisions that were not cited.

are lawyers. On such matters it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of parliament.[1]

In dealing with maintenance and champerty, Danckwerts J. stated: 'A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary.'[2] Devlin J. (as he then was), while agreeing that this approach is more fitting for appellate than lower courts, thought that if a refusal to recognize obsolescence leads to absurdity, then even a judge in any court should be a reformer.[3] If the court is considering an order for maintenance, it should recognize that 'the law is a living thing, moving with the times and not a creature of dead or moribund ways of thought'.[4] Lord Upjohn said of a decision which has stood (although criticized) since 1877: 'The *Parana*[5] . . . must be regarded as either obsolete, being overtaken by events, or overruled'[6]—surely a compendious way of getting rid of an awkward precedent.

Is the English doctrine, which allows binding authority to a single decision of a higher court, too narrow? The answer tentatively suggested is that, while it leads to confusion if lower courts do not follow decisions of upper courts in the same hierarchy, the House of Lords is well advised to keep power to overrule itself. Indeed, over the last few years, the shackles of precedent are being loosened. R. Cross writes: 'When I wrote the first edition (1960) I believed, as others did at that time, that the English doctrine of precedent was more rigid than it had ever been before. It is now clear that this is no longer so.'[7] Various reasons have been used to justify the doctrine of precedent[8]—that it is adequate proof of custom, that it shows respect for the opinion of one's ancestors, that convenience demands that a question once decided should not be subject to re-argument in every

[1] *Pettitt* v. *Pettitt*, [1969] 2 All E.R. at 390.
[2] *Martell* v. *Consett Iron Co. Ltd.*, [1954] 3 All E.R. 339 at 349.
[3] *Winchester* v. *Fleming*, [1957] 3 All E.R. 711.
[4] Per Sachs L.J., *Porter* v. *Porter*, [1969] 3 All E.R. at 644. 'Much water has passed under the bridges since 1929'—per Lord Denning, *Pett* v. *Greyhound Racing*, [1968] 2 W.L.R. at 1476.
[5] (1877), 2 P.D. 118.
[6] *Koufos* v. *Czarnikow*, [1969] 1 A.C. 350.
[7] *Precedent in English Law*, 1968. Cf. Barwick C.J., *Mutual Life and Citizens' Assur. Co. Ltd.* v. *Evatt*, [1968] 42 A.L.J.R. 316: 'The perpetuation of error by an ultimate Court of Appeal is not an indispensable, nor a desirable, feature of a stable system of law grounded on judicial precedent.'
[8] A. L. Goodhart, *Problème des sources du droit positif*, 37.

case in which it arises. All these arguments contain a certain element of truth. Some claim as a virtue of precedent that it leads to certainty: others that flexibility is the chief merit. Clearly a very flexible system can hardly be certain, since no one knows exactly when and where development will take place. It is the eternal difficulty of law to reconcile rule and discretion,[1] and the practical problem is whether the common law achieves a reasonable certainty with some capacity for development. The doctrine of precedent makes against flexibility, although it has not prevented great development, and it leads to certainty[2] save where the cases are so many or so confusing that no clue can be found to the legal maze. An excess of precedents may easily lead to uncertainty unless they are uniform in result, and unless a satisfactory technique exists for discovering relevant cases: sometimes a case may reach the House of Lords before it is discovered that there is a precedent which is binding.[3] In America the increase in the number of reported cases has led to a modification of the doctrine of *stare decisis*—by 1940 the total was nearing the two million mark, and the flood is more than human ingenuity can cope with.[4]

The view that precedent leads to the scientific development of the law is not convincing, for *elegantia iuris* may be secured either with or without a doctrine of binding precedent. Indeed, the doctrine of precedent may mean that unfortunate cases remain to mar logical symmetry. It is also urged that the doctrine has practical advantages —it is true that the case method is closely related to the facts in its development, but precedent is a hindrance since the truly practical method would allow of experiment and an opportunity to correct one's mistakes.[5] Undoubtedly, reversal of a precedent may cause

[1] *Infra*, § 47.

[2] J. Frank, *Law and the Modern Mind*, puts forward the realist thesis that the certainty of precedent is only an illusion, *supra*, § 7. See in general Sachs L.J., *Porter* v. *Porter*, [1969] 3 All E.R. at 643; *Koufos* v. *Czarnikow*, [1969] 1 A.C. 350.

[3] *Penrikyber Nav. Colliery Co.* v. *Edwards*, [1933] A.C. 28; *Christie* v. *Leachinsky*, [1947] A.C. 573 at 586; C. K. Allen, 59 *L.Q.R.* (1943), 308.

[4] A. L. Goodhart, *Essays in Jurisprudence and the Common Law*, 50. See the Report of the Cincinnati Conference on the Status of Precedent, 14 *Univ. of Cincinnati L. R.* (1940), 203–355. The growth may be seen in the following figures. From 1790 to 1840 there were 50,000 reported Federal and State decisions; from 1840 to 1890 there were 450,000 new decisions; from 1890 to 1940, 1,500,000; this makes a grand total of 2,000,000 cases. Will the lawyer of the future operate with microfilm and electronic devices? L. O. Kelso, 18 *Rocky Mt. L. R.* (1946), 378.

[5] A. L. Goodhart, *Precedent in English and Continental Law* (Stevens), 25. One of the greatest vices of the English doctrine of precedent is the occasional distinguishing of cases on very narrow grounds. Thus, Evatt J., in *Chester* v. *Waverley Corporation* (1939), 62 C.L.R. 1, distinguished the *Coultas Case* (1888), 13 A.C. 222, on a very narrow ground in order to secure opportunity for the law to develop.

injustice to those who have shaped their conduct in reliance upon it, but this is an argument for extreme care in overruling precedents rather than for a complete denial of the power. Certainly, if a court follows no consistent policy and frequently changes from one view to another, disrespect for the law results, since a chance majority may affect the decision. The great difficulty, of course, is that, whereas a statute may change the law for the future but leave vested rights untouched, a court can change the law only in the very act of applying it to a case, when 'the attorney who drew the will . . . may have acted on the authority of that very decision' which the court is asked to overrule.[1]

It is also claimed that the individual caprice of the judge is controlled by the necessity of following binding precedents: 'it is better to apply the law, which is the wisdom of a great many, than to act on one's individual impression.'[2] The community must be ruled by law and not by men, for then all are equally treated. But should we carry our natural love of equality as an attribute of justice so far as to treat twenty plaintiffs unjustly because one binding case laid down an unjust rule? Is it better to be ultimately right or consistently and persistently wrong?[3] One factor that is of great importance is that the following of precedent is easier in England than in many other countries, firstly, because the system of justice is centralized and there is a comparatively small number of reported cases; secondly, because there is no written constitution which could be made unworkable if cases deciding its interpretation were made binding; and thirdly,

[1] *In the Goods of Hallyburton* (1866), L.R. 1 P. & D. 90. See also *The Annefield*, [1971] 1 All E.R. 394, where the C.A. showed reluctance to overrule a decision in commercial law which had not been challenged for fifty years. In America some courts take the step of following the precedent in the case before them, but of announcing that they will not follow it in future. This runs counter to the English view that the courts are limited to declaring what the law is and cannot lay down one rule for the case in question and another for the future.

[2] Per Madden C.J. who, in *Harvey* v. *Ottoway*, [1915] V.L.R. 520 at 525, read an amusing sermon to justices who had refused to follow a decision of the House of Lords on the ground that two old married men could not be taught much on the subject of a husband's liability. 'They, and indeed every one of us, would do well to listen to the House of Lords—a tribunal not only composed of the greatest lawyers, but also the most authoritative, for they speak last. And if it be said that the magistrates here acted on an inspiration springing from the antiquity of their domestic relations, they ought still to remember that the judges of the House of Lords, in addition to being great lawyers, are probably no less old and no less married than themselves, and that acting on the inspiration in question is certain to lead to confusion and appeals and costs in the administration of justice.'

[3] Cf. Isaacs J. in *Aust. Agric. Co.* v. *Federated Engine-Drivers Assocn.* (1913), 17 C.L.R. 261 at 278: 'It is not in my opinion better that the Court should be persistently wrong than that it should be ultimately right.'

because the legislature has absolute power to remedy any particular defect. Where there are many courts, as in America, the conflict of decisions inevitably leads to bolder criticism even of cases that are binding on a particular court. Similarly, some freedom must be retained in the interpretation of a written constitution, for amendment is not easy and a single decision might cause unforeseen practical difficulties.[1] In England the courts have showed such great discretion in overruling persuasive precedents which have been accepted as law by a long course of conduct[2] that there is no reason to suppose that the Court of Appeal would exercise rashly a power to overrule its own decisions.[3]

On the topic of precedent there is a voluminous literature which cannot be discussed; but it is submitted that what is even more important than the theory of the common law technique is the spirit in which it is applied. If the law tends to that love of subtlety for its own sake for which Parke B. was notorious and applies precedents in a rigid and unthinking fashion, then the future is dark, but there are welcome signs that courts are fully alive to their real task.[4] What is even more important than the machinery is the quality of the men who control it.[5]

The English doctrine causes surprise to many foreign lawyers, for on the Continent no single decision even of the highest court is absolutely binding. While there is naturally a strong tendency to follow the doctrine of a line of cases, even then in theory[6] a lower court can

[1] Thus the High Court of Australia, the Privy Council, and the U.S. Supreme Court, all of which interpret written constitutions, have retained freedom to overrule their own decisions, and in 1966 the House of Lords adopted a similar policy.

[2] e.g. *Wolstanton Ltd.* v. *Newcastle-under-Lyme*, [1940] A.C. 860; *Lissenden* v. *Bosch Ltd.*, [1940] A.C. 412. Opinion is divided on the merits of the English system. Lord Wright in *The Future of the Common Law*, 81; W. S. Holdsworth, *History of English Law*, xii. 159 and 50 *L.Q.R.* 180; C. K. Allen, *Law in the Making*, ch. iv and 51 *L.Q.R.* 333; H. Goldschmidt, *English Law from the Foreign Standpoint*, 28 et seq. A. L. Goodhart, 50 *L.Q.R.* (1934), 40, 196, and Lord Tomlin (cited 13 *Can. B. R.* (1935), 606) are rather critical. Lord Chorley thinks that one of the main causes of disagreement between the courts in declaring what the law is and the business community in its contention as to what the law ought to be is the doctrine of precedent: 3 *Mod. L. R.* (1940), 272.

[3] This view is supported by Lord Wright, 8 *Camb. L. J.* (1943), 118; 13 *Mod. L. R.* (1950), 23. Lord Cooper deprecates the introduction of the English doctrine into Scotland: 'We are now helpless in its suffocating grasp'—63 *Harv. L. R.* (1950), 472–3.

[4] *Commissioner for Railways* (*N.S.W.*) v. *Cardy* (1960), 34 A.L.J.R. 134.

[5] K. N. Llewellyn, *The Common Law Tradition: Deciding Appeals.*

[6] M. Ancel, 16 *J. Comp. Leg.* (1934), 1; M. S. Amos and F. P. Walton, *Introduction to French Law*, 7. In practice, however, a long line of decisions is of such high persuasive authority that it is rarely departed from. Individual decisions are rarely cited in judgments, and hence the judge cannot shelter himself behind a particular decision. He must justify his judgment on principle. For Scotland, see J. C. Gardner, *Judicial Precedent in Scots Law.*

depart from such a rule and higher courts reserve liberty to reverse the trend of case law. E. J. Cohn has claimed that the development in Germany of a theory of frustration of contract was greatly assisted by the ability to ignore inconvenient decisions.[1] It is absurd, however, to suggest that cases have no weight, for, as in England, they provide the life blood of the law and there is a more extensive adherence to precedent than English lawyers sometimes suppose.[2] At first sight we might think that the existence of codes provided an explanation of the different views of English and continental law, since a code supplies a core of certainty which England finds in decided cases. But France only enacted her code in 1804, Germany in 1900—moreover, the English doctrine of precedent was fully established only in the eighteenth[3] or nineteenth[4] century. What was decisive was the greater influence on the Continent of Roman law which traditionally put great emphasis on the textbook because of the respect paid to the opinions of the jurists and the fact that Justinian's *Digest* was largely 'Readings from famous Text-Books' (to use a modern tag). As Roman law was regarded as a common law for the Continent, it tended to carry the prestige of the textbook with it. In England, due perhaps to the greater reverence which the Bench enjoyed, lawyers turned to decisions rather than to textbooks for binding authority. Another reason is that England has a centralized hierarchy of courts and a relatively small number of judges and reported decisions. If there are a multitude of Courts of Appeal, it is difficult to make all decisions binding.

It is rare on the Continent to cite decisions of last century or before. 'Surely it is significant that continental lawyers are of opinion that a statute, which expressly orders judicial decisions to be binding, cannot mean that such binding force should be given to decisions so far back as twenty years ago.'[5] English assiduity in searching the early reports and even the Year Books for authority seems very strange to a continental lawyer.[6] But in the 'run of the mill' case 'the last twenty years takes up most of the law into itself'.[7]

[1] 28 *J. Comp. Leg.* (1946), 15 at 19.
[2] J. P. Niboyet, 20 *Iowa L. R.* (1935), 416 at 430.
[3] W. S. Holdsworth, *History of English Law*, xii. 146 et seq.
[4] C. K. Allen, *Law in the Making* (7th ed.), 230 et seq.
[5] E. J. Cohn, 5 *Camb. L. J.* (1935), 366 at 370.
[6] C. K. Allen, *Law in the Making* (7th ed.), 230, states that out of 167 cases cited in [1961] K.B., only 5 were older than the nineteenth century. But even making allowance for this, there is a difference of approach between English and continental jurists, for in England nineteenth-century authorities are regarded as modern. Some parts of English law, where there is rapid development, cannot pay great respect to

[*Note 6 cont. and note 7 on facing page.*]

§ 46. Sources where there is no Authority

Many codes lay down specific instructions as to the sources on which the judge should rely when there is no authority. The Japanese Code relies on custom and in default of that on reason and equity.[1] The Swiss Code lays down that in the last resort the judge should apply the rule which he would establish if he were acting as legislator.[2] When there is no code which provides precise directions as to the sources in the absence of authority, a judge will normally turn to persuasive precedents,[3] textbooks,[4] the use of analogy, and such help as may be afforded by custom or the course of business.

Analogy is a useful weapon but it must be cautiously applied. Mill describes it as follows: 'two things resemble each other in one or more respects: a certain proposition is true of the one; therefore it is true of the other.'[5] The accuracy of the conclusion drawn will depend on the relative importance of the resemblances and the unimportance of the differences between the two things—the situation being analysed from the point of view of the proposition which it is desired to establish. For example, it may be desired to find a rule to apply to electricity, and an analogy is sought in the rules relating to water. Artificial accumulations of water are likely to cause great damage if they escape, and the risk, even with reasonable care on the part of the owner, is greater than that to which an occupier normally subjects a neighbour. Yet analogy can furnish only a guide, not a decisive answer. There are nearly always two conflicting analogies which may be used in law. In life we find almost every degree between actual identity and remote resemblance, and a supporter of an analogy will emphasize the points of resemblance, an opponent will maintain that the differences are crucial. Thus it has been accepted by the courts that although electric wiring in a private house may be a source of danger

old precedents. Thus G. C. Cheshire, *Private International Law* (3rd ed.), 479, rejects *Lolley's Case* (1812), 2 Cl. & F. 567 n. as 'too old to be of value'. On the other hand, the C.A. *In re Diplock*, [1948] Ch. 465, canvassed the authorities for 250 years.

[1] Holmes in *Pollock–Holmes Letters*, ii. 20.

[2] N. Sugiyama, *Rec. Gény*, ii. 446.

[3] Art. I. C. Du Pasquier points out (*Introduction à la théorie générale*, 203), that, although the Swiss court uses the classical theories of interpretation, it uses them with a practical sense of what is demanded by the needs of today—it is largely open to the current of ideas represented by *Interessenjurisprudenz*.

[4] Cf. the use made in English courts of Roman law: *Bechervaise* v. *Lewis* (1872), L.R. 7 C.P. 372; *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; or of American decisions: *Haynes* v. *Harwood*, [1935] 1 K.B. 146.

[5] *A System of Logic* (1879), ii. 88.

[6] *Infra*, § 55.

similar in kind if not in degree to a high-tension cable, nevertheless there is no unusual risk created by an occupier who has his house fitted with electric light, since such a procedure is the normal practice.[1] Broadcasting has raised many problems. Is the proper analogy libel or slander? Is the owner of the station liable for interpolated remarks, on the analogy of the newspaper? If a defamatory broadcast is heard in forty-eight states, is a separate tort committed in each state?[2]

The advantage of a proper use of analogy is that it enables the new situation to be dealt with by a rule which can be placed in a coherent relation with rules that are already established. It is thus assumed that the law is a consistent body of principles and every attempt is made to keep it as such.

If analogy fails the judge may turn for help to any source.[3] Such material as he discovers will not, of course, be imperatively binding upon him, and he will reach such a conclusion as can best be fitted into the general body of the law. Textbooks may provide an acceptable solution, or there may be borrowing from a kindred system of law—thus American cases may provide useful material for English courts.[4] Even systems whose basis is far removed may be drawn upon, and the Roman storehouse of legal learning has proved of considerable assistance to English jurists.[5]

But in drawing on these aids, a consideration of what is expedient for the community concerned is

> the secret root from which the law draws all the juices of life. . . . Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy: most generally to be sure . . . the unconscious result of instinctive preferences and

[1] *Collingwood* v. *Home and Colonial Stores*, [1936] 3 All E.R. 200. Is a hydroplane a vessel or not? If the question is whether it should be subject to Admiralty jurisdiction while afloat, its resemblance to a vessel is more important than the fact that it can also fly. But, if the question is whether the representatives of a passenger drowned while the hydroplane was afloat on the water can recover under an insurance policy which excepted the perils of flying, the answer is 'No', for the mere fact that it was afloat at the moment did not lessen the risk, since a hydroplane is more likely to capsize than an ordinary vessel. Hence in one case the analogy was applied and in the other was not: *Reinhardt* v. *Newport Flying Service Corp.*, 232 N.Y. 115 and *Wendorff* v. *Missouri State Life Insurance Co.*, 318 Mo. 363, cited J. C. H. Wu, *The Art of Law*, 127–8.

[2] 60 *Harv. L. R.* (1947), 941.

[3] B. N. Cardozo, *The Nature of the Judicial Process*; F. Gény, *Méthode d'interprétation*.

[4] *Haynes* v. *Harwood*, [1935] 1. K.B. 146 at 156.

[5] *Hamps* v. *Darby*, [1948] 2 All E.R. 474. Speaking of Roman law, Pollock and Maitland, *History of English Law*, i. 24, write: 'It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma.'

inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[1]

What is really decisive is the 'inarticulate major premiss', the judge's view as to the reasons and policy which lie behind the law. Pound has pointed out that there are in every system of law not only concepts and a method of applying them but a body of philosophical, political, and ethical ideals as to the end of law which gives direction to its development.[2] Lord Macmillan writes that 'in almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification' and that, in such cases, ethical considerations operate and ought to operate.[3] No developing system of law can avoid the influence of the general views of the community as to the end that law should pursue. Although developed and consistent theoretical views as to the purpose of law may not always exist,[4] nevertheless there are decisive practical views which sway the court in its choice either between competing analogies or its adoption of the material out of which a new rule is to be fashioned. An analysis of the judicial method thus raises many of the problems which we have already discussed under the heading of natural law.

Whether in the application of a settled rule, or in the creation of new law, we cannot avoid the influence of the personal factor. Lord Wright says of the particular examples which Lord Abinger cited to justify his doctrine of common employment that 'these instances seem to show personal apprehensions rather than any principle'.[5] Scrutton L.J. has confessed to the difficulty of being sure that 'you have put yourself in a thoroughly impartial position between two disputants, one of your own class and one not of your own class'.[6] Sir Ivor Jennings has traced the effect of changes in the personnel of the Judicial Committee on the interpretation of the Canadian Constitution.[7] Lord Buckmaster in the snail case[8] thought it would be

[1] O. W. Holmes, *The Common Law*, 35–6.

[2] 36 *Harv. L. R.* (1923), 645.

[3] *Law and Other Things*, 48. With respect, it is submitted that this dictum must be confined to cases which come before appellate courts.

[4] *Supra*, § 36; P. H. Winfield, 45 *Harv. L. R.* (1931), 112; R. Pound, 45 *Harv. L. R.* (1931), 136. A. I. Vyshinsky, *Law of the Soviet State*, put it that the class essence of juridical chicanery is obscured by a system of formal interpretation. But the issue is not as simple as that.

[5] *Radcliffe* v. *Ribble Motor Services Ltd.*, [1939] A.C. 215 at 239. On the other hand we must beware of formulating facile explanations: e.g. that the view of the judge is determined solely by economic forces. Few today would deny the great part played by economic factors, but it is idle to suggest that they are a sole or ultimate cause: R. Pound, 53 *Harv. L. R.* (1940), 365; K. Renner, *The Institutions of Private Law and their Social Functions*.

[6] 1 *Camb. L. J.* (1922), 8.

[7] 51 *Harv. L. R.* (1937), 1.

[8] [1932] A.C. 562.

little short of outrageous to make a manufacturer responsible to members of the public for every bottle that issues from his works, whereas Lord Atkin thought that to impose liability for negligence was in accordance with sound common sense. 'A tincture of humanity will stain the law reports until the courts are manned by Robots',[1] and few would prefer the Robots to the humanity of the judge.

§ 47. Fixity and Discretion

'Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates.'[2] It has been shown that primitive law tends to be too fluid, but that in the middle period there is too great an emphasis on formality and rigidity. Thereafter many are the devices used to introduce flexibility. One method of extending the scope of the law, the fiction, is discussed above,[3] and legislation, which falls outside the judicial method, is the subject of the next chapter.

If we regard law as a body of rules, we may regard judicial discretion concerning the application of those rules as being outside the law. Thus we might imagine a club with a very strict body of rules, which the committee has power to waive if it so desires. Markby regards the standards applied to the facts by juries as non-legal.[4] But if we emphasize the legal order, such discretion is as much part of it as the rules themselves. Thus the discretion used by the Chancellor in granting injunctions which prevented the plaintiff from securing the fruits of a common law victory may be clearly separated from the rules of common law, but it was a very important part of the English legal order. In truth, discretion is used in two senses—sometimes it means a power to depart from rules, sometimes it means a power of choice within fixed limits set up by law. In this second sense a judge may have discretion as to the sentence he will impose, the upper and sometimes the lower limits being fixed by law. Even an application of the standard of negligence to the facts of a case involves some element of discretion. In truth we can make a clear-cut distinction between the certainty of rules and discretion as to their application,

[1] C. H. S. Fifoot, *English Law and its Background*, 249. One writer suggests that we should apply 'job analysis techniques' to the judiciary!
[2] R. Pound, *Philosophy of Law*, 111.
[3] *Supra*, § 15.
[4] *Elements of Law* (5th ed.), 20.

only if we regard law as a set of detailed rules and ignore the elastic nature of general standards and broad principles.[1]

There are two issues which are sometimes confused: How far *is* the law certain? How far *should* the law be certain? The modern realist school has dealt with the first problem by claiming that certainty is in practice only an illusion;[2] presumably their answer to the second would be that, as certainty is impossible to achieve, it is futile to discuss how far it *should* be achieved. Another point which is sometimes overlooked is that certainty and rigidity are not necessarily the same. Certainty really means a possibility of accurate prediction, and although an unchanging system is more certain than a developing one, nevertheless flexibility does not always mean uncertainty,[3] if the direction of development can be clearly foreseen.

There are many abstract arguments in favour of certainty which can be countered by others to show the need for elasticity. The discussion of precedent, which is set out above,[4] illustrates some of the points that arise. Even justice itself demands some certainty, some rule that will diminish the scope of arbitrary caprice and the personal factor. Judges sometimes show themselves impatient of an argument that is founded on justice alone: 'it is very difficult to call upon judges, who may be assumed to know the law, to lay down standards of high-mindedness or honour as to which perfectly honest and honourable persons may take entirely different views.'[5] Absurdity as a legal test has been stigmatized as a very unruly horse.[6] Modern business would be difficult without fixed rules of law by which men could order their conduct. Popular confidence in the courts is shaken if law is regarded as the mere *ipse dixit* of a judge. Moreover, the law is wiser than the individual view of one man.

Thus to secure certainty, qualitative tests are sometimes made quantitative. If universal suffrage is a principle of democracy, it is desirable that a certain maturity of intellect be present before a vote is awarded. But the difficulty of applying such a test, and the multitude of decisions that would be necessary, makes a quantitative test of age easier than a qualitative test of mental development. The same tendency may be seen in the legal definition of infancy, and in the rules concerning the criminal guilt of children. In one sense the test of

[1] *Infra*, § 48.
[2] *Supra*, § 7.
[3] H. Goldschmidt, *English Law from the Foreign Standpoint*, 44–5.
[4] *Supra*, § 45.
[5] *In re Wigzell*, [1921] 2 K.B. 835 at 859, per Scrutton L.J.
[6] *Grundt* v. *Great Boulder Pty. Mines Ltd.*, [1948] 1 Ch. 145 at 158, 159–60.

age is purely arbitrary, but it prevents arbitrariness in those who have to apply it.[1] The real test of legal technique is whether it can translate ideals into working doctrines: the theoretically perfect rule is of little use if its application leads to such uncertainty that its object is really defeated. But the eternal difficulty of law is that, while it must translate its broad purpose into rules that can be easily applied, it must never forget that rules are made to serve men and not men to serve rules—hence, on the one hand, the struggle to create definite rules, and, on the other hand, to escape from those rules of the past which have become too definite and are no longer in keeping with modern conditions. Economic conditions change, social philosophies develop, and 'an expanding society demands an expanding common law'.[2] What is considered a charity in 1895 may be held not to be one in 1972.[3]

But, even were the community static, a general rule would sometimes create injustice in a particular case, for law has to operate over such a wide field that it must in formulating its rules ignore particular circumstances. Hence the cry for *aequitas* to reduce the harsh effects of a logical application of *strictum ius*, to individualize the general rule, to humanize the administration of the law. A plea which is technically valid may, if allowed, lead to unjust results. Jones marries in 1927 and is granted a deduction in respect of income tax because he is supporting a wife. In 1930 he obtains a decree of nullity, which renders the marriage void *ab initio*. The taxation authorities claim to reassess him for those three years, since it has now been decided that his wife in fact was not his wife in law. The court was courageous enough in this case to find a legal method of dismissing this rather harsh claim.[4] But in other cases it may be more difficult. Thus if French law regards lack of parental consent as a fatal bar to the validity of the marriage of a French minor, and an English court treats such lack as a mere matter of form[5] if the marriage is celebrated in England, it may be that a lady who marries a French minor in England without the consent of his parents is a wife in England but not in

[1] J. Dabin, *Technique de l'élaboration du droit positif*, 122–5; C. Du Pasquier, *Introduction à la théorie générale*, 167–8.

[2] Per McCardie J., *Prager* v. *Blatspiel, Stamp & Heacock Ltd.*, [1924] 1 K.B. 566 at 570. 'The law must keep pace with the times': *Lock* v. *Abercester Ltd.*, [1939] 1 Ch. 861 at 864.

[3] *National Anti-Vivisection Society* v. *I.R.C.*, [1948] A.C. 31.

[4] *Dodworth* v. *Dale*, [1936] 2 K.B. 503.

[5] *Ogden* v. *Ogden*, [1908] P. 46. Quaere whether this case was correct in treating lack of consent as a mere formality: G. C. Cheshire, *Private International Law* (3rd ed.), 288.

France. If the man returns to France, the lady cannot secure a divorce in England as it is not the country of her husband's domicile, and she fails also in France, because a court cannot grant a divorce from a marriage which, according to its own rules, is void *ab initio*. Thus if the English courts refuse to recognize a declaration by the French courts that the marriage is invalid, general rules which are not unreasonable in themselves may produce an absurd result.[1] Hence in 'judge-made law the strict logical position has been departed from time after time in favour of rules of justice and convenience'.[2]

A dislike of the results of *strictum ius* has led to the movement for free law[3] which is popular in many quarters today. This theory takes many forms, ranging from the comparatively mild view that the judge must fill the gaps in the law by relying on his view of reason and public policy to the dangerously wide doctrine that would deprive the law of its logical core of rules and allow each judge to decide every case by relying only on his subjective sense of justice. This last form of the theory is dangerous:

> liberty to decide each case as you think right without any regard to principles laid down in previous similar cases would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what judge his case would come and could guess what view that judge would take on a consideration of the matter without any regard to previous decisions.[4]

But an exaggerated emphasis on rigidity will also lead to unwelcome results: if the courts ignore the practical effects of their decisions, the community will suffer. If the legal system has crystallized too early and allows little scope for development (for example, where law has been cast in the form of a code that is too detailed),[5] the desire for certainty may defeat itself, for warped interpretation will be introduced

[1] A decree of nullity by the courts of the country where the husband was domiciled would now be recognized in England: *Galene* v. *Galene*, [1939] P. 237. But in *Chapelle* v. *Chapelle*, [1950] 1 All E.R. 236, Willmer J. refused to recognize a decree of a Maltese court since only the husband was domiciled there and the marriage was treated by the foreign court as void *ab initio*.

[2] *Townley Mill Co.* v. *Oldham Ass. C'tee.*, [1936] 1 K.B. 585 at 613, per Greer L.J.

[3] 'What we are striving for is that the courts may find the right judgment on the merits by practical sense and true comprehension of the facts, instead of the correct legal deduction by the help of scholastic subtleties': E. Fuchs, cited in *Science of Legal Method*, 101. The *Freirechtslehre* is a dangerous theory politically, for these jurists have anticipated in theory what became reality in the administration of justice under National Socialism: the judge is free to apply what he regards as the will of the Leader: see W. Friedmann, *Legal Theory* (5th ed.), 343.

[4] *Hill* v. *Aldershot Corp.*, [1933] 1 K.B. 259 at 263–4, per Scrutton L.J.

[5] For the problem of the interpretation of a code see *infra*, § 52.

and, once jurists begin reading into the text what is not there, differing opinions will soon lead to chaos. It is better frankly to emphasize the influence of the pressure of social interest on the development of the law and to secure a reasonable elasticity. Even where a judge does not admit the need to adapt the law, we sometimes see the employment of what the barbarous language of jurisprudence terms the crypto-sociological method. In plain words, this means only that the judgment on its face expresses a perfect chain of logical reasoning but conceals the real reasons for the decision—the case is decided 'on the merits', and then the court searches feverishly for legal authorities which will justify this result. What can explain the difference of the approach of Lord Abinger in 1837[1] to the doctrine of common employment from that of the House of Lords a century later,[2] save a change in the social philosophy of the community. Lord Abinger merely assumed that his decision was the only possible one, whereas the House of Lords deliberately canvassed the interests at stake. The doctrine of common employment was too firmly entrenched to be abolished by the courts,[3] but a different view of social realities led to its being cut down as far as possible.

Gény's theory of free scientific research[4] should not be confused with the broader doctrines of free law, for Gény would limit his method to cases where definite authority is lacking. Where no help can be found in the sources, Gény advocates a study of the moral conscience and of the social facts in order that a judge may understand the real nature of the problem. In discussing the end of law, it has been pointed out that Gény considers that natural law does provide universal objective principles which will curb arbitrary caprice, but some of the difficulties of this theory have been touched on.[5] The great value of Gény's work is not his philosophical base but rather his detailed analysis of what he terms technique—the methods by which broad principles are translated into working rules of law. The judge has greater freedom than many classical theories of jurisprudence allowed, and it is the theme of much modern work that it

[1] *Priestley* v. *Fowler* (1837), 3 M. & W. 1.

[2] *Radcliffe* v. *Ribble*, [1939] A.C. 215. Some writers think that there is something sinister in admitting that judges may be influenced by what they call 'extra-legal' considerations. In truth, no legal system could remain tolerable were this not so, for the policy of the law would be alien to the life of today. The courts take account of changes in social manners and the higher degree of self-control now existing in the face of insult: *Holmes* v. *Director of Public Prosecutions*, [1946] A.C. 588 at 600.

[3] It has now been abolished by statute: Law Reform (Personal Injuries) Act, 1948.

[4] *Science et technique: méthode d'interprétation.*

[5] *Supra*, § 34.

is better frankly to recognize this than to exaggerate the element of certainty in law.

It is rather artificial, however, to argue in abstract terms about the rival methods of certainty and discretion. No system of law has ever achieved absolute certainty, and even the most fluid form of law inevitably tends to create a core of principles and rules. What is more practical is to analyse each particular branch of the law, to discover the degree of fixity and elasticity therein, and to consider the effectiveness of its operation. (*a*) Parts of the law require fairly rigid rules for business convenience, for example, in transfers of property and in commercial law generally.[1] The business man wants to know what is a bill of exchange and what is not, instead of leaving the decision to the discretion of a judge. (*b*) Elsewhere, justice may demand certainty, in order that men may know what conduct will subject them to liability for punishment—thus it is unjust to leave the criminal law so uncertain that crimes are in effect created by the courts with retrospective operation. The maxim *nulla poena sine lege* is accepted by many systems[2]—i.e. the doctrine that a person should be punished only if his conduct is prohibited by a specific rule which is already accepted. England has not actually adopted the maxim. Penal statutes may have retrospective operation. Some common law offences are so wide (e.g. criminal conspiracy and an offence to the public mischief) that it is impossible to determine their exact limits in advance. But the general spirit of the maxim is approved by many English writers. (*c*) In other branches the law must deal with varying types of human conduct which cannot be regulated by the rigid detailed rules that may be appropriate to the definition of a crossed cheque. Thus the law of tort is fluid because of the broad standards which it applies.

But a consideration of the problem of fixity and discretion demands an analysis of the method by which law is expressed. There is a vast gulf between the elasticity of a general principle such as public policy and the rigidity of a detailed rule that a killing is murder only (*inter alia*) if the death follows within a year and a day. This entails a discussion of principles, standards, concepts, and rules.

[1] R. Pound, *Philosophy of Law*, 137 et seq. This particular statement has been attacked by the realist school on the ground that the certainty in the law of property is only an illusion. It is true that absolute certainty is rarely attainable in human affairs, but there is relatively more definiteness in the law of property than in tort. In most cases it is fairly easy to say what is a properly drawn cheque, but it is not always easy to determine whether particular facts constitute negligence. On the other hand, rigid and static rules may easily become inconvenient when new business practices are developed: see R. S. T. Chorley, 3 *Mod. L. R.* (1940), 272.

[2] *Infra*, § 83.

§ 48. Principles, Standards, Concepts, and Rules

Modern juristic analysis shows law operating through four distinct categories—principles, standards, concepts, and rules.[1] It is a *principle* of public policy that those who exercise a public calling should not take an unfair advantage of their position. One formulation of this principle is the *rule* that a common carrier must not charge more than a reasonable rate. This rule contains within itself a *concept* (common carrier) and also a *standard* (reasonable rate).[2]

A principle is the broad reason which lies at the base of a rule of law: it has not exhausted itself in giving birth to that particular rule but is still fertile. Principles, the means by which the law lives, grows, and develops, demonstrate that law is not a mere collection of rules. Through the medium of the principle, law can draw nourishment from the views of the community, for the *ratio legis* is wide and, in deducing from it a particular rule, regard may be paid to the circumstances to which the rule is to be applied. A legal principle should be capable of accurate expression, for there is a vast difference between reasonable elasticity and confused statement. The most accurate expression of a principle may still leave its application to particular circumstances in doubt, but that is a characteristic inherent in the nature of all principles. The marks of an efficient legal principle are that it should give cohesion to a particular branch of the law by capably explaining the relevant cases:[3] it must be suited to the practical needs and ethical requirements of that particular community and be elastic enough to afford opportunities for development in the rules that are based upon it. There are, of course, disadvantages in leaving the law expressed only in terms of a fluid principle, for the law may be too indefinite, and hence it is the task of the judge to decide when it is better to secure certainty by laying down a rule.

Legal rules are precepts laying down a definite consequence as the results of certain facts—for example, the rule that a will is invalid unless attested by two witnesses.[4] They provide 'patterns for definite situations'. Legal rules are sometimes born from principles—sometimes even the greatest legal ingenuity cannot discover the reason

[1] J. Dickinson, *Administrative Justice and the Supremacy of Law*, 128; R. Pound, *Philosophy of Law*, 115–43; A. Al-Sanhoury, *Rec. Gény*, ii. 144.

[2] This illustration is borrowed from J. Dickinson, op. cit.

[3] Or the majority of them. In some instances it is naturally impossible to explain anomalies.

[4] R. Pound, 7 *Tulane L. R.* (1933), 475; cited J. Hall, *Readings in Jurisprudence*, 661.

which lies behind a particular rule. A legal rule operates by means of concepts and standards. When within the rule there is a standard, then elasticity is retained—thus the rule that 'a driver on the highway must exercise reasonable care to prevent injury to others' is elastic, for the standard of reasonable care may be applied to the ancient chariot or a modern car. On the other hand, the rule that no damages will lie at common law for the death of a human being[1] is rigid, for it contains no standard, and it is difficult to discover the principle which lies behind it. Such rules are 'infructuous'—they are not agencies of development, but static rules applied only when the courts are bound to follow them.[2] A man can be convicted of murder or manslaughter only if the death follows within a certain time after his act: had the courts laid down the standard of a reasonable time, that would have allowed the law to take notice of improvements in medical knowledge, but, since the detailed rule was applied that death must follow within a year and a day, all elasticity was lost.[3]

The term 'concept' has many meanings, but broadly a concept is an abstraction from particular things, or events etc., forming a general notion. It is man-made and serves to aid thought as in the organization of the infinite particularity of things into classes. For the purpose of jurisprudence, concepts may be defined as those 'categories of classification'[4] which are rigidly determined as a matter of law. In one sense both *negligence* and *necessaries* are legal concepts, for each is a definite category of legal thought. But, as it is desired to analyse the element of fluidity in law, these two terms are treated as standards, for each depends on an idea of what is reasonable, and once this element is introduced, there is room for honest differences of opinion; what is reasonable care or reasonably necessary can be determined only by applying a wide standard to the facts. A concept for our purposes is a category that is so rigidly defined that its application is definite—for example, a document is either a bill of exchange or it is not, for the formal requirements are laid down by the law in a detailed fashion.

Concepts may be built up out of perceptions of fact—thus the idea of a motor-car is not a picture of any particular car, but conveys the notion of the class of car. Other concepts may be created of more abstract factors—e.g. corporate personality is a concept that is the

[1] *Baker* v. *Bolton* (1808), 1 Camp. 493.
[2] Cf. per Slesser L.J., *Flint* v. *Lovell*, [1935] 1 K.B. 354.
[3] *R.* v. *Dyson*, [1908] 2 K.B. 454.
[4] J. Dickinson, *Administrative Justice and the Supremacy of Law*, 136.

result of a long process of development. The more abstract the concept, the greater the play that may be made with it—the notion of the *estate* enabled the lawyer to introduce many subtleties and to carve out future interests in a way that would have been difficult if the land itself had been the object of thought. The intellectual maturity of a legal system may be tested by the degree of abstract generality it achieves in its concepts.[1]

Many concepts fail in their true purpose because they cannot be adequately defined. Thus the category of chattels dangerous *per se* is determined as a matter of law, but, as no precise definition of the class can be given, it would be more convenient (instead of seeking to label chattels by a consideration of their abstract qualities) to leave the law in the form of a fluid standard which could be applied and adapted to the circumstances of each particular case. Thus a loaded gun is not always dangerous, and the attempt of courts to classify chattels according to their abstract qualities has ended in confusion.[2] The concept serves best where there are relatively fixed 'counters' the definition of which can be rigidly determined, as in the law dealing with bills of exchange.

In comparison with the elastic principle and the adaptable standard, concepts thus give a *relative* certainty to law, but it is ridiculous to expect that even a concept can remain absolutely definite and static, for concepts are tools of thought, and the end which the thinker has in mind will determine his use of terms. Thus a child who has received no actual permission to enter may be removed from the category of trespassers to that of licensees, if the law of tort can grant a remedy by spelling out an implied licence because of the occupier's failure to eject on previous occasions.[3] Practical considerations have strained the accurate use of language. It was once considered that a legal concept was a substantive reality with a fixed and definite meaning discoverable by analysis. Today we adopt a more functional view—a concept is a tool of thought which we use to deal with certain situations and its development is guided as much by a desire to do justice in the individual case as by any *a priori* logic which deals with the

[1] H. Goldschmidt, *English Law from the Foreign Standpoint*, 21, suggests that English law is rather deficient in general conceptions: thus there is a tendency for each statute to set up its own definitions.

[2] W. T. S. Stallybrass, 3 *Camb. L. J.* (1929), 385–9.

[3] *Cooke* v. *Midland G. W. Rly.*, [1909] A.C. 229; cf. *Gough* v. *National Coal Board*, [1954] 1 Q.B. 191; see for Australia, *Commissioner of Railways (N.S.W.)* v. *Cardy* (1960), 34 A.L.J.R. 134. Changes were brought about in England by the Occupiers' Liability Act, 1957 (5 & 6 Eliz. II, ch. 31).

'inherent properties' of a concept.[1] We would expect to be able to say whether growing corn was realty or personalty, but it has been held that a sale of growing corn is not a sale of land within the Statute of Frauds, and also that it is not personalty so far as the laws of execution are concerned.[2] It might be thought that such a concept as marriage was rigidly defined, but a person may be married for one purpose and not for another. If a husband obtains a decree that his marriage was void *ab initio*, he is still entitled to rebates of income tax for the period while the marriage was subsisting,[3] but if a husband leaves money to his wife, so long as she does not remarry, a marriage afterwards avoided *ab initio* is ignored.[4] A daughter who had been married, and then obtained a decree of nullity, is unmarried for the purposes of the Inheritance (Family Provisions) Act.[5] The progressive development in the meaning of concepts is emphasized by two decisions of the Judicial Committee in the same year. In the first it was admitted that it was difficult to define piracy, since history shows so much development,[6] and in the second it was pointed out that the concept of *poena* in Roman-Dutch law has widened, for 'that law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society'.[7] A railway ticket has been held to be property in the sense that it can be stolen, and also not property because it lacks the element of transferability.[8] The motive of economy of thought often leads to the extension of the meaning of a concept, so that a new situation may be dealt with by an old rule instead of creating a new doctrine. Thus we do find some flexibility even in concepts, especially if we take the law over a long period; but, compared with the broadness of a principle or the elasticity of a standard, concepts represent comparatively fixed counters of legal thought.

It is not always easy to determine whether a previous line of cases has laid down a detailed rule of law or merely applied a wide standard to particular facts. Thus in *Nordenfelt* v. *Maxim Nordenfelt*

[1] As J. C. H. Wu puts it, many now reject the *a priori* subject–predicate analysis and prefer the *a posteriori* antecedent consequent: *The Art of Law*, 124. See also an interesting paper by Zechariah Chafee jun., 41 *Col. L. R.* (1941), 381.

[2] E. R. Latty, 34 *Mich. L. R.* (1936), 597 at 605.

[3] *Dodworth* v. *Dale*, [1936] 2 K.B. 503.

[4] *In re Dewhirst*, [1948] Ch. 198.

[5] *Re Rodwell (deceased)*, [1969] 3 All E.R. 1363.

[6] *In re Piracy Iure Gentium*, [1934] A.C. 586 at 600.

[7] *Pearl Assur. Co.* v. *Govt. of Union of S.A.*, [1934] A.C. 570 at 579.

[8] C. R. Noyes, *The Institution of Property*, 381.

Guns and Amm. Co.,[1] the real issue before the court was whether the rule concerning restraint of trade was rigid (that general restraints are always bad) or whether it contained within itself a standard (that the restraint must be reasonable in the interests of the parties and of the public). There are various factors that are useful in reaching a conclusion. Firstly, history may furnish a guide—the treatment of the rule in question by judges in the past. 'When a rule has become inveterate from the earliest time . . . it would be legislation pure and simple were we to disturb it.'[2] Secondly, conditions may have so changed that it becomes almost unthinkable to enforce what appears to be a definite rule of law. Thirdly, the actual language in which the rule is expressed will throw light on the question. If in case after case the rule has been laid down in the same detailed terminology, it is difficult to escape the conclusion that it has crystallized into a definite rule of law. But the ultimate view held as to the purpose of law will naturally influence its interpretation and development. There are those who glory in the strong decision which upholds the technical consistency of the law even at the cost of injustice, and those who regard the rules of law as subject to the moulding influence of the principles which originally fashioned them.[3] In some parts of the law creative activity has greater scope than in others, but the distinction between static and dynamic interpretation is just as useful in considering case law as in dealing with a written constitution. The reforming mind attempts, if possible, to get behind the detailed rules of the law to the broad principles which lie behind them.[4] Where certainty is necessary, detailed rules and definite concepts are needed. Some parts of the law, for example the law relating to property and to commercial transactions, demand certainty almost above all else; and there is much to be said for requiring certainty in the criminal law.[5] If fluidity is desired, the principle or the standard should be used as the medium of legal expression.

A practical problem illustrates the issues that arise. Can a secular

[1] [1894] A.C. 535.

[2] Per Earl Loreburn, *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A.C. 38 at 41. And see per Lord Porter: 'I do not think it possible to say that a change in the outlook of the public, however great, must immediately be followed by a change in the law of this country.' *Best* v. *Samuel Fox & Co. Ltd.*, [1952] A.C. 716 at 727.

[3] *Prager* v. *Blatspiel, Stamp & Heacock Ltd.*, [1924] 1 K.B. 566 at 570 per McCardie J.; per Cockburn C.J., *Wason* v. *Walter* (1868), L.R. 4 Q.B. 73 at 93; *In the Matter of Davy*, [1935] P. 1.

[4] Equity had its great creative period: it has now become relatively rigid.

[5] Cf. *R.* v. *Newland*, [1954] 1 Q.B. 158; and *Shaw* v. *D.P.P.*, [1961] 2 All E.R. 446, [1962] A.C. 220, and per Lord Simonds at 452–3.

society, one of whose objects is to deny the truth of the supernatural element in religion, lawfully take property by bequest? Is it a rule that 'Christianity is part of the law of England'? Lord Finlay thought that such a doctrine had been laid down by previous cases, but the majority looked behind what was apparently a rule to the wider principle that behaviour which tended to cause a breach of the peace or to endanger society is illegal. Today society is more tolerant and a reasoned denial of the truths of religion is not likely to provoke violence. Hence the maxim that Christianity was part of the law of England may once have been a fairly accurate summary of the application of the principle that acts dangerous to society should be regarded as illegal—but it was held by the House of Lords not to be a rule of law, and, conditions having changed, the same principle would now allow gifts to a secular society.[1]

Public policy illustrates the varying degrees of definiteness which the law may assume. In itself, public policy is a principle, the broadness and fluidity of which may be seen in the variety of cases professing to have been decided under it. But sometimes a rule that was originally based on public policy has become so crystallized that only a statute can alter it, e.g. the rule against perpetuities. In other cases, there may be an apparent rule, but courts will go behind the rule to see whether the reason for it applies in the particular case. It is accepted that public policy prohibits an alien enemy suing in time of war, but, if he is a member of a British partnership, and sues merely as a co-plaintiff in order that the partnership may be wound up, does that remove the mischief? Lord Atkinson and Lord Sumner thought that the court should not go behind the detailed rule, but the majority considered that the rule was still subject to the dominant reasons of policy which created it,[2] and, as the particular evils, which the prohibition of suits by enemy aliens was designed to avoid, would not arise in this case, there was no object in preventing the action being brought.

[1] *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406. Cf. *Bourne* v. *Keane*, [1919] A.C. 815; W. S. Holdsworth, *History of English Law*, viii. 402–20. But these cases illustrate again the different situations at different points in the judicial hierarchy. There can be little doubt that the maxim would have been applied as law (with differing consequences at different times it is true) at any time in the eighteenth or nineteenth centuries—see *Briggs* v. *Hartley* (1850), 19 L.J. (Ch.) 416; *Cowan* v. *Milbourn* (1867), L.R. 2 Ex. 230; *De Costa* v. *De Paz* 2 Swanst. 487, note (2), 532; and *In re Bedford Charity* 2 Swanst. 470, 522, 527.

[2] *Rodriguez* v. *Speyer*, [1919] A.C. 59.

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IX

STATUTES AND CODES

§ 49. Comparison of Case Law and Statute

It has often been claimed that the method of developing law by statute has inherent advantages over any system which leaves it to the judges to create new law. Firstly, it is said that a statute is abrogative and can sweep away inconvenient rules, whereas, while a precedent may constitute the law for the future, the judge is imperatively bound by such rules as the legislature or higher courts may have laid down. If the judge is, in one sense, a law-maker, it must be remembered that this power of creation is limited by his duty to apply the law as laid down by the legislature or by previous judicial authority. His most obvious creative role, therefore, is seen when he must fill a gap existing in the legal system. Hence, when unjust rules exist, a legislature may sweep them away, whereas a judge must follow binding authority which is in point, however much he may dislike the rule which it lays down.

Secondly, a statute can lay down the law in advance, whereas case law is sometimes created only at the actual time of application. A statute can change the law for the future, leaving vested rights untouched, whereas if an English appellate court wishes to overrule a line of persuasive precedents it can do so only by making the change retrospective, thus (perhaps) upsetting the expectations of a party who reasonably relied on the previous authorities.[1] But these statements need some qualification. A reading of the law reports gives a false view of the fluidity of case law, for (at least in theory) only cases of definite legal importance are reported. Moreover, new points may arise under statute just as under case law. But, even admitting these qualifications, it remains true that there is no method whereby the courts can lay down law for the future save in the decision of a specific dispute.

[1] In America, however, a court may apply its previous precedents, but at the same time announce that it will apply a different rule to subsequent transactions: *Gt. N. Rly.* v. *Sunburst Oil and Refining Co.* (1932), 287 U.S. 358; E. W. Patterson, 88 *Univ. of Pa. L. R.* (1939), 156 at 158; *Moliter* v. *Kaneland Community School District* (1959), 18 Ill. (2d) 11, 163 N.E. (2d) 89; B. H. Levy, *Realist Jurisprudence and Prospective Overruling* (1960), 109 *U. of Pa. L. R.* 1.

The greater creative power of the legislature is frequently justified by the traditional doctrine of the separation of powers[1]—that it is for the legislature to change the law, to decide awkward questions of social policy, and to live amid the dust of party politics; whereas the court, untouched by strife, is to apply the law with Olympian calm, secure in the belief that if injustice is done, or if the law is obsolete, a kindly legislature will take the necessary steps for reform. But even statutes themselves, when obsolete, need new legislation to reform them, for statutes do not lose force through desuetude.[2] Hence the makers of codes have sometimes attempted to confine the courts to their task of applying law, but no legislature has had the necessary time or zeal to decide all doubtful points and, whether they wish it or not, courts have been forced to develop the law in some degree.[3]

It is sometimes alleged that statute law is superior, in that the rules are logically arranged and may easily be discovered, whereas the quest for a common law principle entails a long search through multitudinous reports and, even when the cases bearing on the issue have been isolated, it may still be difficult to reconcile them. This defect of form is inherent in the very nature of case law, however lawyers may try to minimize it by the use of digests and textbooks as a guide to the law.[4] But logical and concise arrangement of the rules is not necessarily a merit of statute law, though it is a mark of a well-drafted code. When, as in England, statute provides a gloss or amendment of the common law, then we may find the utmost disorder in the statute book. Lawyers who are used to a code, or even a general consolidation, are amazed that England should be content with the chaotic arrangement of her statute book. Similarly, even a particular statute may sometimes be described as a 'thing of shreds and patches', 'a ... nd of statutory Joseph's coat'.[5]

Another suggested advantage of statute law is greater certainty, since the rule is laid down in categorical language, whereas in dealing

[1] *Infra*, § 75.

[2] *A.G.* v. *Prince Ernest Augustus of Hanover*, [1957] A.C. 436.

[3] *Infra*, § 52, for a reference to the French experiment of obliging the courts to refer gaps in the law to the legislature.

[4] In *Worthy* v. *Lloyd*, [1939] 2 K.B. 612, two cases were cited from the *Estates Gazette Digest*. In *Gibson* v. *S. American Stores*, [1949] 2 All E.R. 985, the C.A. followed a decision of their own, given in 1935, of which no report existed at all. In 1953 Somervell, Denning, and Romer LL.J. stated that they were not willing to permit citation of reports which were not made by members of the Bar; and Denning L.J. said there were enough cases that could be cited apart from those in the *Estates Gazette*, *Birtwistle* v. *Tweedale*, [1953] 2 All E.R. 1598, [1954] 1 W.L.R. 190.

[5] Per Rich J., *The King* v. *The Federal Commissioner of Taxation*; *Ex Parte Sir Kelso King* (1930), 43 C.L.R. 569 at 574.

with a judgment it may be extraordinarily difficult to discover the *ratio decidendi*. But difficulties of interpretation are not confined to case law, and in some reports over half of the cases are concerned with statutory interpretation.[1] Lord Buckmaster wrote of a taxing act:

> I do not pretend that the opinion I hold rests on any firm logical foundation. Logic is out of place in these questions and the embarrassment that I feel is increased with the knowledge that my views are not shared by other members of the House. . . . It is not easy to penetrate the tangled confusion of these Acts of Parliament, and though we have entered the labyrinth together, we have unfortunately found exit by different paths.[2]

Austin considers that statute law is superior because it is made after due deliberation, whereas judicial law, owing to the practical exigencies of disposing of a crowded list, is made in haste. But there is nothing essential about this distinction. The modern 'end of session' rush in Parliament creates law at a greater speed than any court would dare to attempt, even at the end of term.[3] An appellate court may take long to consider a judgment, though fortunately today there are none as cautious as Lord Eldon, who pondered for years over a particular decision.[4] It is also claimed by some that judge-made law may be the result of the whim of an individual, whereas a statute must pass the scrutiny of a body of men. There is some truth in this, but a legislature under a wave of political opinion may be as partial as any one man could be.

Such are some of the suggested advantages of statute. A recent study by a committee of the Statute Law Society[5] suggests the following defects, which were based on a questionnaire sent to nearly 5,000 'users' of statutes:

(*a*) It is difficult to find out when a statute comes into force—sometimes part of an Act is proclaimed, while other sections are left for the future.

[1] Workmen's compensation, taxation, industrial regulation, and traffic control account for a surprisingly large number of decided cases.

[2] *G. W. Rly.* v. *Bater*, [1922] 2 A.C. 1 at 11.

[3] Griffith C.J. once refused to follow a case on the ground that it was 'briefly, and I regret to say, insufficiently argued and considered on the last day of the Sydney Sittings. . . . The arguments which now commend themselves to me as conclusive did not then find entrance to my mind': *Duncan* v. *State of Queensland* (1916), 22 C.L.R. 556 at 582. Curiously enough, *Duncan's Case* itself was later overruled in *McArthur Ltd.* v. *State of Queensland* (1920), 28 C.L.R. 530.

[4] W. S. Holdsworth, *History of English Law*, i. 437–8.

[5] *Statute Law Deficiencies* (1970).

(*b*) A statute is drafted with two purposes in mind. It must fit into the legislative procedures and be so designed as to favour the political chance of its passing into law: it is also a legal instrument once it is affirmed. The requirements of the first purpose sometimes derogate from the efficiency of the statute as a binding rule. To meet opposition a 'formula' may be devised which is intentionally obscure. The politician's insistence on haste causes much difficulty for the draftsman.

(*c*) The same subject may be dealt with in many Acts, e.g. there are 179 national Acts and 220 local Acts dealing with building operations. As far as possible, there should be one Act for each particular topic and that Act should deal with that topic alone.

(*d*) It is almost impracticable for the practitioner to keep his statute law up to date. The official indexes are inadequate. Scarman J. writes[1] that taking the 32 volumes of the Statutes Revised, up to 31 December 1965 over 9,000 pages (out of a total of 26,000) had been cancelled. This amounted to over one-third of the material. On the pages which remain there are amendments and annotations slips. Periodic consolidation is one answer to this problem: another is the use of computers to discover the ruling section.

(*e*) Because of the strict attitude taken by the courts to the interpretation of statutes, excessive detail is inserted in the draft, with highly complicated schedules.

(*f*) Legislation by reference is an easy political way of securing the passing of an Act, but it causes great difficulty in interpretation, as it frequently sacrifices simplicity and clarity.[2]

(*g*) The secrecy surrounding the initial stages of a bill prevents full consultation with professional experts outside the Department.

Sometimes obsolete statutes cause difficulty. 'I find it incredible that the law (on charities) is still derived from the preamble to the Statute of Elizabeth, long since repealed and long since out of date and in modern times applied by analogy on analogy on analogy. It is time this branch of the law was reconsidered, rationalised and modernised.'[3]

Now the merits traditionally ascribed to case law fall to be considered. It is said that case law has within itself an organic principle

[1] *Law Reform*, 50–1. In the five years ending on 31 December 1968 there were nearly 400 statutes and 10,000 statutory instruments enacted.

[2] Per Salmon L.J., *R.* v. *Goswami*, [1969] 1 Q.B. 453 at 461.

[3] Per Foster J., *Council of Law Reporting* v. *A.G.*, [1971] 1 All E.R. 436 at 448.

of growth and therefore that it can be adapted to new situations, whereas the statute lays down a detailed rule which will be rigidly applied to certain circumstances and will remain inflexible however much conditions may change. If reform is desired, a new statute is passed, and hence the statute book becomes a disjointed series of particular rules, whereas, since case law contains broad principles, it is more of a consistent whole. The periodic swing in political parties means that the policies of statute law change rather too rapidly as the sessions progress. But the accuracy of this distinction depends on the particular types of statute and case law which we are considering. There is no *a priori* reason why a statute should not lay down broad principles which are sufficiently elastic to be made the foundation of a developing body of law—on the other hand, case law, if great skill is not used, may easily become a 'wilderness of single instances'.

Again, case law is said to be more practical, since it is developed only after studying carefully the precise facts to which it is to be applied, whereas the legislature lays down an abstract rule the precise effect of which may be the opposite of that desired. This is frequently true, but it is sometimes impossible for a court to foretell the practical effects of a particular decision. Thus, in public policy cases, no evidence is given as to what is for the public benefit, and a judge must use his knowledge of the world as best he may;[1] on the other hand, a legislature may set up a commission to carry out the most detailed factual investigation of local circumstances and of the experience in other countries of the effects of the suggested rule. Both case law and statute may be exceedingly practical or exceedingly remote from the currents of life. The only advantage of case law in this respect is that it proceeds one step at a time, whereas a statute is usually rather more ambitious in its aim.

But it is rather futile to discuss the question in the abstract, for no country today is faced with a choice between pure statute law and pure case law. No code has ever been successful in preventing the growth of a body of judge-made law; no case system has ever functioned so well that the legislature or some other authority has not been forced to intervene.[2] The practical question today is the degree

[1] Cf. Lord Haldane, *Rodriguez* v. *Speyer*, [1919] A.C. 59 at 79: 'It was certainly the opinions of men of the world, as distinguished from opinions based on legal learning, which guided this House to its conclusion in that appeal.' The reference is to *Egerton* v. *Brownlow* (1853), 4 H.L.C. 1.

[2] Thus in the law of tort, the legislature intervened when case law became confused on such subjects as contributory negligence, defamation, occupier's liability, limitation of actions, and personal injuries.

to which freedom should be left to the judge. This question can be determined only by a consideration of all the circumstances in a particular country, for it is dangerous to codify until the law has reached a certain stage of development.

The criticisms discussed above may suggest that English law is but a chaos of particular rules. As the courts increasingly turn out new precedents, and the legislature drafts additional statutes, how is a working knowledge of the law to be gained? The sections which follow indicate some of the answers to this problem. Consolidation and codification deal with the accumulated mass of statutory law: institutions for the purpose of initiating law reform are set up in many countries. The digest and the textbook attempt to provide a clue to the maze of precedent.

§ 50. Consolidation

Consolidation is the combination in a single measure of all the statutes relating to a given subject-matter and is distinct from codification in that the latter systematizes case law as well as statutes. Thus the Partnership Act and the Sale of Goods Act are really codes in that both case law and statute are arranged in a harmonious whole. There is some confusion in the meaning of the terms consolidation and codification in many English books, but the orthodox view makes this clear distinction between the two.[1]

Consolidation does not primarily aim at amendment, but rather at making accessible the *statute* law on a given point. But if there are, for example, 132 statutes dealing with perjury,[2] it is clearly inadvisable to be content with paste-and-scissors work. Hence amendment is usually necessary in some degree. The great advantage of consolidation is that it renders the statute law easier to handle. Thus Victoria[3] has consolidated the whole of her statute law on four occasions, in 1890, 1915, 1928, and 1958, eight volumes being sufficient on the last occasion. In England the task of consolidation

[1] Thus C. E. Odgers, *The Construction of Deeds and Statutes* (2nd ed.), 226, seems to recognize no distinction. 'Consolidating acts are acts to comprehend in one statute the provisions contained in a number of statutes and which codify the law on some subject as far as they go.' The illustration given is the Bills of Exchange Act, 1882, which according to the distinction drawn in the text is a code. Lord Watson in 1895 referred to a consolidation as a code, *Administrator-General of Bengal* v. *Prem Lal Mullick* (1895), L.R. 22 I.A. 107 at 116. Cf. per Chitty J., *Re Budgett*, [1894] 2 Ch. 557 at 561.

[2] As in England in 1913.

[3] Australia.

is proceeding slowly,[1] but an attempt to consolidate all the statute law would, doubtless, be regarded as grandiose.

Even if the words are not changed, the actual effect of re-enacting a section in a consolidating statute may be great, since the consolidation, like any other statute, speaks from the date on which it comes into force.[2] Thus, unless there are saving clauses, by-laws made under the old act will lapse, since Parliament has repealed the section under which the power to create them was exercised. It is true that the re-enacted section will give the same power to make by-laws, but a power given in 1938 will not, without express words, validate by-laws made before that date.[3]

But the general intention lying behind a consolidation has two practical effects on the theory of interpretation: firstly, in cases where the meaning is doubtful, it is presumed, in the absence of evidence to the contrary, that the consolidation did not intend to change the law;[4] secondly, respect is still paid to prior decisions interpreting a section which is drawn into the consolidation.[5] The majority view supports these two presumptions, although, of course, they must give way before any clear evidence that the intent of the consolidation was otherwise. Since many amendments are made in the course of consolidation, each particular case must be examined on its merits. In a code there is no presumption against an intent to change the law, and cases decided before the code was enacted are no authority for its interpretation, although they may be examined to throw light on the previous state of the law.[6]

[1] From 1870 to 1934 there were over 100 consolidation bills—see W. M. Graham-Harrison, *J. Soc. Public Teachers of Law* (1935), 9 at 24. From 1935 to 1960 there were 90 consolidation acts passed.

[2] Hence it is wrong to speak of a consolidation as a declaratory act, for: (1) most consolidations introduce some changes; (2) even where there is no change in the language, the re-enacting of a section may lead to unforeseen results, as the new section now speaks from a different date.

[3] *Martin* v. *Trigg*, [1931] A.L.R. 34. Cf. M. Chalmers, cited W. M. Graham-Harrison, op. cit., at 22: 'The language of an old Act can hardly be introduced into a new Act without alteration. I was looking the other day at a clause in a Consolidation Bill. If the words of the original section had been reproduced, five important changes in the existing law would have been made, including the re-establishment of the three old common law courts at Westminster.'

[4] Per Romer L.J., *Swan* v. *Pure Ice Company*, [1935] 2 K.B. 265 at 274; *Nolan* v. *Clifford* (1904), 1 C.L.R. 429 at 447; *Re Warren*, [1939] 1 Ch. 684.

[5] This has been laid down in many cases: *Smith* v. *Baker*, [1891] A.C. 325 at 349; but Lord Watson, *Administrator-General of Bengal* v. *Prem Lal Mullick* (1895), L.R. 22 I.A. 107 at 116, referred to it as a singular proposition which had neither reason nor authority to commend it.

[6] *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107 at 144–5, which dealt with the interpretation of the Bills of Exchange Act which is really a code.

§ 51. Statutory Interpretation in England

The manner in which an Englishman interprets statutes has recently come in for much criticism—'the common lawyer is at his worst when confronted with a legislative text'.[1] The skill that has been trained, not to accept the words of a judgment at their face value, but to search for the spirit of the decision, seems to desert him when he turns to the consideration of statutory texts. We cannot cavil much at the theoretical canons of construction, though a few are rather narrow and suggest, as Pollock has stated, an underlying assumption that all parliamentary interference is evil *per se*.[2] But the rules are wide enough to afford justification for the most diverse interpretations, and what is decisive is the spirit in which they are used.

Pound has pointed out that statutes might be received fully into the body of the law as affording, not only a narrow rule, but a principle from which to reason, to be extended if necessary by analogy just as are the rules of common law; or courts might confine the statute to the cases with which it directly deals, but give a broad interpretation to the words used; finally, a narrow and rigid construction might be applied. The learned author suggests that the last is the typical common law approach.[3]

There are three fundamental rules suggested in the English cases: firstly, the literal rule that, if the meaning of a section is plain, it is to be applied whatever the result; the 'golden rule' that the words should be given their ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the instrument;[4] and the 'mischief rule' which emphasizes the general policy of the statute and the evil at which it was directed.[5] Judges frequently disagree as to whether a section is plain or not, and, even where it is agreed that the meaning is plain, each may differ from the other as to what that plain meaning is. The doctrine that the intent of Parliament should be followed does not take us very far, for it is agreed that the subjective intention of Parliament cannot be considered, and that the intent must be gathered from the statute itself.[6]

[1] R. Pound, *Future of the Common Law*, 18.

[2] *Essays in Jurisprudence and Ethics*, 85. See also M. Radin, 43 *Harv. L. R.* (1930), 863; J. M. Landis, 43 *Harv. L. R.* (1930), 886; D. J. Llewelyn Davies, 35 *Col. L. R.* (1935), 519; R. A. Eastwood, *J. Soc. Public Teachers of Law* (1935), 1; W. M. Graham-Harrison, op. cit. 9.

[3] 21 *Harv. L. R.* (1908), 385.

[4] Cf. *Grey* v. *Pearson* (1857), 6 H.L.C. 61 at 106.

[5] J. Willis, 'Statute Interpretation in a Nutshell', 16 *Can. B. R.* (1938), 1.

[6] *Sussex Peerage Claim* (1844), 11 Cl. & F. 85 at 143.

Many of the presumptions used in construction are not unreasonable. Thus we should not expect Parliament to interfere with a fundamental common law rule (for example, to take property away without compensation, or to impose criminal liability where there is no *mens rea*) except by clear words bringing about those results.[1] But an improper use of these presumptions may go far to defeat the purpose of an act. 'I venture respectfully to think that the view of the Court of Appeal illustrates a tendency common in construing an Act which changes the law, that is, to minimise or neutralise its operation by introducing notions taken from or inspired by the old law which the words of the Act were intended to abrogate and did abrogate.'[2] When an individualist common law is modified by collectivist legislation, we sometimes see an unsympathetic construction. Thus the real basis of housing legislation is a sacrifice of private rights of ownership in order to make possible a planned attack on the problem of the provision of suitable accommodation—hence an over-emphasis on the presumption against interference with the private rights of the landowner sometimes in the past led to a defeat of the real purpose of an Act.[3] Pennsylvania has attempted to overcome rigid interpretation by a Statutory Construction Act which abolishes the rule that statutes in derogation of the common law are to be strictly construed.[4]

The most marked difference from continental methods of interpretation is the greater tendency in England to the literal approach.[5] Thus, where an Act stated that bills of sale should be attested by a solicitor and that the attestation should assert that the solicitor had explained the nature of the instrument to the grantor before execution, it was held that it did not matter whether in fact the solicitor had given an explanation so long as the attestation asserted that he had done so.[6] But it is wrong to consider that English judges always

[1] 'But who, that is acquainted with the difficulty of new modelling any branch of our statute laws (though relating both to roads or to parish settlements) will conceive it ever feasible to alter any fundamental point of common law, with all its appendages and consequents, and set up another rule in its stead?' Blackstone, *Commentaries*, iii. 267. 'Would it be within the capacity of a Parliamentary Draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?' Sir Owen Dixon, *The Common Law as an Ultimate Constitutional Foundation*, 31 *Aust. L. J.*, (1957), 241.

[2] Per Lord Wright, *Rose* v. *Ford*, [1937] A.C. 826 at 846.

[3] W. I. Jennings, 49 *Harv. L. R.* (1936), 426: 'What (administrative lawyers) ask is not that judges shall pervert legislation in favour of a "bureaucracy", but that they shall not interpret it against public policy in the interests of private property' (pat. 454).

[4] 43 *Dickinson L. R.* (1938–9), 236.

[5] M. S. Amos, 5 *Camb. L. J.* (1934), 163.

[6] *Ex. p. National Mercantile Bank* (1880), 15 Ch. D. 42, cited M. S. Amos, op. cit. 167.

construe statutes narrowly, for there are many examples of a liberal interpretation.[1] The rules hunt in pairs—the court may not fill a *casus omissus*, but it must attempt to find a construction which will not defeat entirely the intention of the Act. The court must accept a meaning which is plain, but, if possible, the section should be so interpreted as not to lead to unjust results. If a person keeps strictly within the letter he may offend against the spirit of an Act with impunity, but on the other hand the court will not allow an Act to be evaded by shift or contrivance.[2] Hence a court can build on that rule which it considers best suited to the merits of a particular problem—but a difference of approach between various courts will be manifest, as is also the case in the interpretation of a written constitution.

There are welcome signs that a pedantic use of technical rules is falling into disfavour. Lord du Parcq thought it worth while to emphasize the truism that the best way of finding out the meaning of a statute is to read it and see what it means.[3] Denning L.J. deprecates the old-fashioned tendency to belabour the draftsman and points out that it is beyond human reason to foresee all contingencies and beyond the resources of language to achieve absolute clarity—the judge must work constructively by drawing the conclusion which fits the policy of the Act.[4] 'We do not now in this court stick to the letter of a statute. We go by its true intent. We fill in the gaps.'[5] Logic plays its part, but interpretation is really a creative art and it has been persuasively argued that the approach should differ according to the type of statute in question.[6] A constitution and a criminal code may both be statutes, but it is dangerous not to take account of the

[1] Cf. *Miller* v. *Hilton*, [1937] A.L.R. 298: 'No person shall on any controlled route drive any vehicle or cause any vehicle to be driven for the purpose of carrying etc.' If the regulation is literally read, a person who causes is liable only if he is on the controlled route himself, but this so obviously is a drafting slip that the High Court of Australia refused to read the statute in this way. See also *In re Allen, Craig & Co. (London) Ltd.*, [1934] Ch. 483; *Anstee* v. *Jennings*, [1935] V.L.R. 144; *Day* v. *Simpson* (1865), 34 L.J.M.C. 149. Contrast for a narrower interpretation *Moore* v. *Tweedale*, [1935] 2 K.B. 163; *Inland Revenue Commissioners* v. *Duke of Westminster*, [1936] A.C. 1. 'Simplicity and common sense are . . . qualities which must be applied with caution in the construction of a taxing statute': per Megarry J., *Roberts* v. *Granada T.V. Rental Ltd.*, [1970] 2 All E.R. 764 at 771–2.

[2] Compare *Samuel* v. *Adelaide Club*, [1934] 2 K.B. 69 with *Milne* v. *Commissioner of Police for City of London*, [1940] A.C. 1.

[3] *Cutler* v. *Wandsworth Stadium Ltd.*, [1949] A.C. 398 at 410.

[4] *Seaford Court Estates Ltd.* v. *Asher*, [1949] 2 K.B. 481 at 499; D. Lloyd, *Current Legal Problems* (1948), 89.

[5] *Ministry of Housing* v. *Sharp*, [1970] 1 All E.R. 1009 at 1015; Cross L.J. at 1034. See also *R.* v. *Bonner*, [1970] 2 All E.R. 97, which emphasizes that the object of the Theft Act was to get rid of the subtleties and absurdities of the previous law.

[6] W. Friedmann, 26 *Can. B. R.* (1948), 1277.

difference between them.[1] 'How long can we assume that the statute provides a complete set of answers?'[2]

Many of the narrowing presumptions of the English doctrine of interpretation would not be applied on the Continent. In England statutes are a gloss written around the common law, and hence we can regard the common law as primary except in so far as it is specifically altered by legislation. On the Continent the influence of the work of Justinian led lawyers to regard enacted law as the primary type,[3] and today, of course, the real foundation of the law of Western Europe is found in the codes. Hence the continental statutes are more broadly drafted and more sympathetically applied. In England statutes are not extended by analogy, although in earlier times the doctrine of the equity of a statute led to a treatment that was similar to that applied to English case law today.[4]

Thus a vicious circle has been created. The interpretation in the past has tended to be so literal that the draftsman is forced to be very specific; and the method of drafting is so detailed that the broad interpretation given to the French Code is rendered difficult, if not impossible.[5] If present English methods of interpretation and drafting were continued, it would be a tragedy if a code were instituted. The continental draftsman 'whether of a will, of articles of association, or of a law, does not regard himself as a general disposing his troops for a frontal attack upon a hostile position, but as one who is bringing up reinforcements to an ally. A nod is as good as a wink to a friendly court.'[6] It is hardly fair to put the blame on the draftsman, as is sometimes done.[7] The doctrine of precedent has increased the difficulties of the situation, for a comparatively short section may

[1] J. Bentham, *Limits of Jurisprudence Defined*, 253, cynically states that interpretation is called strict when it is what the legislator really intended and liberal when you apply to him an intention he did not possess because he failed to appreciate the problem.

[2] Harry Bloom, 33 *Mod. L. R.* (1970), 197.

[3] M. S. Amos, 5 *Camb. L. J.* (1934), 163 at 173.

[4] W. S. Holdsworth, *Sources and Literature*, 46; T. F. T. Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, 72 et seq.

[5] Cf. T. F. T. Plucknett, in *Rec. Lambert*, i. 434. M. S. Amos instances § 3 of the Wills Act, 1837, as 'a good example of the frenzy of caution to which at that time draftsmen were driven by the reign of judicial terror under which they lived. If the judges could not be relied on to help, by occasionally taking something for granted, the only course to take, so it seemed, was to endeavour to enumerate every possible case': 5 *Camb. L. J.* (1934), 169.

[6] M. S. Amos, ibid. 175.

[7] But sometimes we find unconscious humour in a statute: see § 1 (2) of 24 & 25 Geo. V, c. 21: '. . . if an animal appears . . . to be unbroken or untrained it shall lie on the defendant to prove that the animal is in fact broken or trained.' Scrutton L.J., *Roe* v. *Russell*, [1928] 2 K.B. 117, regretted that he could not order the costs to be paid by the draftsmen and the members of the legislature at 130.

soon be overlaid with a mass of binding case law which is difficult to harmonize. Goddard L.J. has stated:

I cannot help thinking if those words had to be construed by somebody who did not labour under the considerable disadvantage of having at his elbow a copy of the Workmen's Compensation Reports and the various text-books on the subject, he would have no difficulty is saying that 'suitable' meant 'suitable' and that work which involved danger to the eyes was not suitable work for a one-eyed man.[1]

Another difference between English and continental methods of approach is that in England very little use is made of 'preparatory work'. Thus reports of debates in Parliament are not admissible as evidence of the policy of a statute,[2] and a report of a royal commission can be used only to show the state of the law before the Act was passed.[3] Sometimes this rule has led to a result the opposite of that which Parliament really intended,[4] and there are some signs that the rigid exclusionary rule may be weakened a little.[5] A dictatorship sets simpler problems for the draftsman. In 1938 a pithy German statute imposed a contribution of one million reichsmarks on the Jews. 'All necessary implementing regulations shall be issued by the Minister of Finance in agreement with the Minister of the Reich concerned.' No English draftsman could be so concise.[6]

§ 52. Codification

A general movement towards codification marked the nineteenth century.[7] It is sometimes said that the predominant motive for codifi-

[1] *Hoe and Co.* v. *Dirs*, [1941] 1 K.B. 34 at 42.

[2] They have been cited in Australia (*Engineers' Case* (1920), 28 C.L.R. 129 at 147) and by the J.C. with the discreet omission of inverted commas or reference (see 48 *L.Q.R.* (1932), 145), but the general rule now is that it is not permissible to refer to them: P. B. Maxwell, *Interpretation of Statutes* (10th ed.), 25–8.

[3] Per Lord Wright, *Assam Railways and Trading Co. Ltd.* v. *Inland Revenue Commissioners*, [1935] A.C. 445 at 457–9.

[4] *Ellerman Lines Ltd.* v. *Murray*, [1931] A.C. 126. Lord Halsbury has said that the person least qualified to interpret a statute is the person responsible for its drafting, for he is likely to confuse his actual intention with the effect of the language which he employed: *Hilder* v. *Dexter*, [1902] A.C. 474 at 477; C. B. Nutting, 20 *Boston Univ. L. R.* (1940), 601.

[5] See per Sholl J. in *T. M. Burke Pty. Ltd.* v. *City of Horsham*, [1958] V.R. 209 at 216; and G. Barwick, *Divining the Legislative Intent*, 35 *Aust. L. J.* (1961), 197.

[6] S. P. Simpson and J. Stone, *Law and Society*, 1987.

[7] 1804, the French Civil Code; 1811, Austria; 1838, Holland; 1844, Serbia; 1864, Rumania; 1865, Italy; 1889, Spain; 1900, Germany; 1907, Switzerland. The French Code was also taken as a model for Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Honduras, Louisiana, Mexico, Montenegro, Peru, Portugal, Quebec, Salvador, San Domingo, Uruguay, and Venezuela: R. Pound, *Outlines of Jurisprudence* (1943), 136.

cation was a desire to render the law certain, but this, at least in the case of France and Germany, was really overshadowed by the desire to replace the differing laws of the various provinces or states by a system that was national and unified.[1] Two types of countries tend to adopt codes: those with well-developed systems where the possibility of further development is remote for the moment: those with undeveloped systems which cannot grapple with new economic problems.

Nevertheless, many codifiers emphasize that one of their aims is to make the law simple and accessible, logically arranged and harmonious, certain and definite. Both Justinian and Napoleon thought that the law would remain clear until the commentators started to explain it. In the first flush of enthusiasm it was said in France that all the problems of law had been solved and that every case could be decided by deduction from the provisions of the code. Bugnet said: 'Je ne connais pas le droit civil, je n'enseigne que le code Napoléon.'[2] Hence a purely logical method of interpretation was adopted. Liard writes that law is only the *loi écrite* and that the work of the judge should be as exact as that of the geometrician who by deduction draws from his axioms the answer to all possible problems.[3] The writers who took this view are known as the exegetical school, since all the emphasis was put on the interpretation of the written law.[4]

But no code can be all-sufficient. The doctrine of the logical plenitude of law is a useful one,[5] but if jurists think that a limited number of sections in a code include all the law that there is, the problem becomes increasingly difficult as the decades roll by. No draftsman can altogether avoid such flaws as ambiguity, obscurity, or conflict of sections, and even if he could, new problems arise which could not possibly have been foreseen and new social philosophies become popular which are out of keeping with the basis on which the code is built.

In the long run, the real test of a code is the measure of flexibility which it has allowed the law. It was the early French scheme that the

[1] In France there were 60 general systems of law and 300 particular systems before 1789. W. Simons in *Law, a Century of Progress*, i. 84, says that when he was a judge in Thuringia there were 13 different systems dealing with property of married persons within his *Landgericht*.

[2] Cited F. Gény, *Méthode*, i. 30.

[3] Cited ibid. 54. See also J. Bonnecase, *La Pensée juridique française de 1804 à l'heure présente* (1933), i. 522, where he discusses *l'école de l'exégèse*.

[4] The school emphasized the intention of the legislature as the primary source of law, and thus regarded it as omnipotent. But, as in the case of Austin (*supra*, § 4), they also thought that there were fundamental and absolute principles which could be made the basis of jurisprudence.

[5] *Supra*, § 43.

courts should merely apply the law; if points of obscurity did unaccountably arise, the judges might refer them to the legislature, and when a conflict of decisions revealed a gap in the law, such reference was obligatory.[1] But the scheme proved unwieldy, for the long delays were injurious to suitors and it was soon abolished without regrets. It also proved to be increasingly difficult to regard the code as containing the answer to every possible problem, especially as the passing of the years brought new difficulties which could not have been foreseen when the code was drafted. If the legislator has not directed his mind to a specific point, there will always be differences of opinion when the argument by analogy is used, and if the most likely answer leads to unjust results, it is difficult not to succumb to the temptation to use a 'perverse logic'. In England, where a statute clearly does not deal with a specific point, there is the reservoir of common law principles which may be drawn upon, but if in France the theory was adopted that *all* the law was contained within the code, it is easy to see the problem that arose. In many cases the traditional method of interpretation did not lead to certainty, for, where there was a gap in the law, opinions differed as to what the legislature would have enacted had the particular problem been present to their minds. Moreover, the code was based on a somewhat narrow individualism and upheld the interests of the middle classes—consequently the rising tide of collectivism and an increasing concern for the welfare of the labourer have created difficulties for any theory of literal interpretation.

As a reaction to the exegetical school there arose a dangerously wide theory of interpretation that the jurist should not attempt to discover the intention of the legislator, but should treat the code as having a life of its own—the text should not be *interpreted*, but rather *adapted* to the changing world of modern times. That interpretation is best which most successfully warps the text to suit the needs of the present hour.[2] When the increasing number of accidents caused by the motor-car led jurists to desire a stricter theory of liability which could be applied to the driver it was necessary to find a peg in the code on which such a doctrine could be hung. This was difficult, for the traditional interpretation of the relevant articles founded liability for delict on fault and fault alone. Saleilles and Josserand advocated that

[1] F. Gény, *Méthode*, i. 78–9. A. I. Vyshinsky considered that difficult questions of statutory interpretation should be dealt with only by somebody responsible to the legislature: *Law of the Soviet State*, 339.

[2] Cf. the dictum of M. J. Percerou, cited F. Gény, *Méthode*, i. 262.

strict liability should be the lot of the driver, but each based it on a different section.[1] Gény approved the result, but not the particular means by which it was reached, for the torturing of the text leads to a dangerous arbitrariness, since once the process begins of reading into the codes what is not there, how are limits to be set to this method, and how is the content of the new rules to be determined?

Gény prefers to restore the code to a place of respect, and argues that the judge must interpret it as faithfully as possible by attempting to discover the real meaning of the words in which it is expressed, as is done in the construction of contracts or wills. But he would rigidly confine the code to the precise circumstances with which it deals, and, where a problem arises on which the code, honestly construed, throws no light, he argues that the judge, instead of reaching a conclusion by a fanciful use of analogy, should fill the gap by free scientific research —free because the formal authorities do not bind, and scientific because it places itself on a solid base of objective truth. The topic has already been discussed.[2] But the importance of Gény's approach, so far as the code is concerned, is that he recognizes that the code does not contain all the law.[3] Hence, even where codification is adopted, the search for new law must proceed, and in France there has been on many points greater flexibility than in England during the last generation. Hence it is superficial to consider that a code makes inevitably for rigidity, for all depends on the method of its drafting and the manner of its interpretation.

§ 53. The Growing Importance of Statute Law

There is still a tendency in English legal education to treat statute law too lightly. For this there are several reasons: first, the common

[1] L. Josserand based it on 1384. 1, which enacted that a person is responsible for damage caused by things in his custody. R. Saleilles boldly reinterpreted 1382, putting the notion of cause in place of that of fault. The French courts finally adopted a theory of presumption of fault, which could be rebutted only by showing that the cause of the accident was external to the car.

[2] F. Gény, *Méthode*, ii. 78. It is rather difficult to translate Gény's word *scientifique*, for it has a special meaning in his work which it derives from its opposition to *technique*. *Science* is the study which scrutinizes the *donné*, the objective realities which lie at the base of law, as opposed to *technique*, the intellectual elaboration wherein the jurist has certain powers of construction within the limits set by the *donné*. 'Scientific' is not an adequate translation, for science in English suggests a concern with empirical facts.

[3] J. Bonnecase, *La Pensée juridique française*, ii. 27: 'La loi n'est plus le droit, mais bien l'expression plus ou moins parfaite du droit.'

law is the basis and must be understood before a statute becomes intelligible: secondly, common law is, in general, more interesting to teach: thirdly, statutes may be more ephemeral—especially during a war there is a vast quantity of legislation most of which disappears. Consequently, the student receives an intensive drill in the mechanics of precedent and the methods of searching for authority and not enough emphasis is placed on the technique of drafting statutes and the problems of their interpretation.

This attitude is reflected in the character of the books available. It is true that drafting is an art to be learnt rather than an abstract study to be lectured on, but not nearly enough has been done to assist the student. There are the pioneer efforts of Bentham, the works of Sir Henry Thring,[1] of Sir Courtenay Ilbert,[2] and an excellent paper by Sir William Graham-Harrison.[3] It is also significant that the parliamentary draftsman's office was not established till 1869—this led to an improvement in the style of statutes and greater uniformity in drafting. Many of the works on interpretation collect dicta instead of coming to grips with the real problems of drafting and interpretation. If the lawyer has no appreciation of the real problems, it will deprive him of the power to understand statutes. 'The best Act you can have is a repealing Act: the only good Act is a dead Act'—these words were written flippantly, but they do describe the attitude of some writers.

The importance of statute is emphasized by the spread of codification on the Continent, and the increasing bulk of the statute book in England. The common law is historically based on individualism, and the increasing popularity of collectivist measures (such as the nationalization of mines, railways, or the provision of free medical services) requires extensive statutory interference with the fundamental doctrines of the common law. A new Duguit is needed to write on the Transformation of Private Law. It is a delicate task to work out a new balance between common law and statute and only the fullest knowledge of the technique of the drafting and interpretation of statutes will succeed in retaining some consistency in English law as a whole. The greater the use of statute, the more skilful must be our technique.[4]

[1] *Practical Legislation* (1877).
[2] *The Mechanics of Law Making* (1914); *Legislative Methods and Forms* (1901).
[3] *J. Soc. of Public Teachers of Law* (1935), 9.
[4] H. R. Hahlo writes of the dangers of a code for England: 30 *Mod. L. R.* (1967), 241. For a reply see M. R. Topping, 33 *Mod. L. R.* (1970), 170.

§ 54. Law Reform

It is clear that any far-reaching study of law reform requires a choice between the ultimate ends that law should pursue. An adequate discussion of the choices that face a modern community would require several volumes, and lengthy excursions into the fields of politics, economics, and sociology.[1]

But even without trenching on controversial issues there is room for much reform in cutting out the inconvenient relics of the past and amending rules which, whatever may once have been the case, are now for the benefit of none. Law reform is an urgent need of all countries, and on the whole the lawyer has not played the part that would be expected (although the cynic may say that the lawyer's apathy was natural). If we may adopt Gény's terminology, there is within the realm of technique much room for improvement without changing the basic principles on which a legal system is based. The mode in which the law is expressed, its clarity and ease of application, the simplicity of procedure and the cost of litigation—all these demand the serious study of the lawyer. In this sphere jurisprudence should indeed be a creative study by focusing attention on such parts of the law as do not achieve the purpose for which they were designed. The Crown Proceedings Act, 1947, is a good example of what reform should do. The Act not only improved the substantive law, by granting fuller remedies to the subject, but it also swept away many old procedural forms (e.g. Latin and English informations) and replaced them by simpler rules. Another illustration is the Theft Act, 1968, which made a heroic attempt to remove useless subtleties from the old law.[2]

An interesting development is the use of the royal commission or special committee appointed to investigate thoroughly the matter in question, and to make suggestions for legislation based on a detailed consideration of all the evidence that is available. This enables the legislative body to build on a more secure foundation, especially where the experience of other countries has been available for analysis. But the royal commission is specially appointed for each particular project, and hence it cannot serve as a permanent impetus to law

[1] One of the greatest English law reformers was Jeremy Bentham: W. S. Holdsworth, 28 *Calif. L. R.* (1940), 568; *Jeremy Bentham and the Law* (ed. G. W. Keeton and G. Schwarzenberger).

[2] The Report of the Criminal Law Revision Committee, which was the basis of the Act, took seven years to prepare.

reform. A significant experiment in England was the appointment in 1934 of a Lord Chancellor's Law Revision Committee. The personnel was composed of judges, practising and academic lawyers, and thus a representative opinion was ensured. Although the committee is limited to reporting on the topics referred to it by the Lord Chancellor, much useful work has already been done, and several statutory changes have resulted.[1] The Law Reform Committee was set up by Lord Simonds in 1952, and produced eleven reports.[2]

The appointment of the Law Commission in 1965[3] was hailed by Lord Chorley and G. Dworkin as a landmark in the history of English law.[4] The function of the Commission was breath-taking in its scope: 'to take and keep under review all the law . . . with a view to its systematic development and reform.'[5] Five full-time members were appointed: some criticism was evoked on the ground that membership should not be confined to lawyers. The Chairman, Scarman J., points out that the Commission has independence, deriving its existence not from a Cabinet decision, but from a statute.[6] The Commission is required to submit to the Lord Chancellor from time to time programmes for the reform of different parts of the law, but the Lord Chancellor is bound only to lay before Parliament those schemes which meet with his approval. The Commission has a 'close and confidential relationship with the Government machine'.[7] It can take the initiative, and also act in an advisory capacity to government departments: for example, a paper was prepared for the Lord Chancellor on the proposal for the reform of the divorce law. The fact that the Commission received 632 proposals for law reform soon after its inception shows that there is much public interest in its operation. Consolidation is one of the subjects stressed in the Act, as is the repeal of inoperative statutes. Both these methods will reduce greatly the sheer volume of statute law. Its published programme includes the preparation of a series of codifying enactments

[1] e.g. Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. V, c. 30; Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. V, c. 41; Limitation Act, 1939, 2 & 3 Geo. VI, c. 21; Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. VI, c. 28; Law Reform (Enforcement of Contracts) Act, 1954 (2 & 3 Eliz. II, c. 34); Variations of Trust Act, 1958 (6 & 7 Eliz. II, c. 53); Occupiers, Liability Act, 1957 (5 & 6 Eliz. II, c. 31).

[2] For an interesting survey see 24 *Mod. L. R.* (1961), 1–143. In addition a Private International Law Committee was set up in 1952, and a Criminal Law Revision Committee in 1959.

[3] Law Commissions Act, 1965.

[4] 28 *Mod. L. R.* (1965), 675.

[5] § 3.

[6] 10 *J. Soc. of Public Teachers of Law* (1968), 91.

[7] The Chairman, op. cit. 94.

relating to contract, landlord and tenant, family law, and criminal law.

Scarman J. states that it is 'high time that legal education took full account of the truth about legal reality and abandoned the fiction that our law is to be found in the law reports . . . Our law has been set, since the middle of the nineteenth century, upon a course that takes it away from the law reports and towards the statute book.'[1] 'The true work of the Law Commission is therefore, in my submission, to help Parliament and the courts to maintain in a changing world that capacity for development which has always been a feature of the common law, and is the secret of its survival over the centuries.'[1]

'We think that we are justified in treating as axiomatic the proposition that much of our English law is out of date and some of it shockingly so. The fact that this view is shared by the overwhelming part of the legal profession is significant; for taken as a whole, no profession could be more conservative.'[2]

The major difficulty is to secure a close relationship between the courts, the commission, and the legislature. Many pages of the law reports bear testimony to the desire of the Bench for reform. It is a most unpleasant task for a judge to give a decision that he knows to be unjust because the weight of authority is compelling. The judicial complaint, however, is often buried in the reports and no action follows. In many countries the judges are empowered as a body to make suggestions for the reform of the law, but for various reasons few changes can be ascribed to this source. If there is lacking a channel between the courts and the legislature, there may also be little co-operation between the legislature and a law revision committee. It is of little practical use to draw up new bills if they are to be stored in the pigeon-holes of an administrative department. Legislatures are busy with their own projects and are traditionally shy of long bills relating to matters which are not of immediate political interest. Hence 'education' of the legislature is just as necessary as intensive research by the reformer. One of the advantages of a permanent body for law revision is that it has the opportunity of gaining, by its record of service, the respect of the legislature.[3]

[1] Ibid. 99.
[2] Gerald Gardiner and Andrew Martin (eds.), *Law Reform Now*, 1.
[3] e.g. the Law Institute in the State of Louisiana, U.S.A. This will also presumably apply to the Law Commission in U.K. In Australia, there are active Law Reform Commissions in Queensland and N.S. Wales, and a Chief Justice's Law Reform Committee in Victoria.

Another aim of law reform is to secure unification of law. This problem is particularly acute in federations. America with fifty states and Australia with six appreciate the inconvenience of diversity in state statutes. Australia has six bodies of law relating to commercial transactions. Even when English statutes are adopted, sometimes each State introduces small amendments. As between the nations, it is clear that trade is hampered by differences in commercial law. Since 1851, much enthusiasm has been spent on projects for the unification of law, but progress has been slow.[1] One difficulty is the cleavage between Anglo-American and continental systems: a second, national pride: a third, that of persuading legislatures to devote sufficient time to the topic.

[1] H. C. Gutteridge, *Comparative Law*, ch. xi.

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X

JURISTIC WRITINGS AND PROFESSIONAL OPINION

§ 55. The Influence of Juristic Writings and Professional Opinion

Juristic writings and professional opinion have played a part in legal evolution that should not be ignored. If it is a question whether a persuasive precedent should be followed, a court may be swayed by the opinion of the profession concerning the correctness of that decision, by the 'press' which it has received in the law reviews, or by the views expressed in the leading textbooks.[1]

In England a humbler place is afforded to the textbook than in most systems of law. 'There is everywhere a sort of competition between the judiciary and the scientific jurists. When one of these groups is endowed with all the official power and the other is restricted to private activity, as is the case in England in respect to the Bench and the theorists, there can be little doubt as to the result of the contention.'[2] But it must not be supposed that the textbook has had no influence in English law. In the early period the dearth of authority led men to turn to such books as there were, and the work of Bracton did much to shape the foundations of English law. It was at one time thought that Bracton had foisted on his contemporaries a second-hand version of Roman law as an English textbook, but further investigation[3] has shown that Bracton searched for and gave English authority where it existed and used Roman law only to provide the

[1] Thus in discussing whether it should follow *Hurst* v. *Picture Theatres Ltd.*, [1915] 1 K.B. 1, the High Court of Australia discussed adverse criticisms and defences of the decision by Holdsworth, Miles, Denis Browne, Cheshire, Hanbury, Gale, Winfield, Pollock, Geldart, Salmond, Smith's Leading Cases: *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1937), 56 C.L.R. 605. '*Communis opinio* is evidence of what the law is': per Lord Goddard, *R.* v. *St. Edmundsbury and Ipswich Diocese*, [1947] K.B. 263.

[2] H. Goldschmidt, *English Law from the Foreign Standpoint*, 71–2. But nevertheless 'so soon as there is a legal profession, professional opinion is among the most powerful of the sources that shape the law. . . . In Edward the First's day it is impossible to uphold a writ which "all the serjeants" condemn and often enough to the mediaeval law reporter, the "opinion of the serjeants" seems as weighty as any judgment': F. Pollock and F. W. Maitland, *History of English Law*, i. 196.

[3] *Bracton and Azo* (Selden Society, ed. F. W. Maitland).

general structure and to fill the gaps left by the decisions of the King's Courts. The five great names of Glanvil, Bracton, Littleton, Coke, and Blackstone demonstrate the debt that English law owes to her text writers. Bracton laid the foundations, borrowing from Roman law what was necessary to create a system with a reasonable flexibility and sufficient coherence to withstand the later assaults of Roman law. Littleton gave a scientific account of the theory that lay behind the decisions on real property and his 'glory is that he proved that English law could form a legal system independent of the Roman law'.[1] Coke, versed in the ancient learning, provided a bridge between medieval and modern law, and finally Blackstone, with a genius for comprehensiveness, reduced to an ordered system and ornamented with a literary style the diverse sources of English law.

After the days of Coke the growth of law reports meant that decisive authority could be found for an increasing number of problems, and as the reports became more accurate there was greater reliance upon them. But if at this period there was a tendency for law reports to kill the textbook, the very increase of reports resurrected it as a guide to the luxuriant chaos of case law. In the days of Bracton the textbook was important because there were so few precedents; today it is valued because there are so many. But textbooks remain only persuasive authorities, although it must be stressed that the five great books of English law have such high prestige as statements of the law of their day that there is only a thin line between the degree of their authority and that of a case of the same period.[2]

Lord Eldon once remarked that a writer who had held no judicial situation could not properly be cited as an authority.[3] This view has been gradually modified, and it became the convention that the works of dead authors could be cited—not, of course, as binding authorities, but only as expert evidence as to the state of the law. Thus Lord Wright paid a graceful tribute to Pollock's *Law of Torts*, 'fortunately not a work of authority'[4]—the point being that the learned author was still adorning the literature of the law. But there is not a great practical difference between adopting the argument of a living author

[1] H. Lévy-Ullmann, *The English Legal Tradition*, 142.

[2] Humphreys J. said in *R.* v. *Sandbach*, [1935] 2 K.B. 192 at 197: 'It is too late, in 1935, to attempt to show that Blackstone was wrong.'

[3] *Johnes* v. *Johnes* (1814), 3 Dow 1 at 15; but he continued that it would be flattery even of a judge to say that he knew as much law as Serjeant Williams.

[4] *Nicholls* v. *Ely Beet Sugar Factory Ltd.*, [1936] 1 Ch. 343 at 349. In one report the force of this remark was lost and the remark was reported as 'unfortunately not a work of authority': 154 L.T. at 533.

without citing him as authority (which was permissible) and citing his work as authority or as an expert opinion of what the law is (which was not), and in modern times the number of citations of the work of living authors has increased and is increasing. This is due mainly to an improvement in the quality of text-books and to the growth in the quality and quantity of contributions to legal learning appearing in the periodical literature. The excellence of the work of Glanvil, Bracton, Littleton, Coke, and Blackstone must not blind us to the fact that their work covers a span of five centuries, and there were few other books of the same quality. In the last seventy years many books have been written by barristers who afterwards achieved fame on the Bench, and the universities have aroused a greater interest in the literature of English law. To take an example from private international law, Dicey's work[1] exercised a great formative influence, and Cheshire's more recent textbook[2] has achieved repute within a remarkably short time of its appearance. The classic texts of Pollock and Salmond on the law of tort were cited in numerous cases even before the deaths of these authors. In *Bradford* v. *Symondson*[3] the judgment turned almost entirely on a discussion of the books of leading writers on insurance.[4] The work of the conveyancers and real property lawyers has exerted a tremendous influence.[5] Lord Wright said of Sir Frederick Pollock: 'This at least is clear that he has vindicated to this generation the vital importance of extra-judicial writing.'[6] Moreover, we note a surprising increase in the citation of articles from periodicals.[7] In *Haynes* v. *Harwood*[8] the Court of

[1] *Conflict of Laws* (1st ed., 1896, 7th ed., 1958).
[2] *Private International Law* (1st ed., 1935, 7th ed., 1965).
[3] (1881), 7 Q.B.D. at 462–3.
[4] In *China* v. *Harrow U.D.C.*, [1954] 1 Q.B. 178 at 183, Lord Goddard C.J. said: '... not only is there no authority on this question, but there is no *communis opinio* among text writers.'
[5] e.g. H. W. Challis on *Real Property*, cited by Byrne J., *In re Hollis's Hospital and Hague's Contract*, [1899] 2 Ch. 540 at 551. See C. K. Allen, *Law in the Making* (4th ed.), 240. In *Shenton* v. *Tyler*, [1939] 1 Ch. 620, Greene M.R. cited the works on Evidence of Gilbert, Peake, Starkie, Best, Greenleaf, Taylor, Wigmore, Wills, Stephen, Phipson, Cockle; Halsbury's *Laws of England*, Lush on *Husband and Wife*. In addition, Luxmoore L.J. cited Holdsworth, *History of English Law*.
[6] (1937), 53 *L.Q.R.* 151.
[7] The High Court of Australia has shown great industry in exploring articles in periodicals: see *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1937), 56 C.L.R. 605, where articles from the *L.Q.R.* by Geldart, Miles, Pollock, and Winfield were cited: *Thomas* v. *The King* (1937), 59 C.L.R. 279, cited the *Camb. L. J.* and *L.Q.R.*; *Davis* v. *Bunn* (1936), 56 C.L.R. 246, cited the *Can. B. R.*; *Chester* v. *Waverley* (1939), 62 C.L.R. 1, cited the *Camb. L. J.*, *Harv. L. R.*, and the *Can. B. R.* In *Gold* v. *Essex C.C.*, [1942] 2 K.B. 293, great reliance was placed on an article by Goodhart.
[8] [1935] 1 K.B. 146. Cf. G. V. Nicholls, *Can. B. R.* (1950), 422.

Appeal adopted as the basis of their decision a conclusion reached by Professor Goodhart in an article in the *Cambridge Law Journal*, and this is not an isolated instance of the influence of legal reviews.[1]

An interesting account of the part played by the textbook in the development of American law is given by Roscoe Pound.[2] His view is that doctrinal writing has had more influence in America than in England, especially in the formative era. Even today that influence is not waning, for the lists of courts are congested, authorities are many, and there is a natural temptation to turn to any textbook which states the law clearly and definitely.[3] The American *Restatement of the Law* is an interesting modern example of co-operation between Bench, the practising profession, and the law teacher. The mass of decisions given in fifty-one jurisdictions makes it impossible for the practitioner to keep abreast of the law. Hence the American Law Institute, recognizing that the law was becoming uncertain, set up machinery to enable the law to be restated in short sections. An acknowledged authority was appointed as reporter for each subject, and given the assistance of a council of advisers consisting of judges, practitioners, and university teachers. After passing the scrutiny of these advisers, the work was submitted to the Law Institute for its approval. The *Restatement* is neither a textbook nor a digest, for no authorities are cited: the law is stated in black-letter sections to which comment and illustrations are attached. Nor can it be called a code, for it has no authority, save that gained by its prestige. But it is an interesting example of co-operative effort by the legal profession and the twenty-seven volumes already published have exercised great influence in the courts,[4] and even the Privy Council is not immune.[5]

In Roman law the textbook occupied a much higher place. There was no official bench in the early period, and the jurist secured the prestige which in England is accorded to the judge. The Law of Citations of A.D. 426 recognized the work of five jurists as the main source of Roman law, and the *Digest* of Justinian was largely a series of readings from famous textbooks. When, at the time of the Renaissance, the reception of Roman law was stimulated, it was to the *Digest* that men turned. The great teachers of Roman law achieved international fame, and Roman law was regarded almost as the *ius commune* of Western Europe. Many countries employed lay judges

[1] Cf. *Re Cleadon Trust Ltd.*, [1939] Ch. 286.
[2] *The Formative Era of American Law* (1938), ch. iv. [3] Ibid. 165.
[4] *The Restatement in the Courts* (American Law Institute).
[5] See *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt*, [1971] 1 All E.R. 150.

and there was little or no systematic instruction given in the native customary law. Hence when an expert class was needed, it was the doctors of Roman law who were called upon, with the result that the influence of Roman law increased, and correspondingly the textbooks gained greater prestige.

The French Code was largely indebted to the work of the great jurists Domat and Pothier who had begun the task of fusing the Roman rules of the south and the Germanic customs of the north. Even today in Europe some of the outstanding teachers of law are more fortunate than the highest judges in their reputation, prestige, and emoluments.[1]

In international law the textbook is still an important source, and must remain so until there is a greater body of case law. 'Vattel', said Sir William Scott, 'is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe.'[2]

Can we trace any characteristics of English law which are due to the humbler place occupied by the textbook? It is difficult to answer, because it is hard to separate from this problem the results which are due to the doctrine of binding precedent and, indeed, to the particular English temperament. Would the doctrine of binding precedent have become established had the textbook enjoyed greater prestige? One result of the reliance on cases is that English law is very practical and related to the concrete facts of life. On the other hand, there is a dearth of general principles and in some cases a lack of general terms. Moreover, since a single decision may be binding, most branches of the law are disfigured by somewhat narrow distinctions between particular cases. But it is impossible to say whether the attitude towards the textbook is a cause or itself a result of more significant factors.

§ 56. The Function of the Textbook

The textbook attempts to universalize, to reduce to an ordered unity, and to discover the deeper principles that underlie particular decisions. There are works which are mere collections of cases strung together in narrative fashion, but while these have their use as convenient repositories of the relevant decisions, they are not textbooks

[1] M. S. Amos and F. P. Walton, *Introduction to French Law*, 8–9.
[2] *The Maria* (1799), 1 C. Rob. 340 at 363; *R.* v. *Keyn* (1876), 2 Ex. D. 63 at 69.

in the true sense of that word. The speculative and generalizing mind of an expert views particular decisions in their proper perspective and discovers principles which are latent in a line of cases. Under the English system, which treats even a single decision of a higher court as binding, there must be a perpetual struggle to prevent law becoming a mere collection of specific decisions and to search for unifying principles. As one judge has remarked, paying a sincere tribute to the function of the textbook: 'I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory textbook upon the subject.'[1]

The textbook may be necessary for teaching, but its influence goes farther. Ehrlich suggests that Roman law owed its great systematic completeness and perfection of form to the teaching activities of the jurists.[2] Maitland remarked that taught law is tough law, and thereby he was referring not to the sufferings of students but to the strength given to a system when it is systematically expounded. Roman law had greater influence on the Continent than in England largely because the teaching of the universities was confined to Roman law alone and the native systems were rather despised, whereas in England, even if the earlier universities concentrated mainly on Roman law, the Inns of Court established a learned tradition for the common law. Teaching requires that the law should be, as far as possible, reduced to a systematic order—hence the search for principle which can afford the *ratio legis* lying behind a particular part of the law. If the reason for a particular rule can be explained, then it is remembered more easily and the teacher tries to discover broad principles that are only implicit in the law. Thus the early textbooks of the law of tort attempted to organize the subject on the principle of 'no liability without fault'. The generalization may have been premature, but it aided in transforming the law from a collection of forms of actions into a body of principles—although it must be confessed that the law of tort is still notoriously difficult for those who demand logic, order, and system.

Text books were naturally influenced by the prevailing theory of law. In the eighteenth century natural law was drawn upon in order to fill the gaps of the law, and in this way new principles were introduced and law was brought into closer touch with moral theories. To many persons today natural law seems a mere empty figment, but the

[1] Per Atkin L.J., *The Susquehanna*, [1925] P. 196 at 210.
[2] *Fundamental Principles of the Sociology of Law* (trans. W. L. Moll), 269.

text-writer, in his search for reason, drew largely on the experience of other systems and thus filled with a practical content the philosophic theory borrowed from the past. Kent and Story in America treated comparative law as declaratory of natural law.[1] In the nineteenth century in England the analytical school was predominant, and the attempt to organize and explain the mass of cases on the basis of logical principles gave to English law strength and cohesion. Today it is realized that the analytical school tended to subordinate everything to *elegantia iuris*, and textbooks are exercising more independence of thought and are criticizing rules on the basis of their social effects.

But the text-writer has a much narrower creative function than the judge, for he holds no official position. His first task is to expound the law that is and to correlate the various rules. But there must inevitably be some discussion of the basis of law. The main dispute today is the degree of independence which a textbook should show. Should it merely record and explain or should it aim at being creative? Is it limited to analysing the decisions of the court, or should it adopt a critical approach in the hope of developing the law? The English analytical school treated the decided case with great reverence: on the other hand, Duguit wished to abolish all outworn concepts, and the modern realist school in America speaks of the 'transcendental nonsense' involved in certain legal theories.[2] The best means of approach is a *via media*. It is of little use for a textbook to write of an ideal law of tort under the pretext of discussing English law; on the other hand, merely to record decisions is an abdication of function. The limits of freedom left to a text-writer are narrow, but within these there should be an attempt to create. An interesting technique is that of Cheshire,[3] who in dealing with each topic concerning private international law first discusses what the theory of the law should be, and then deals with the actual decisions. This allows a textbook to be a faithful record of the law that is, while pointing the way to further reform by providing a critical commentary of the cases that have been decided.

[1] R. Pound, *The Formative Era of American Law*, 147.
[2] F. S. Cohen, 35 *Col. L. R.* (1935), 809.
[3] *Private International Law.*

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