BOOK IV

THE TECHNIQUE OF THE LAW

XI

CLASSIFICATION

§ 57. The Purpose of Classification

Within a legal system, classification has two objects: firstly, the creation of a logical structure that will enable the rules of the law to be so interrelated and so effectively and concisely stated that they may be more easily grasped, applied, and developed;[1] secondly, in order to enable lawyers to find their law. The second purpose may be achieved by a very rough and ready classification—provided it be understood, it perhaps matters not if it is unscientific. Thus an alphabetical classification may have little logical merit but be quite useful to enable the practitioner to find the necessary rule. Even the crudest alphabetical arrangement, however, requires the choice of concepts round which particular rules may be grouped: e.g. bailment, book debts, negligence.

For jurisprudence the problem is more difficult. If we confine ourselves to English law, a classification may be achieved which will be more or less generally acceptable. But legal systems differ not only in their rules but also in their methods of classifying these rules. It was once thought that it would be possible to 'discover' a universal classification within which all systems could be placed. It is now recognized that many distinctions claimed by jurists to be fundamental were merely the pigeon-holes created by the medieval carpenter out of Roman materials.[2]

[1] R. Pound, 37 *Harv. L. R.* (1924), 933 at 944.

[2] And it is easy to exaggerate the influence of pure classical Roman law—much of what is adopted is the product of the civilians who adapted Roman law to the needs of western Europe from the sixteenth century onwards.

English law has proved remarkably stubborn to the classifier with a Romanist bias. Thus the trust (in the view of some writers) spoils the dichotomy between rights *in rem* and rights *in personam*. Bracton cannot make up his mind whether *novel disseisin* is an *actio in rem* or *in personam*.[1] 'The too impatient student who looks down upon mediaeval law from the sublime heights of "general jurisprudence" will say that most of our English actions are mixed, many of them very mixed.'[2] Even today it is not always an easy matter to determine what is a 'criminal cause or matter',[3] and the boundary between tort, contract, and quasi-contract is rather blurred.[4] Again the tort of seduction, which in essence protects the family honour, is historically an action for loss of service. In feudalism there is hardly any distinction between public and private law—jurisdiction, even kingship, is largely regarded as property.[5]

The problem of characterization in private international law illustrates this difficulty. Breach of a promise to marry falls under the heading of contract in English law and delict in French law. If a promise to marry is made in France and broken in England, how are we to classify the action? If we treat the action as contract it will be governed by its proper law: if we treat it as tort then presumably the law of the place of the wrongful act must be considered. Is the French doctrine of community of property between husband and wife part of the matrimonial law (governed by the law of the domicil of the parties at marriage) or part of the testamentary law (governed by the law of the domicil at death)? Does the English Statute of Frauds relate to substance or procedure? The former is governed by the proper law of the contract which in a given case may be French, but if the action is brought in England, procedural points will be governed by English law.

To apply English law to every point would cause injustice. There are no universal principles of classification. A start must be made somewhere in the process of analysis. Hence the first step is primary classification which is normally carried out according to the rules of English law. Having classified the problem as one of contract or tort, the next step is to find the 'connecting factor' (such as domicil or the proper law of a contract) which will point to a particular foreign system of law. The next step is to apply the appropriate foreign law.

[1] F. Pollock and F. W. Maitland, *History of English Law*, ii. 568.
[2] Ibid. 570.
[3] C. K. Allen, *Legal Duties*, 230.
[4] P. H. Winfield, *Province of the Law of Tort*.
[5] F. Pollock and F. W. Maitland, op. cit. i. 209.

These few sentences cannot do justice to the complexity of the problems that arise and there are keen disputes as to the rules of characterization and their theoretical basis. But the rules of private international law would be much simpler if a universally agreed system of classification existed.[1]

§ 58. Possible Methods of Classification

For a particular system an historical classification of law by its sources may be extremely useful—thus in England an appreciation of the development of common law and equity is essential. But such tests are of little use for a general juristic classification, since the accidents of history will largely determine what law was created by a specific source in each country.

Holland adopted the method of classifying law on the basis of rights, using as his first division the distinction between rights *in rem* and *in personam*.[2] The major difficulty of this approach is that equity creates rights which can only with difficulty be fitted under either head and that many legal relationships give rise to both types of rights—thus a contract creates rights *in personam* as between the parties, but each party to the agreement has also a right *in rem* against persons in general that they should not knowingly induce breach of contract. Holland also separates sharply antecedent rights (which exist independently of wrongdoing) and remedial rights[3] (created by some particular injury).

Some jurists expect to achieve a universal classification, a 'generalized comparative anatomy' under which all the legal systems of the world could be organized, but the greater the knowledge we obtain of other systems, the smaller does this hope become.[4] Each legal system is stubbornly individual in some respects. Nevertheless, the analysis of legal concepts provides the most useful means of approach. Thus, to understand the working of the legal mind we must analyse its development of categories such as legal personality, obligation, liability, crime, contract, tort, property, ownership, possession. No claim need be made that all such concepts are universally present in

[1] A. H. Robertson, *Characterization in the Conflict of Laws*; G. C. Cheshire, Private International Law (7th ed.), 40.

[2] *Infra*, § 65.

[3] *Infra*, § 65. This division has been attacked by certain realists on the ground that the so-called antecedent rights do not exist at all—there is no right to reputation but only a power to sue, if that reputation be attacked. This point is discussed in the next section.

[4] R. Pound, 50 *Harv. L. R.* (1937), 565.

legal systems. The law has certain problems to solve in its endeavour to discover a reasoned basis for compromising the disputes of the community. It must develop a certain minimum technique, e.g. in deciding what persons will be recognized, in what cases constraint will be applied, what rights to enjoy portions of the material world will be recognized. A legal system might exist without a clear notion of legal personality, but, since this concept is vital in mature systems, it would be ridiculous for jurisprudence to ignore it, even if it could not logically be proved to be an *a priori* necessity.

The major difficulty is to strike a happy mean between treating of the pure form of the law and making jurisprudence an outline study of English and Roman law. It is reasonable for one writing for English students to draw much (if not most) of the illustrative material from English law; but the material must be used because it throws light on jurisprudence and not merely to explain English law. In the teaching of geology or botany, emphasis will be placed on local characteristics, but in each case these are related to the general principles of the science. Probably one of the best short descriptions of jurisprudence is the theory of the legal method. One of the favourite legal methods is the development of concepts or categories in terms of which particular legal rules are expressed. Hence the concept of contract is important, even if it is not universal (Roman law never had a general theory of contract), because it illustrates a method by which a particular problem is solved. Even if many modern systems of law abolished the concept of contract, it would still rightfully hold a place in jurisprudence, for in the history of the law it has played an important part. An analysis on the basis of concepts enables us more easily to understand the history of the law than if we build our analysis purely on rights.

But any purely analytical survey must be supplemented by a functional approach, which shows the actual working of these concepts in the world both in the past and today. Some have so exaggerated the importance of the functional approach that they advocate teaching the law on the basis of 'typical factual situations' rather than by analysing the conceptual basis of the law.[1] Thus instead of teaching the law of contract or of tort, these writers would approach the problems from the situation of an actual motor accident, and bring in the concepts of law by an analysis of the facts. Political relations, or family relations, could also be used as a basis. As a supplementary

[1] J. Hall, *Readings in Jurisprudence*, 618.

method of teaching, this is quite useful, for it demonstrates that the problems of actual practice do not come labelled as contract or tort, but represent a cross-section of life which may raise difficulties in many fields of law. But the defect of using 'factual situations' as the primary approach to law is that at some point the student must be grounded in the judicially accepted meaning of words such as contract, tort, property. Unless this teaching precedes a study of particular situations, it is a mere matter of chance where an analysis of contract is to be found. Moreover, unless the meaning (say of contract) is systematically discussed at some point, there must be much repetition under the different heads.

The same difficulty of arrangement seems fatal to any adoption of interests as a primary classification. Thus an examination of the interest of association entails a discussion of corporations and groups —under one head we must discuss legal personality, contract, tort, the trust deed, co-ownership, and the injunction. Again a person's interest in his bodily freedom is protected by the criminal law, the law of torts, and doctrines of public policy. What are sometimes called the 'rights of personality' are protected by doctrines belonging to public and private law, and a full discussion would cut right across the analytical division.

It therefore seems preferable to analyse fundamental legal concepts in the traditional manner, but to apply functional tests to the working of each legal category. If two corporations contract with each other, the law may regard each as capable of protecting its own interests, but when a workman contracts with his employer, it may be thought necessary to protect the welfare of the economically weaker party. Analytically the two contracts are the same, but functionally the law has distinguished between them. Once we understand the nature of contract, we can easily study its working in the world today, but we can hardly appreciate the scope of contract without a previous grounding in analysis.

Codification clearly is difficult unless there be an adequate analysis of the law. Firstly, the rules must be distributed among the various codes—civil, criminal, procedural, etc.; secondly, the whole process is simplified by creating a General Part which contains a definition of all the concepts which bear on more than one division of the classification adopted. To approach the matter scientifically there should be a general part discussing the concepts common to all the codes and also a general part for each specific code. This clearly saves much

repetition and also helps to ensure a uniform use of legal concepts.[1] An adequately organized general part would provide very useful material for jurisprudence. The arrangement of the actual codes leaves, however, much to be desired, and not as much help can be obtained from them as one would expect.

§ 59. The Arrangement Adopted

Firstly, there is the distinction between international law and the law of the State, but this has already been discussed.[2] Within the law of the State there is a fundamental division between public and private law.[3] Public law is normally divided into constitutional, administrative, and criminal law, but there is less certainty concerning the appropriate heads of private law. Indeed we find in actual codes almost every possible principle of arrangement.[4] Primitive codes are frequently based on external similarity of subject-matter rather than an analysis of the rules of law—thus having mentioned a rule relating to women, the codifier considers this a useful point at which to collect other rules relating to that sex. The classical Roman analysis is a threefold division of the law relating to persons, to things, and to actions, but this scheme is not carried out very logically. The law of actions is today called the law of procedure, but the distinction between procedural and substantive rights applies not only to private law but to public law as well. The Roman law of things covers both the law of obligations and of property. In the law of persons we do not find (as we would expect) a discussion of the notion of legal personality and the effect of a restriction of capacity on legal right, but rather a mere collection of different types of status, the legal effect of membership of a status being only incidentally mentioned, if it is referred to at all.

The modern orthodox approach is as follows:

(*a*) The law of persons—a discussion of the nature of legal personality and of the effect of restricted capacity on legal right.

[1] A. Kocourek, cited J. Hall, *Readings in Jurisprudence*, 636. For a summary of the classification of typical codes, see R. Pound, *Outlines of Jurisprudence* (1943), 163.

[2] *Supra*, § 21. [3] *Infra*, Ch. XIV.

[4] From the purely logical point of view the French Code suffers from serious defects. Thus there is no adequate attempt to separate the general part from the special part, e.g. to discover the nature of a juristic act we must turn to the law of contract. The German Code is in this order: *General Principles*: Persons, Things, Legal Transactions, Computation of Time, Prescription, Exercise of Rights; *Special Part*: Law of Obligations, Law of Things, Family Law, Law of Inheritance. The Swiss Code: Law of Persons, Family Law, Law of Inheritance, Law of Things, Law of Obligations. For a discussion see R. Pound, 37 *Harv. L. R.* (1924), 933.

(*b*) The law of obligations—obligations being classified as arising from (1) contract, (2) quasi-contract, (3) tort or delict, (4) quasi-delict.

(*c*) The law of property.

From a juristic angle this classification is not satisfactory. Firstly, there are many systems which do not know of such concepts as quasi-contract or quasi-delict, which depend merely on the historical accidents of particular systems. The only logical division is between rights created directly by the law and rights created by the consent of another—or, to look at the same question from the angle of duty, to distinguish between duties imposed on a person against his will and duties which he freely accepts. Delict, quasi-delict, and quasi-contract deal with duties imposed by the law; contract concerns duties voluntarily incurred. Logically, therefore, quasi-contract is akin to delict, although English legal history has related it to contract.[1]

Secondly, the classification is not exhaustive. In common speech, obligation is merely a synonym for legal duty, but in jurisprudence it is confined to that part of the law which creates rights *in personam*. Thus the Romans distinguished between *dominium* which creates rights *in rem*, and *obligatio* which gives rise to mere rights *in personam*.[2] If obligation is confined to rights *in personam*, and if the classification of persons, property, and obligations is meant to be exhaustive, wherein are the general duties of tort to be placed? What the traditional classification implies is that obligations arise (*inter alia*) from the making of a contract or the commission of a tort. But this has always proved confusing, for what is analogous to the commission of a tort is the breaking, not the making, of a contract. The significant contrast between tort and contract is that in the former case rights *in rem* are created by the law and bind persons generally, whereas in contract rights *in personam* are acquired by consent and bind only a specific person or persons. Hence it is useful to distinguish those rights which exist independently of wrongdoing (antecedent or primary rights) and those which come into existence only because another has committed a wrong (remedial or secondary rights).[3] Thus I have a primary right granted by the law that I shall not be defamed; if Jones libels me, I have a secondary right to recover

[1] *Infra*, §§ 108, 109.

[2] The Roman definition of *obligatio* was: 'iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura': *Inst.* 3. 13.

[3] *Infra*, § 65.

damages. I have a primary right that Brown shall fulfil the contract that he made with me—this right arises out of Brown's consent to incur the corresponding duty. If Brown breaks the contract, I have a secondary right to secure damages.[1] The traditional divisions of the law of obligations rather tend to obscure this distinction.

A further difficulty also arises. The general duty to fulfil a contract may be placed under the heading of obligation, because the contract creates only rights *in personam*. But the general duties of tort are *in rem* and so cannot be placed under obligation if we confine it to rights *in personam*. If this be so, many of the general duties of tort seem to fall outside the division of persons, obligations, and property. Some solve this difficulty by denying that primary rights really exist—there is no right not to be defamed, but only a right to a remedy if one is defamed; there is no right that another shall fulfil his contract, but only a right to sue for damages if he does not. Thus Holmes suggests that at common law a person does not promise to keep his contract, but is liable to pay damages if the promised event does not come to pass.[2] This approach, however, is inconvenient and seems to suggest a lack of proportion. The primary rights are the foundation on which the structure of remedies is built. It may be true that, at certain periods, the law rather narrowly places undue emphasis on procedural rights and tends to say that where there is no remedy there is no right. But the struggle of law is ever to reverse this proposition and to create remedies where primary rights have been infringed. Moreover, it is inconvenient to treat ownership not as creating a right *in rem* but merely incidentally in dealing with remedies. Again, in some cases the law will directly enforce the primary duty as by ordering Brown to fulfil his contract or by preventing Robinson from defaming Smith as he threatens to do. All these considerations show the importance of recognizing the existence of primary rights.

What is quite illogical is to recognize that there is a primary right where contract is concerned, but to fail to appreciate this in tort. If we recognize that all the general duties of tort cannot be fitted into the heading of persons, obligations, and property, then it seems that another approach is necessary. The remedy in tort is ancillary to the primary right that others shall obey the prescriptions of the law, just as the remedy in contract is ancillary to the primary right that the other party shall carry out his promise.

[1] Or in certain cases Brown may be forced by an injunction to carry out his promise.
[2] *The Common Law*, 298, criticized W. W. Buckland, 8 *Camb. L. J.* (1944), 247.

Obligation should be sharply distinguished from liability. Obligation relates to what a person ought to do because there is a duty laid upon him: liability to what he must do because he has failed to do what he ought. We do not say that a prisoner ought to serve the sentence pronounced upon him—the law will see to it that he must. If a person refuses to meet a judgment debt, he is liable to have his property seized.

It is, therefore, more convenient to avoid the use of the term 'obligation' as one of the major heads. Instead we distinguish between rights created directly by the law, and rights created by consent. These are primary rights breach of which gives rise to a remedial right.

The basis adopted for the remainder of this work is as follows:

1. Rights and duties.
2. Titles, acts, and events.
3. Public law.
4. Private law:
   (*a*) The concept of legal personality.
   (*b*) Rights created by a juristic act.
   (*c*) Rights directly created by law.
   (*d*) Remedial rights.
   (*e*) Extinction of rights.
   (*f*) The concept of property.
   (*g*) The concept of possession.
5. The law of procedure.

§ 60. Subordinate Classifications

Family Law is not treated as a separate heading in the analytical survey, but many points relating to it arise in the law of personality and of property. A short attempt was made to draw the rules together under the heading *Family Interests*.[1] The law of succession and inheritance is historically grounded in the rules relating to the family, but in modern times the rules have in part broken free and succession is most conveniently treated under the law of property.

Private International Law. A case which falls to be decided in England may contain a foreign element. If a Spaniard assaults a German in a Parisian night-club, can an action be brought in England if the parties subsequently arrive there? If a contract, made by correspondence between an American living in Italy and a Peru-

[1] *Supra*, § 38.

vian residing in Germany, is to be performed in France, what law should be applied? It would be unjust for English courts to apply purely English rules to a contract made and to be performed abroad. The mere fact that the defendant is served with a writ when on a visit to England does not necessarily make it reasonable to apply English law to the transaction. There is, therefore, in every mature system of law a set of rules dealing with cases that have a foreign element. There are three broad questions to be answered: firstly, in what circumstances are the courts of England competent to deal with cases that have a foreign element? Secondly, if the English courts are competent, what law should be applied to the transaction in question? Thirdly, in what circumstances will a foreign judgment be regarded as decisive in English courts or as enforceable by action in England?[1]

The typical English view is that conflict of laws is part of the common law. Pillet thinks that, since the rules deal with the conditions under which one state will give effect within its territory to the rules of another state, there is no essential difference in the nature of public or private law.[2] The rules, so to speak, prescribe the competence of the courts of each nation to deal with specific disputes—in other words, conflict of laws deals with the application of the law in space. If there were a universal set of rules applied by the courts of every country, this view would be correct, but as the English doctrines of conflict of laws differ materially from those of any other country, it is absurd to compare conflict of laws with international law. English and French jurists may differ as to the precise principles that should be applied to a blockade, but the dispute would concern the meaning of international law itself, for both would agree that there cannot be one international law for England and another for France; whereas there may easily be one set of rules for conflict of laws applied in England and another in France. It is true that there are certain principles which underlie the various systems of conflict of laws in the several countries; but we may also discover principles common both to the French and German law of contract, and the law of contract is universally admitted to belong to municipal law alone. It is also true that in certain cases the International Court of Justice may be asked to decide a question dealing with conflict of laws. England may bind herself by treaty with France to adopt a particular rule in dealing with French cases: in rare instances there may be a rule of international

[1] G. C. Cheshire, *Private International Law* (7th ed.), 3.
[2] *Traité pratique du droit international privé*, 20; J. G. Starke, 52 *L.Q.R.* (1936), 395.

law which determines the question; but, in general, conflict of laws is part of the municipal law of each state.[1]

Why should one country take notice of the laws of another? Dicey[2] supported the theory of vested rights. If I obtain a right by the law of Patagonia, that right should be recognized in England, if no reasons of policy forbid. This theory, however, begs the question, for sometimes we do not know what law is to govern a transaction till the English rules for choice of law are applied. In truth, English courts can only apply English law. A right does not exist *in vacuo*, and, torn from the system to which it belongs, it changes its nature. English rules are decisive on questions of procedure, public policy, application of statutes, and choice of law. But, in appropriate cases, where English rules point to a particular system of law, our courts will enforce a right as alike in content to the foreign right in question as is permitted by the nature of our system and its particular views of policy.[3] If a father could sue his daughter for maintenance according to the law of Ruritania, he could not enforce his right against his daughter while they were both in England even if he were still domiciled in Ruritania. Some foreign rights have no counterparts in our system and are, as it were, indigestible.

Private international law is a subject that throws much light on jurisprudence. The application of laws in space, the characterization of situations, the analysis of the nature of a right, the conflicting rules of the various systems which may be brought into play—all these are part and parcel of a subject in which academic theories may lead to important practical results.[4]

The connecting factors which assist in the choice of a particular law are of several kinds. In the law of persons, half the world stresses the element of domicil, half that of nationality. The main defect of domicil is that it is sometimes difficult to ascertain what the domicil is. Nationality is not a useful test for the British Commonwealth, as a common nationality may cover many different systems of law. The domicil of origin of a legitimate child is the domicil of his father at the time of birth, of an illegitimate that of his mother. Domicil may be changed by a person *sui iuris*, provided there is an actual removal to a new country, with intent to make it a permanent home.

Commercial Law is another cross-division that is rapidly growing

[1] See Judgment No. 14 of the P.C.I.J.—the case of the Serbian loans cited J. G. Starke, 52 *L.Q.R.* (1936), 395 at 400.
[2] *Conflict of Laws* (7th ed.), 11.
[3] W. W. Cook, *Logical and Legal Bases of the Conflict of Laws*, 20 et seq.
[4] The theory of *renvoi* alone is one that would have delighted medieval logicians.

in importance today. Many countries have separate codes for commercial and civil law.[1] From the juristic point of view it is difficult to frame a precise test which will distinguish an 'act of commerce', and normally the problem is solved by a mere enumeration of particular acts which are declared to be acts of commerce. Commercial law cuts across both the law of obligations and the law of property. Thus from one point of view a bill of exchange is a contract, yet functionally it is property. A bill of lading is partially a receipt for the bailment of a specific object and possesses the quality of being 'negotiable', so that in some ways it may come to represent the goods: it is also a document which contains a contract for the carriage of the goods.

The course of business provides many of the detailed rules of law, and many foreign jurists make a special study of *droit économique*.[2] Thus the law merchant of the Middle Ages was not created by the State, but developed autonomously and was 'received' into legal systems long after the merchants had developed it. The recent growth of state regulation of industry and the creation of public utilities owned by the State have led to the intrusion of public law into the realm of commerce. Although for purposes of exposition it may be useful to isolate commercial law, jurisprudence must strive to distribute it under the various heads.

Industrial Law is another cross-division which is assuming increasing practical importance. In the days of *laissez-faire*, this realm was left to the free play of the rules of contract, tort, and property. Today the State cannot tolerate industrial anarchy and a growing body of law regulates the wage contract, conditions of work, holiday pay, and even sometimes the right of dismissal. Australia has ambitiously set up courts to try to create, in the words of Higgins, 'a new province of law and order'. This experiment has not fully justified the hopes of an earlier generation, but the arbitration and conciliation procedure has averted many strikes and raised the general standards of livelihood. This is but another example of the increasing complexity of the problems with which law attempts to deal in the twentieth century.[3]

[1] e.g. France: M. S. Amos and F. P. Walton, *Introduction to French Law* (2nd ed. 1963), 339–40.

[2] Or *Wirtschaftsrecht* as the Germans call it. See H. Goldschmidt, *English Law from the Foreign Standpoint*, 90; F. de Király, *Rec. Gény*, iii. 111; H. Sinzheimer, *Le Problème des sources*, 73.

[3] Many other subordinate classifications have appeared and are appearing in response to the increasing complexities of practice and changes in the aims and methods of legal education.

§ 61. Legal Personality—An Introductory Note

Before embarking upon a discussion of the matters classified above[1] it is desirable to point out that most of the matters to be discussed involve not tangible things which exist in the world around us independently of man, but intangible things created in one way or another by man for his purposes as a social animal. Notions and concepts like rights and duties, juristic acts, remedial rights, property, or possession, although they may be concerned with tangible things in one way or another, are not themselves tangible things but represent or stand for or serve or describe certain relationships. If Adam were the only animal on earth he would not need to conceive the notion of ownership. It is not until a question of *meum* or *tuum* arises that notions of ownership or property need to be considered. It is difficult to conceive of rights or duties except as going to the relationships between persons.

If by persons we meant always human beings, then perhaps there would not need to be much discussion about legal personality. It is clear, however, that the law creates not only its own rules for determining the relationships between persons but its own rules for determining what entities shall be recognized as persons for the purposes of the law. For the purposes of the law an idol, a trade union, or a 'one man' commercial company may be recognized as persons for the purposes of legal relationships, distinct from any human beings connected with them.[2]

This being so, it would perhaps be logical to discuss the concept of legal personality at the outset when embarking upon a discussion of the techniques of the law. Legal personality has been placed later for treatment, however, partly because it is traditional to treat it as a question arising within the area of private law, and partly because the matters discussed under the heading of public law are either, as with the State, matters requiring special treatment on their own so far as the notion of legal personality is concerned, or, as with crimes, matters which have traditionally concerned themselves with human beings, if not to the exclusion of other kinds of legal persons, at least very nearly to their exclusion.

[1] §§ 59–60 *supra*.
[2] The relevant cases are discussed *infra*, Ch. XVI.

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XII

RIGHTS AND DUTIES

§ 62. Analysis of a Right

The noun *right* is one that has many meanings. A common dictionary definition of it is that it means the standard of permitted action within a certain sphere.[1] Until we are clear about the sphere of which we are speaking, however, it is absurd to argue whether a particular act is right or not. If a Frenchman and an Englishman are arguing about the length of a path, they would not be so stupid as to use different standards (metres and yards) without attempting to adopt common units for the purpose of solving the dispute—but in the sphere of Jurisprudence we sometimes find bitter disputes because of reckless ambiguity in the use of the term 'right'.

Within a particular system of ethics we discover whether a particular action is right by asking whether it is consonant with the general principles on which the system is based. Christianity may supply yet other standards, or we may judge an action by the positive morality of a given community. A theory of natural law may be made the basis for the deduction of natural rights which (it is argued) inhere in every human being by virtue of his personality and are inalienable and imprescriptable.[2] From all these uses of the term there must be distinguished a *legal* right, of which the test is a simple one—is the right recognized and protected by the legal system itself? Thus a person may have a legal right to do an act which is unethical and opposed to the standards of positive morality. But to draw a distinction between legal rights and other rights is not to suggest that the law is unreceptive to the general conception of right which exists in a community, for the ethical views and positive morality of a given community naturally influence the law in its determination of the conduct which it will protect and of the actions which it will prohibit. '*Rights* spring from *right*. Principles of liability, in the last analysis, must be derived from the moral sense of the community.'[3]

The term 'right-duty' covers several legal relations, each with its distinct characteristics.[4] For the moment it is sufficient to emphasize

[1] *Shorter Oxford English Dictionary*.
[2] C. K. Allen, *Legal Duties*, 111.
[3] *Supra*, § 33.
[4] *Infra*, § 63.

that there are four elements in every legal right: (1) the holder of the right; (2) the act or forbearance to which the right relates; (3) the *res* concerned (the object[1] of the right); (4) the person bound by the duty.[2] Every right, therefore, involves a relationship between two or more legal persons, and only legal persons can be bound by duties or be the holders of legal rights.[3] Rights and duties are correlatives, that is, we cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right we are really referring to a right-duty relationship between two persons, and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed.[4] Some examples will make this clear. If Jones owes Smith five pounds, then Smith has a right that Jones should do an act (pay) relating to a *res* (the money). If Brown owns Blackacre, then Brown has a right to exclude persons generally from the object of the right—the land. Persons generally are under a duty to refrain from trespassing.

As used in this analysis, the term *res* is very wide, and covers much more than material things. Thus Robinson has a right that others shall not unjustifiably defame him—here the object of the right is that intangible but valuable possession, a good reputation. Can a person ever be the object of a right? There is no doubt that a human person may be a *res*, as we can see in the case of slavery which treated a man as mere property. But the slave was not a legal person and could neither possess rights nor be bound by duties. A more difficult question arises if we ask whether a *legal* person may be the object of a right. Austin suggests that since a master has an action against anyone who knowingly induces the servant to break his contract, or against anyone who negligently injures the servant so that he cannot perform his duties, the servant is the object[5] of the right. But the object is the services of the servant rather than the servant himself. Similarly, the rights which a father possesses that no one shall interfere with his control over his children relate not to the child as a *res* but rather to the custody and guardianship of the children.

Turning to another problem in the definition of rights, there are

[1] Austin calls the *res* the 'subject' of the right (*Jurisprudence*, Lect. XVI), but this introduces confusion and 'object' seems a more convenient term.

[2] T. E. Holland, *Jurisprudence*, ch. viii.

[3] Legal personality is defined below: see Ch. XVI.

[4] A possible exception to the doctrine that no duty can exist without a corresponding right is the conception of absolute duties, but this is discussed *infra*, § 64.

[5] *Jurisprudence*, i. 368.

three elements that must be considered. A right is legal because it is protected (or at least recognized) by a legal system—hence the criterion of enforceability must be discussed. The holder of a right exercises his will in a certain way, and that will is directed to the satisfaction of a certain interest. Each of these elements—protection, will, and interest—is essential to a true description of a right, but many disputes have arisen because of a false emphasis either on the will which is exercised or on the interest desired. Thus some define right in terms of will, and others in terms of interest alone. Each of these elements now falls to be discussed.

(*a*) *The Protection afforded by the State*

As has been said, the characteristic mark of a legal right is its recognition by a legal system. If the right is challenged, will the State enforce it, or grant damages for any failure to carry out the corresponding duty; or in some other way recognize the right and attach legal consequences to interferences with it? In the case of a right which is recognized *only* by morality or ethics, the law will grant no remedy. Enforceability by legal process has, therefore, sometimes been said to be the *sine qua non* of a legal right. Three qualifications must, however, be made to this statement, for enforcement is only the most obvious mark of recognition.

Firstly, the law will not always enforce a right, but may grant the injured party only a remedy in damages.

Secondly, there are certain rights, sometimes called imperfect rights, which the law recognizes but will not enforce directly. Thus a statute-barred debt cannot be recovered in a court of law, but for certain purposes the existence of the debt has legal significance. If the debtor pays the money, he cannot later sue to recover it as money paid without consideration; and the imperfect right has the faculty of becoming perfect if the debtor makes an acknowledgement of the debt from which there can be inferred a promise to pay. But there is no real difficulty in this case; if we use terms which are discussed below,[1] the creditor has no claim for the money, the debtor has liberty to pay if he so desires, but no claim to recover the money once he has paid it, as the 'natural obligation' prevents him from bringing an action for money had and received. The law has really cut down the creditor's rights to the receipt of a voluntary payment, although

[1] *Infra*, § 63.

in certain circumstances (e.g. a promise to pay) the imperfect right may become perfect.

Thirdly, in some systems courts of justice do not control an adequate machinery for enforcement. Thus in international law there is no power in the court to enforce its decree. Hence, ultimately, the answer to the question whether the essence of a legal right lies in its enforceability will depend on our definition of law. Dicey distinguished between constitutional conventions and laws, the test of the latter being that they will be enforced by the courts, whereas the conventions will not.[1] Many constitutional lawyers point out, however, that if we apply rigorously the test of enforcement in a court of law, we are left with too narrow a view of constitutional law.[2]

Because of the difficulties which sometimes arise in the enforcement of particular rights, it is better to define a legal right in terms of recognition and protection by the legal order.[3] This does not unduly narrow the meaning of legal right. Thus an international court would recognize any rights granted by international law and would protect them so far as it could, even although there was no machinery for direct enforcement. The element of enforceability is important in questions of jurisdiction and private international law. The principle of effectiveness must be considered, since it is absurd for a court to make a decree that is futile. An English court will not make a decree concerning the title to immovables situated abroad and even if a defendant is subject to the English jurisdiction, equity will not order him to do an act illegal by the law of the country where it is to be performed.

(*b*) *The Element of Will*

Many uphold the will theory on the ground that the very purpose of the law is to grant the widest possible means of self-expression—the maximum of individual self-assertion. Rights, therefore, are inherent attributes of the human will. This theory was extended by the doctrine of natural rights, which declared that there were certain spheres of personal life with which the State could not legally interfere. This is based on a confusion of what is and what ought to be. There are certain rights which it is desirable that the law should protect, but that does not prove that they are protected by the law nor

[1] *Law of the Constitution* (8th ed.), 23.
[2] W. I. Jennings, *The Law and the Constitution* (3rd ed.), 314.
[3] e.g. J. W. Salmond, *Jurisprudence* (12th ed.), 217: 'A right is an interest protected by rules of right.'

that any law which interferes with them is void. But we must not rush to the other extreme and think of the law as creating rights out of nothing. After all, the law exists to compromise the conflicting desires of society, and some partisans of the will theory merely say that the law should protect the individual will as far as possible.

Holmes defines a legal right as 'nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force'.[1] This is not quite exact, for some rights or claims[2] consist not of a liberty to do something but of an ability to force others to perform an act. In some cases the law, as Holmes says, does merely protect the natural powers. Jones may garden or sleep, make love or quarrel upon his own plot of ground—and one who interferes with these activities does so at his peril unless he can justify his act. Here the law adds nothing except protection. But when the State grants me power to dispose of my property by will, it is not merely protecting my natural activities, for, once dead, I cannot actually distribute my property. This is a realm where the law does not merely protect the natural powers of individuals, but grants a power by virtue of which a declaration of intent will operate after death.[3]

Duguit's attack on the traditional concept of subjective right is really based on his opposition to the notion that right depends upon will. The traditional theory of right he conceives as being based on the metaphysical idea of two wills being face to face with one another, one of which in the particular relationship is superior to the other.[4] Will (he argues) is not the essential element in law or in the right which flows from it, for the real basis of law lies in the objective fact of social solidarity. The emphasis on will is anti-social, for it suggests that man is in conflict with his fellows, instead of emphasizing that man is bound by duties created by the fact of social solidarity. Society creates duties for every man, but no right save that of always doing his duty. Duguit's paradox is a useful antidote to the excessive individualism of some of the theories of natural law, but truth lies in a *via media* between the two extremes. It is true that man can realize an effective life only in society, but that does not mean more than that his rights must be adjusted to those of his fellows. The individual will may be directed to social or anti-social ends, but the will is the 'mainspring'

[1] *The Common Law*, 214.
[2] *Infra*, § 63, for a discussion of the difference between a liberty and a power.
[3] *Infra*, § 63.
[4] C. K. Allen, *Legal Duties*, 156; O. Ionescu, *Archives de phil. du droit* (1932, 1–2), 269.

of the individual personality, and for the law to attempt to create a system which ignored the wills of individuals would be futile. The aim of the law is not primarily to create a new life for society and new desires for men, but rather to regulate such life and such desires as already exist. Will may be an essential element in many attempts to analyse the conception of legal right, but it is not the only element. As we shall see, it is artificial to divorce will from interest.

(c) *The Element of Interest*

The main argument of those who hold that interest and not will is the fundamental basis of right is that persons may have rights, although they have no wills: a baby one day old, an irrational idiot, a corporation, or a foundation cannot be regarded as having wills, but undoubtedly the law grants to such persons legal rights. Yet in all these cases there is a will operative, for the law sets up a guardian to protect the rights of the child, a committee in the case of the lunatic, and it imputes to the corporation or foundation the acts of human beings to whom power to bind the artificial entity has been granted. Nékám is so impressed by this division of will and interest that he suggests that we should always distinguish between the subject of rights and the administrator of those rights.[1] The passive capacity to be the subject of rights may belong to any entity to which the law chooses to grant this privilege. The administrator must be a human person with an actual will. In the case of the normal adult, the subject of the rights is also the administrator, but this power may be taken away, for example in the case of the prodigal or the lunatic. On the other hand, if the law grants legal rights to an idol, then there must be a separation, since the idol has no will to guard its interests. Nékám suggests that it is only a coincidence that in the majority of cases the subject administers his own rights—but surely this is allowing exceptional cases to have undue weight.

Ihering attacked the will theory because he thought that the purpose of law was not to protect individual assertion but certain interests. He therefore defined rights as legally protected interests.[2] These interests or values are not created by the State for they already exist in the life of the community, and the State merely chooses such as it will protect.

In truth it is an exaggeration to set interest and will too much in

[1] *The Personality Conception of the Legal Entity*, 29; H. A. J. Ford, *Unincorporated Non-profit Associations*; L. C. Webb (ed.), *Legal Personality and Political Pluralism.*

[2] *Geist des römischen Rechts*, iii. 332; F. Hallis, *Corporate Personality*, 169.

opposition to each other. 'The essence of legal right seems to me to be not legally guaranteed power by itself, nor legally protected interest by itself, but the legally guaranteed power to realize an interest.'[1] The human will does not operate *in vacuo* but desires certain ends, and interests are but objects of human desire.[2] An interest is a claim or want of an individual or a group of individuals which that individual or group wishes to satisfy. And the law grants rights not to the human will as an end in itself, but to a human will that is pursuing ends of which the legal system approves. The vigour with which this problem has been debated is due, not so much to an academic interest in the nature of a right, as to the theories of law and the State which are built on any particular theory of the nature of a right. If a legal right consists merely of a protected will, how are we to reconcile the conflicting wills of men save by postulating a superior will which can overcome all opposition? It is hard to reconcile wills if we do not consider also the ends which mankind strives to reach. If we define rights as interests, it is easier to effect a reconciliation on paper, since true interests do not always conflict; but such an approach often leads to abstract solutions which neglect the fact that men are not entirely rational in their behaviour or choice of ends. Again, the will theory may easily lead to the doctrine that, since the purpose of law is to protect individual self-assertion, there should be as little interference with freedom as possible: the interest theory may be exaggerated so as to destroy liberty in favour of forcing men to seek what they should desire.[3] A true theory of the State can be based only on a proper analysis of a legal right that gives due scope to the elements both of interest and of will. Frequently the law allows me to exercise my own will; in other cases my will may be restricted in order to serve what are deemed to be my higher interests or the needs of others. A lunatic or a prodigal is not always allowed to effect his own desires. But there is danger in assuming that the law can in every case dictate to man wherein his interests lie.

§ 63. Claim, Liberty, Power, Immunity

Salmond[4] pointed out long ago that the term 'right-duty' was very overworked and was frequently used for relationships which were not

[1] C. K. Allen, *Legal Duties*, 183. Cf. G. Jellinek: 'a right is the will-power of man applied to a utility or interest recognized and protected by a legal system': *System der subjectiven öffentlichen Rechte* (2nd ed.), 44; cf. F. Hallis, *Corporate Personality*, 191.

[2] *Restatement of the Law of Torts*, i. § 1.

[3] Cf. N. S. Timasheff, *Sociology of Law*, 333–4.

[4] *Jurisprudence* (9th ed.), 299. (See 12th ed., ch. vii.)

in reality the same, thus causing confusion in legal argument. Hohfeld carried the analysis farther,[1] and his work has been developed by other writers. Hence an attempt has been made to analyse the right-duty relationship (in its broad sense) into its component parts, and the table set out below is the result of the work of Hohfeld, although some changes of terminology have been made. At first the tendency was to regard this analysis as too academic, but it has had increasing influence—for example, it has been adopted by the American *Restatement of the Law*. The table provides an interesting test of the accuracy of legal thought and, though there are defects which have been exposed by the subtle insight of Kocourek,[2] it repays study.



(The braces indicate correlatives and the lines opposites.)

In the claim-duty[3] relationship the emphasis is on what I may force another to do, or to refrain from doing. I have a claim against Jones for five pounds and he is under a duty to pay it. Claim and duty are correlatives in the sense that one cannot exist without the other. Under the second head, liberty represents what I can do for myself, free of the possibility of legal interference by others.[4] I have liberty to breathe, to walk in my own fields, to play golf on my private links. Here no precise relationship to others is in question, save that the law will protect my liberty if others interfere with its exercise. But it is more accurate to say that I have a liberty to play than that I have a claim, for I may exercise my liberty without affecting others, whereas my claim can be enforced only by coercing another to act or forbear. If the table is examined, it will be seen that liberty is the opposite of duty. Logically, therefore (it is argued), the correlative of liberty should be the opposite of claim. But there is no word in English which expresses the lack of a claim and therefore the rather barbarous 'no-claim' has been suggested.

[1] *Fundamental Legal Conceptions*, R. Pound, 50 *Harv. L. R.* (1937), 572; M. Radin, 51 *Harv. L. R.* (1938), 1141; G. W. Goble, 35 *Col. L. R.* (1935), 535.

[2] *Jural Relations*.

[3] W. N. Hohfeld used the term 'right-duty'. But since 'right' is here used in a somewhat narrower sense than is customary, it seems advisable to use another term in order to prevent confusion.

[4] It is *legal* interference by others that is emphasized. There are few situations where a person is entirely free from the risk of illegal force—but if the law be broken, a remedy normally lies.

One of the difficulties of the table is the desire to retain formal symmetry, and this forces us to link together liberty and privilege. The usual distinction is that liberty covers those acts that are primarily lawful for all, whereas privilege[1] covers those that are prima facie unlawful but allowable in certain circumstances to all, or else to a limited number of persons. The *Restatement of the Law of Property* defines a privilege as a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a certain act. Thus, where qualified privilege arises, a person has a privilege to make defamatory statements concerning another, provided he makes an honest use of the occasion; the person defamed has 'no-claim' to prevent him.

A power is an 'ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act'.[2] In one sense, I have a liberty to make a will, since persons generally are under a duty not to interfere with the free exercise of my power. But the question which arises under this third head is not my liberty to inscribe certain words on paper, but the effect which those words will have on the distribution of my property. The notion of a power of appointment is familiar, and, by its exercise, the legal rights of another may be affected by the receipt of the property in question. The table generalizes the notion of power in this sense and uses it to cover all ability to affect the legal relations of others.

There is no convenient word to express the correlative of power. The term 'liability' (which is used) certainly conveys the sense of being affected by the exercise of the power, but it suggests something disadvantageous which one would seek to avoid. Hohfeld generalizes the term so as to cover a chance of being benefited as well as of suffering loss. Thus Jones has power to make a will and his children are liable to benefit. The State has power to punish a criminal and he is liable to suffer the penalty.[3]

An immunity is 'a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person'. A judge is immune from having to pay damages for

[1] This term has many meanings in English usage: A. Kocourek, *Jural Relations*, 8. (1) It may mean immunity, e.g. the privilege of a Member of Parliament from arrest; (2) it may mean power, e.g. the privilege of the recaption of chattels; (3) it may mean privilege in the sense set out in the text: W. E. Hearn, *Legal Duties and Rights*, 172.

[2] *Restatement of the Law of Property*, § 3.

[3] A. H. Campbell, 7 *Camb. L. J.* (1940), 206 at 209, points out that in one sense Hohfeld's table is incomplete, because I am under a liability to have my legal position changed by an *event* beyond human control as well as by the act of another.

defamation because of anything he has said in the course of a trial. The correlative is disability. It may be noted that, just as in the case of the first half of the table, there are opposites in the second. Thus disability is the opposite of power, and immunity the opposite of liability. If a legislature passes an unconstitutional statute, that is not a breach of duty for which the State can be sued in damages—the statute is merely a nullity. Thus we cannot say that a fruit-grower has a claim that the legislature should not pass an unconstitutional statute, for that would imply that the legislature was bound by a duty, since a claim cannot exist without a duty. But the grower is legally immune from interference by a statute that is not within the powers of the legislature.

Thus a trustee has power to convey the legal title of the trust property to a purchaser, but he has no privilege to do so in breach of trust. If he does act in defiance of the trust deed, the purchaser, provided he gives value in good faith and with no notice of the equitable claim, takes a good title, since the trustee has power to convey it. But if the beneficiary learns in time of the prospective breach of trust, he has a claim which can be made effective, for the court, if appealed to, will enforce the duty lying on the trustee to carry out the terms of the trust. This is an example which is dealt with more clearly by the use of Hohfeld's terms than by attempting to force the term 'right-duty' to express every shade of the relationship. Again a royal commission may have liberty to carry on an inquiry in the sense that no one can prevent its functioning, but no claim which imposes on witnesses a duty to answer questions.[1] A judge has power to try a prisoner who is liable to be affected by his decision; the Crown has a claim that the judge shall perform his work and the judge is bound by a duty. An owner of a mine asks for an injunction against union leaders who are attempting to induce his employees to join a union. The employer has a liberty to employ non-union labour, but this is not necessarily a claim which will impose a corresponding duty on union leaders not to attempt to persuade the employees to join the union.[2]

One value of the table is that it emphasizes that a particular legal relationship may give rise not to a single right and duty relationship but to a bundle of claims, liberties, immunities, and powers. Thus if A and B make a contract, each has a claim against the other that the contract shall be fulfilled. If A breaks the contract, B has power to

[1] Cf. *A.-G. of Australia* v. *Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237.
[2] W. W. Cook, in *Lectures on Legal Topics*, v. 5, 335 at 339.

sue for damages and to enforce execution. Both A and B have a claim against persons generally that they shall not knowingly induce breach of the contract.

The most accurate and subtle analysis of legal rights has been carried out by Kocourek,[1] but it is impossible to expound his scheme within the limits available. A high algebra for the law may conduce to clarity but it cannot be concisely explained. His glossary covers over seventeen pages, and the first two terms are 'abnormal concatenation' and 'abnormal intercalation'.[2] It is not easy to explain such a term as 'heterophylaxis' in a few words. Nevertheless, where it has been possible to do so, his ideas have been drawn upon, and, for those who can master the terminology, there is much value in his work.

§ 64. Absolute and Relative Duties

Austin distinguished between absolute and relative duties. In the latter case we have the normal relationship of a right held by one person to a duty owed by another—this is exemplified by the normal jural relationship between subjects. But Austin claimed that there was also a class of absolute duties to which no corresponding rights attached. An analysis of this type of duty throws interesting light on the nature of law itself.

There were four kinds of such absolute duties according to Austin's analysis:

(*a*) duties not regarding persons (e.g. those owed to God and the lower animals);
(*b*) duties owed to persons indefinitely (e.g. towards the community);
(*c*) self-regarding duties;
(*d*) duties owed to the sovereign.[3]

The first type create no difficulty—they are not, in fact, legal duties at all. Man's relation to his Creator is a matter of religion and not of law: if the legal system protects certain religious duties with a sanction, then that duty is part of the law and amenable to the same analysis as other legal duties. If I must attend church or pay a fine, then the criminal law is brought into play. So far as duties towards animals are concerned, I have no legal duty towards them. If the law prohibits

[1] *Jural Relations* (2nd ed.).
[2] *Jurisprudence*, i. 400; C. K. Allen, *Legal Duties*, 156.
[3] Op. cit. 427.

cruelty, then I may owe a duty to the State; so far as the law of tort is concerned, I may owe a duty to the owner of the dog. But I cannot owe a legal duty to something that is not a legal person.

It is difficult to know what Austin meant by duties owed to persons indefinitely: I have a general duty not to defame my neighbours, but this duty is merely the correlative of the right inhering in each member of the community. The 'general duty' towards the community breaks up into a mass of duties towards each particular individual.

As for self-regarding duties, there cannot be a legal duty owed to oneself. The duty not to commit suicide is not a duty I owe to myself but is part of the criminal law and subject to the same analysis as any other duty of the criminal law.[1] This point cannot be discussed without considering Austin's last point—duties owed to the sovereign.

The State should be regarded as a legal person.[2] But, even if this is granted, Austin would deny that there can be a legal relationship between sovereign and subject, on the ground that a right-duty relationship can exist between two persons only if there is above them a political superior who will enforce the obligation. The sovereign, *ex hypothesi*, has no superior, and hence may change the law whenever he desires. From a realistic point of view it must be admitted that in practice a legal right against the State is not as effective as one against a fellow citizen.[3] In a dictatorship, where one person is the supreme lawgiver, administrator, and judge, it may smack of hypocrisy to say that a subject has a legal right against one who may retrospectively change the content of the law as he pleases and give judgment in his own favour. If the State has absolute power to change the law, formal limits *ex hypothesi* cannot be set to its ability to change the rules in its own interest.

This argument thus leads to the rejection of the notion that there can be a right-duty relationship between the subject and the State.

[1] If the suicide be successful, more difficult problems arise, for by committing suicide the individual has destroyed his legal personality. If the penalty is dishonour of the body, a realistic analysis shows only that the State has power to prevent the executors disposing of the body in the normal way; if the penalty is confiscation of goods, the State has power to prevent the beneficiaries from receiving the goods and the beneficiaries are liable to be affected. There seems to be no need to suggest, as A. Kocourek does, that we must postulate that the legal personality survives the death, even for an instant: *Jural Relations*, 296–7.

[2] *Infra*, § 77. 'The State is surely as capable of possessing a right as is the Corporation of London': T. E. Holland, *Jurisprudence* (10th ed.), 126.

[3] Until 1947, the Crown was not liable in tort in England. Even now that the Crown Proceedings Act has changed the rule, the Crown still possesses advantages in litigation, e.g. concerning discovery and the periods of limitation. In Victoria, the Crown was not made liable in tort until 1955 (Crown Proceedings Act, 1955).

This means that an investor has no legal right to interest on funds lent to the government. It was natural, therefore, for Austin to maintain the converse of this proposition—that when the State imposes a duty on a subject, it is a misuse of language to say that the State has a corresponding legal right. The State has physical power, and since no superior binds it, to say it has only a legal right, is to understate the position, for the exercise of a legal right is regulated, whereas the power of the sovereign is not.

This approach is logical enough if Austin's definitions are accepted as premisses, but it is more convenient to regard the State as bound by law until the law is changed. If the example of the dictatorship seems to show that there is certain realism in Austin's approach, the example of the modern democratic federation shows that the power to change the law may be so circumscribed (at least where the constitution is concerned) that for practical purposes the subject is protected. This topic raises the issue of the relationship between law and the State,[1] and the theory adopted concerning absolute duties will depend on the more fundamental question of the nature of the State.

Austin's thesis is generally rejected in modern times, but Dr. Allen has given it powerful support.[2] He defines right as legally guaranteed power to realize an interest.

> The power and the interest embodied in legal right are essentially the attributes of an individual, in his relation to other individuals. If right be regarded as *mere* power, no doubt the state has the 'right' to punish anything or to order anything. . . . And similarly if legal right be regarded as *mere* interest or social advantage, then . . . doubtless all legal right is ultimately the interest of the community.[3]

The learned writer denies that the duties imposed by the criminal law have any true counterpart in legal right. It is admitted that the community is too nebulous a body in which to place legal rights. But is it not too narrow to suggest that legal rights are essentially the attributes of individuals? Corporations have rights and are bound by duties—is not the State the supreme juristic person? Is not the counterpart of the duty imposed by the criminal law the claim of the State that its prescription shall be obeyed? If the criminal law is broken, then the State has power to punish and the wrongdoer is liable to be punished.

[1] *Infra*, § 76.
[2] *Legal Duties*, 183 et seq.
[3] Op. cit. 185–6.

The State has power to impose taxation on the community, and once taxation is imposed the State has a claim against each specific person subject to the impost and that person is under a duty to pay. It is true, of course, that the State frequently has power to change the rules at any moment. Acts that are innocent may be retrospectively declared criminal; a special statute may double John Smith's income-tax assessment after he has received it. This, however, relates to Austin's point that the sovereign cannot be bound by law. But if we admit, as Dr. Allen does, that an investor in the public funds may have legal rights against the State,[1] it seems illogical to regard the duties of the criminal law as absolute.

It is submitted, therefore, that Austin's list of absolute duties can be reduced to one head—duties owed to the sovereign. These are of a special nature because of the particular powers possessed by the State as a legal *persona*. Whether we regard the relationship between sovereign and subject as one of law will depend on our theory of the State. But convenience demands that we treat the State as a legal person bound by law until it is altered.

§ 65. Classification of Legal Rights

1. *Perfect and Imperfect Rights*

These have already been discussed.[2]

2. *Antecedent and Remedial Rights*

Some rights exist for their own sake before any wrongful act has been committed. Thus Jones has a right against persons generally that his reputation shall not be unjustifiably attacked. If Brown breaks his duty in this respect, then Jones has a remedial right to secure damages.[3] Some modern writers would ignore antecedent rights altogether on the ground that, looked at realistically, there is no such thing as a right to reputation, but only a claim to damages if one's fair name is unjustifiably impugned.[4] This raises the whole question whether law is only the realm of constraint. Does law end where liberties begin? It is rather narrow to confine law to litigation or even to threats of proceedings, and it is convenient to retain the notion of

[1] Op. cit. 190.

[2] *Supra*, § 62.

[3] T. E. Holland, *Jurisprudence* (10th ed.), 141. Remedial rights should not be confused with the narrower sphere of the law of procedure: *infra*, Ch. XXIII.

[4] Sometimes called the monist theory: A. Kocourek, 20 *Col. L. R.* (1920), 394.

a legal duty (e.g. not to defame) even if the only remedy be damages for non-fulfilment of it. We uphold the existence of antecedent rights for three reasons: firstly, the language of the law becomes difficult if we ignore such antecedent rights as a right to property, a right to reputation; secondly, law does not exist only to provide constraint but also to create the conditions under which community life is possible and to increase the powers of men;[1] thirdly, some antecedent rights may be specifically enforced—for example, specific performance of a contract may be ordered. In these cases the court normally has a discretion whether it will grant specific performance or not, and it seems surprising to say that Jones has a legal claim against Brown that he shall fulfil his contract only if the court will exercise its discretion in his favour. Again it is said that a husband owes a duty of care to his wife even though she has no remedial right to sue him in tort: this antecedent right is not a mere fiction as she can sue her husband's employer if the husband injures her negligently while in the course of his employment.[2] The mere existence of a legal duty is frequently sufficient to secure its fulfilment. It seems too narrow to confuse the law, the rules on the basis of which the life of the community is carried on, with the remedies which are provided for the comparatively rare number of cases of breach of legal duty.

3. *Rights* in rem *and Rights* in personam

These terms have caused confusion to readers who cannot resist the temptation to translate them literally as a right to a thing and a right against a person. The Romans distinguished between an *actio in rem*, an action brought to recover a specific *res*, and an *actio in personam* which was a claim against a specific person. There was in Roman law a clear-cut distinction between *dominium*, title which availed against the world, and *obligatio* which bound only the parties to the agreement. An action *in personam* was one for the enforcement of an *obligatio*. *Mancipatio* was the typical conveyance and it transferred title alone. For a conveyance to contain covenants would have seemed to the Romans inelegant. If the parties wished to make a collateral agreement, it would be in a separate document. The covenant

[1] W. W. Buckland and A. D. McNair, *Roman Law and Common Law*, 265: 'It is difficult to see how one can infringe a right *in rem* unless there is such a thing.'

[2] *Broom* v. *Morgan*, [1953] 1 Q.B. 597; cf. *Schubert* v. *August Schubert Wagon Company*, 249 N.Y. 253, 164 N.E. 42 (1928); and *Riegger* v. *Bruton Brewing Company* 16. A, (2d), 99 (Md. 1940), 25 *Marquette L. Rev.* (1941), 169.

would create a right *in personam* alone—it would not be a right running with the land which could bind persons generally.[1]

The modern terms right *in rem* and right *in personam* have been generalized, somewhat inaccurately, from Roman sources. The typical modern example of a right *in rem* is that of the owner of land against persons generally that they shall not interfere with his rights of ownership. A typical example of a right *in personam* is that arising between the parties to a contract. A right *in rem*, since it relates to a greater number of persons, is more secure—indeed, it is somewhat arrogantly defined as a right availing against the world, although the usual definition is now more limited and describes it as availing against persons generally.[2] On the other hand, a right *in personam* binds only either a particular person or persons. If I buy a motor-car and obtain title, I have a right *in rem* which is effective in that a purported sale by another of the car without my consent is of no avail; if I merely make a contract to buy a particular car in six months time, and the vendor sells in breach of contract, the sale is valid. The contract would bind only the parties to it, and its effect was to promise me a right *in rem* in the future, not actually to transfer one at the moment.

This analysis shows that all rights concern two persons, a *res*, and an act or forbearance. But in a right *in rem* the relation to the *res* seems more prominent (thus it is Jones's special relationship to Blackacre that creates rights availing against persons generally); whereas in rights *in personam* attention is attracted to the particular relationship between definite parties which gave rise to the obligation.[3] To avoid the cumbersome repetition of *in personam* and *in rem* the adjectives 'real' and 'personal' are sometimes used, but, however clearly the meaning may be explained, there is always confusion in the mind of the English student because of the fundamental distinction between real and personal *property*. Historically there was at first no *actio in rem* for the recovery of personal chattels, since judgment was given in the alternative that the defendant either return the chattel or pay its value as damages, but the owner of land could recover it by action. In the critical period, when English terminology was becoming fixed, the tenant had a mere right *in personam* against the landlord—if the landlord sold the property and the purchaser ejected the tenant, the latter was confined to an action for breach of contract against the

[1] W. W. Buckland and A. D. McNair, *Roman Law and Common Law*, 92.
[2] J. Austin, i. 370; B. Windscheid, *Pandekten* (9th ed.), § 41; A. Kocourek, *Jural Relations* (2nd ed.), 189.
[3] J. W. Salmond, *Jurisprudence* (12th ed.), 235.

landlord. Hence a leasehold interest was regarded as *personal* property, since the tenant had no *actio in rem*;[1] and since the owner of land could specifically recover it, such an interest was held to relate to *real* property. This, however, is a usage peculiar to English law.

A right *in rem* need not relate to a tangible *res*. Thus a right that one's reputation should not be unjustifiably attacked is today described as a right *in rem*, since it is a right that avails against persons generally. This shows how far the conception has developed from the Roman notion of *actio in rem*, for one who sues to protect his reputation is not asking for judgment for a specific *res*. It should also be noticed that on breach of a right *in rem*, a right *in personam* arises against the aggressor. Most rights *in rem* are negative; it is difficult to conceive of a positive claim against persons generally since the persons on whom the active duty would fall would be so numerous. But there is no *a priori* reason why a positive claim should not lie against every member of a given community.[2] Rights *in personam* may also be either positive (requiring a specific act) or negative (requiring a forbearance).

The distinction between rights *in rem* and rights *in personam* is a useful one, although analysis shows that no adequate definition has yet been discovered. Firstly, a right *in rem* is not a single right but merely a convenient short expression for a bundle of as many rights as there are persons bound by the duty.[3] What causes these rights to be linked together is the fact that they are fundamentally similar in content. Thus I have a right availing against persons generally that they shall not trespass on Blackacre—although there may be many duties, the content is in each case the same. This consideration leads Hohfeld to define a right *in rem* as 'one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people'.[4] A right *in personam* is 'a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons): or else it is one of a *few* fundamentally similar, yet separate, rights availing respectively against a few definite persons'.[5]

[1] 'English law for six centuries and more will have to rue this youthful flirtation with Romanism': F. Pollock and F. W. Maitland, *History of English Law*, ii. 114.

[2] A. H. Campbell, 7 *Camb. L. J.* (1940), 206 at 212–14: 'most real rights are negative, but positive real rights are not inconceivable, and some examples are actually found.'

[3] A. Kocourek, *Jural Relations*, 198; W. N. Hohfeld, *Fundamental Legal Conceptions*.

[4] He uses the term 'multital claim' for right *in rem*: op. cit. 72.

[5] A *paucital* claim in W. N. Hohfeld's terminology.

Secondly, from a logical point of view the distinction is defective in that no clear line can be drawn between the limits of 'persons generally' and 'particular person or persons'.[1] If a landowner grants the right to cross his land to every person except to B, what is the nature of the landowner's right against B? According to the traditional definition the right would be *in personam*, because it did not avail against persons generally. Yet, before the landowner granted a right to all of the community except B, the claim against B would be *in rem*, and why should it change its character merely because of an agreement made between the landowner and persons other than B? The answer is that if the only distinction between rights *in rem* and rights *in personam* is the number of persons bound by the duty, then such an agreement does change the nature of the right against B. But suppose that the landowner each day makes agreements with a hundred members of the community imposing a duty to pay for the privilege of crossing the land and continues this practice until he has treated with every member of the community save B, what is the precise point at which the right *in personam* arising out of contracts of this type becomes a right *in rem*, because of the fact that similar duties are owed by a great number of people? This example shows that the distinction is not a very logical one. Kocourek's own solution is that a right *in rem* is one of which the essential investitive facts do not serve directly to identify the person who owes the duty. According to this test, the landowner's rights against those members of the community to whom he has granted privileges arise out of a contract which serves specifically to identify the parties to the relationship (i.e. they would be *in personam*). The right against B would remain *in rem* on this test, even if he were the only person who did not have a privilege to cross the land, since the right arose from ownership of the land, and this title would not specifically identify B as being bound by a duty.

Thirdly, the dichotomy does not suit the peculiarities of every system. English law stubbornly resists Roman classification, and the fact that the right of a beneficiary under a trust cannot easily be placed either under the one head or the other raises doubts in the minds of some writers as to the accuracy of any dogma that all rights are either *in rem* or *in personam*. It is frequently argued that the beneficiary's right is not *in rem*, because it does not avail against a bona-fide purchaser for value without notice and that it is not merely a right *in personam* against the trustee, because of the extensive

[1] A. Kocourek, *Jural Relations*, 198–201.

powers of following the trust property.[1] But if we admit that a right is not *in rem* merely because it may be defeated by a particular class of purchaser, that argument would apply not only to the beneficiaries' rights under a trust, but also to the whole class of negotiable instruments. Have I no right *in rem* to my money, because one who receives it for value and in good faith obtains a title superior to mine even though it was originally taken from me by a thief? Hence some writers regard the right of the beneficiary to the trust property as being *in rem*. If so, the existence in English law of the trust would not prevent the division of rights into the two classes (*in rem* and *in personam*) from being exhaustive. However, as Hanbury points out,[2] the immunity of the bona-fide purchaser for value and of the holder in due course of a bill of exchange, have a totally different origin, the former being the logical result of equitable theory which will not touch a person whose conscience is unscathed, whereas the latter is demanded by the exigencies of commerce.

The phrase *ius ad rem* is sometimes used. 'I have a *ius ad rem* when I have a right that some other right shall be transferred to me.'[3] This is merely a specific claim against a particular person, and hence it is not as effective as one which avails against persons generally. If Jones agrees to sell me a book next December, I have a claim against him for performance of the contract, but that claim, in most systems of law, will not be effective against one who purchases in good faith in November.

4. *Proprietary and Personal Rights*

Property is an extraordinarily ambiguous term,[4] and the adjective 'proprietary' conveys the same confusion. Personal rights can be defined only as the residuary rights which remain after proprietary rights have been subtracted. We cannot say that personal rights are those which are necessary for the development of the human personality, for many would think that certain rights over property were necessary for a true self-expression. Some have suggested that personal rights are those which cannot be transferred or have no money value. But neither of these tests will suit English law. Choses

[1] F. W. Maitland, *Equity* (1936), 23; W. W. Cook, B. Ames, and T. Lewin call the beneficiary's right one *in personam*. A. W. Scott, 17 *Col. L. R.* (1917), 269, suggests that it is a right *in rem* and is supported by P. H. Winfield, *Province of the Law of Tort*, 112. F. Pollock, 28 *L.Q.R.* (1912), 297, would treat trust as a head *sui generis*. H. G. Hanbury, *Modern Equity* (5th ed.), 505–7.

[2] 63 *L.Q.R.* (1947), 115.

[3] J. W. Salmond, *Jurisprudence* (12th ed.), 238.

[4] *Infra*, Ch. XXI.

in action were regarded as creating proprietary rights even before they were transferable, and equity treats as a proprietary right a member's share in the assets of a club to which he belongs, yet his share cannot be transferred to another or sold for value. A pension may be inalienable and yet none the less property. The goodwill of a medical practice in England, under the National Health Service Act, 1946, may exist as an asset and yet be non-transferable.[1] It is true that most 'personal' rights cannot be transferred (for example, the right to physical integrity), but it does not follow that all proprietary rights can be transferred. In English law the distinction has achieved a certain practical importance because of the dictum that equity will act only to protect rights of property. The protection against financial and material loss developed more speedily than the protection of rights concerning more intangible things. The backwardness of the law in protecting personal rights is due partly to the emphasis placed on the necessity of showing financial loss, partly to the desire to discourage a flood of litigation, partly to difficulties of proof. Damage to a car is easy to demonstrate and the resulting loss may be easily calculated: it may be difficult to prove that nervous shock resulted from an accident, or to assess damages that would be equitable.[2] Thus there has been an increasing tendency, when at last it was desired to protect a particular personal right, to attempt to discover an element of property on which protection could be based. If a girl be seduced, the father cannot sue for the outrage to the family honour, but he can sue for loss of service, and incidentally in an appropriate case claim exemplary damages.[3] If a writer wishes to prevent the publication of his love letters by a faithless recipient, he pleads property in the letters.[4] If a lecturer wishes to prohibit publication of a lecture delivered only to a limited class, he claims property in his composition.[5] If a broadcasting company arranges to spy on the land of a race-course owner so as to broadcast to the community the happenings on the race-course, the owner has no remedy, even if he can show financial loss due to falling attendances, as he has no property in the spectacle.[6] But in different branches of English law

[1] *Whitehill* v. *Bradford*, [1952] 1 Ch. 236; 68 *L.Q.R.* (1952), 145.

[2] R. Pound, in *Selected Essays on the Law of Torts*, 108–9; 29 *Harv. L. R.* (1916), 670; *Social Control through Law*, 60.

[3] *Irwin* v. *Dearman* (1809), 11 East. 23. This action is now abolished.

[4] *Gee* v. *Pritchard* (1818), 2 Swans. 402; *Pope* v. *Curl* (1741), 2 Atk. 342.

[5] *Caird* v. *Sime* (1887), 12 App. Cas. 326.

[6] *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor* (1937), 58 C.L.R. 479; G. W. Paton, 16 *Can. B. R.* (1938), 425 at 435.

we find that different meanings are given to the term 'proprietary right'. Some dicta go so far as to speak of 'property in reputation' and thus deprive the term of any consistent meaning.[1]

In America the term is also of practical importance because of constitutional provisions for the protection of property. A monumental work[2] which discusses the term in all its meanings leaves us at first with the depressing feeling that law is crudely unscientific in its use of terminology, then with the reflection that law is a subtle art which will find its way by devious means to the result desired in the particular case.

Salmond concludes that the essential nature of the distinction is that proprietary rights are valuable, whereas personal are not—'the former are the elements of a man's wealth, the latter are merely elements in his well-being'.[3] There may be a guiding principle lying behind these words, but it is not one that can precisely be applied. A man's right to his reputation may be very valuable—the loss of reputation may mean that of livelihood. The right to physical integrity is a personal one, yet health is a valuable asset in the sense that economic welfare may depend on it. Value is a difficult term to define unless we adopt the test of exchange value, and we have seen that not all proprietary rights can be exchanged. The vital thing to grasp at the outset is that proprietary rights, like all other rights, involve legal relationships between legal persons, and cannot be explained by reference to relationships between human beings and things. Some of our legal terminology springs from times when that was not generally understood and confusion has been made easy.[4]

The most important proprietary rights are discussed below.[5] Here we may note that an important division of proprietary rights is into *ius in re propria* and *ius in re aliena*.

Ius in re propria and *in re aliena*. Salmond defines a *ius in re aliena* or encumbrance as one 'which limits or derogates from some more general right belonging to some other person in respect of the same subject matter. All others are *iura in re propria*'.[6] Austin confines the latter right to ownership and describes a *ius in re aliena* as a fraction or particle of ownership which is held by another than the owner of

[1] Malins V.C. in *Dixon* v. *Holden* (1869), L.R. 7 Eq. 488 at 499.
[2] C. R. Noyes, *The Institution of Property*.
[3] Op. cit. 239.
[4] F. S. Cohen, *Dialogue on Private Property*, 9 *Rutger's L. R.* (1954), 357.
[5] *Infra*, Ch. XXI.
[6] *Jurisprudence* (12th ed.), 241.

the *res* concerned.[1] The precise nature of the distinction is, however, best discussed in connection with the analysis of ownership and of property.[2] The problem is now much more complex than in the days when land, cattle, and other material things formed the subject-matter of property. The growth in importance of the company share and the negotiable instrument renders it necessary to examine the position afresh.

5. *Vested and Contingent Rights*

The satisfaction of rights is always subject to contingency in one sense. Smith may owe me £100 and may be able to meet the debt, but, before he pays it, he may be involved in some financial disaster. The distinction between vested and contingent rights, however, is based on another notion, but unfortunately terminology is not consistent in the various systems of law, and it is difficult to secure a broad definition.[3] Much feudal learning was built around the English distinction between vested and contingent remainders, but the details of any one system are not a proper study for general jurisprudence.

Every right arises from a title.[4] When all the investitive facts which are necessary to create the right have occurred, the right is vested; when part of the investitive facts have occurred, the right is contingent until the happening of all the facts on which the title depends. This is a simple distinction. But, unfortunately, the word 'vested' is used in two senses. Firstly, an interest may be vested *in possession*, when there is a right to present enjoyment, e.g. when I own and occupy Blackacre. But an interest may be vested, even where it does not carry a right to immediate possession, if it does confer a fixed right of taking possession in the future. Since all the investitive facts which are necessary to create the right have occurred, the right is vested in interest, even though actual enjoyment be postponed to a definite time in the future. If a grant is made to B in fee simple, he takes a vested interest in possession. If a grant is made to A for life, remainder to B, then according to English terminology B takes a vested estate in remainder. From one point of view, B's title is not complete until A has died, but two factors are regarded as important. Although it is uncertain when A will die, he must die at some time, and even if B dies first, B's heirs will take. Hence B has a definite interest which cannot be defeated;

[1] *Jurisprudence*, ii. 847.
[2] *Infra*, § 116.
[3] See J. Austin, Lect. LIII.
[4] *Infra*, § 67.

moreover, it is an interest which he can alienate at once, for it has a present money value. But if the grant is to B for life, and if C survives B, to C in fee simple, C has a contingent interest only, because it is uncertain whether he will survive B. A grant to D at twenty-one is contingent, because until D reaches that age, it is uncertain whether the condition will ever be fulfilled.

A mere *spes successionis* must be distinguished from a contingent right. If Matilda has nursed her invalid friend for thirty years, she may have every hope of succeeding to the property, but she has no right. The title necessary would be a valid will. If such a will leaves the property to Matilda on condition that she marries, she then has a right which will become effective on satisfaction of the condition.

In the civil law a legacy was vested if it was payable at a future time certain to arrive and the legatee had a transmissible right, contingent if it depended on an event which might never happen, in which case the legatee had no right which he could transfer until the condition was satisfied.

6. *Legal and Equitable Rights*

This classification depends on the division between common law and equity which is peculiar to English history. The problems that arise are elsewhere discussed.[1]

§ 66. The Creation and Extinction of Rights

When a person claims a right he must show a title thereto. In a broad sense all rights flow from the law, since it is only through the protection of the law that a legal right gains its efficacy. Sometimes, however, a right may be granted directly by the law without the consent of the person bound, e.g. the general rights of the law of tort. Jurisprudence frequently refers to these rights as arising *ex lege*. Other rights are created by consent through a juristic act, or else from the happening of a particular event, e.g. a river may by accretion add to the land of Jones. The points are discussed in the next chapter.

The problem of extinction of rights is more easily discussed after the methods of creation have been sketched.[2]

[1] *Supra*, § 15. [2] § 112.

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XIII

TITLES, ACTS, EVENTS

§ 67. Titles or Operative Facts

'Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him.'[1] A person claims rights, then, because of some particular title or fact.

Some rights arise *ex lege*, in the sense that they are directly conferred by the law, as when a statute gives to the Sunshine Trust a monopoly of the sale of oil. Jurisprudence interprets the term 'title' in a broad sense and treats the existence of this statute as the title of the particular rights claimed by the trust. In practice, it is impossible for the law to confer every right directly, for law has to operate over a wide field and is bound to generalize in order to achieve economy of thought and time; therefore certain particular situations of fact are specified by the law as giving rise to certain rights and duties. Thus when a child is born there is no need for a statute to be passed defining the reciprocal rights and duties of parent and child, for in such a typical relationship the general duties are laid down by the law. The technique of the law is to create a chain of legal rights and duties spreading from the normal relationships of life. Thus the duties of a user of the highway towards others upon it are laid down by the law of tort, and the fact of negligent driving causing damage to another is a title creating a right of compensation in that other. The juristic use of the word 'title' is wider than its common use: the word is generalized to cover any fact or combination of facts which creates rights and duties.

Bentham criticizes the word 'title' because, while it denotes the facts which give rise to the creation of right, it does not denote those which destroy a right. He proposes to call every fact by which a right or duty is created or destroyed a dispositive fact—he further divides those dispositive facts into investitive which create rights and duties, and

[1] O. W. Holmes, *The Common Law*, 214.

divestitive which destroy them.[1] Title, however, has a well-accepted meaning, and Bentham's terminology has not succeeded in maintaining itself. It must be remembered that the same facts which give rise to rights in A may destroy rights in B—for example, a river may by changing its course add to A's land and subtract from B's.

Facts may be divided into acts and events. In one sense acts are events, but for the purpose of jurisprudence it is convenient to distinguish between them. A change in a legal relation may take place because of the occurrence of a particular fact: if that fact is under the control of human agency, then there has occurred an act which has produced certain consequences; if that fact is independent of human intervention, we may describe it as an event.[2]

Thousands of events and acts may and do occur without affecting the legal relations of any person, but the law lays down that certain acts and events will have a particular influence on legal relations. Thus a river may gradually deposit accretions on A's land and wear away the bank on B's side. In this case an *event* independently of human activity has added to and subtracted from the area of particular estates. If a hunter kills a lion, by his own *act* he has created new rights with respect to the lion.

Theoretically the same analysis should be applicable to all acts, whether they be lawful or unlawful.[3] But for practical reasons we find that the law has adopted a slightly varying approach, on the one hand to wrongful acts which create either criminal or tortious liability, on the other hand to juristic acts[4] which are carried out subject to the rules of law with the express purpose of creating, altering, destroying, or transferring rights. In the first case, the law emphasizes that certain physical acts will lead to the imposition of liability against the will of the actor. If you do this, you will be punished (crime) or forced to pay compensation (tort). Under the second head, the law emphasizes the element of power—if you do this act according to the legal requirements, a certain series of rights (or duties) will accrue to you. Logically in both cases the law is adding a legal result to certain manifestations of the human will. In both cases there is conduct in the

[1] J. Bentham subdivides further the investitive facts into collative (which confer rights) and impositive (which confer duties); and divestitive facts into destructive (which end rights) and exonerative (which release from duties). See J. Austin, Lect. LV.

[2] F. Pollock, *First Book of Jurisprudence* (4th ed.), 142.

[3] A. Kocourek, *Jural Relations* (2nd ed.), 270.

[4] For example, the question of capacity is approached from a different angle in the case of juristic and criminal acts.

physical world and legal results which are attached by the law to that conduct. The making of a contract requires physical acts, just as does the murder of Jones. But in practice there is more emphasis on the physical side in cases of crime and on the element of legal power in making a contract.

§ 68. An Act as the Basis of Liability in Crime and Tort

Does an act require to be manifested in the external world? Is thinking an act? In one sense it is a form of action so arduous that it is indulged in by few people. Some distinguish between internal and external acts,[1] but this terminology is confusing, and it is better to regard the so-called internal acts as states of mind and to define an act 'as any muscular or glandular change which results from motor nerve impulse'.[2] There are many views today as to the nature of human action, one extreme being the old metaphysical theory of an entity called will with absolute freedom to determine the destiny of each human being, the other consisting of the modern determinist theory that our physical make-up and our environment determine almost exclusively our action in any particular event. The typical modern view lies between these two doctrines. The amazing changes that may be caused in a human personality by diseased functioning of the ductless glands shows that human action is rather less free than man's conceit had believed. 'A drop of iodine stands between most of us and insanity.' On the other hand, if the importance of physical influences in determining men's actions is increasingly realized, the influence of mental factors on the health of the body is also recognized. Medicine, psycho-analysis, and psychiatry are opening new doors and the law will gradually be forced to reconsider the theories on which its analysis of an act is based, although it is as yet premature to seek in the new learning for definite and accepted hypotheses which can be made the basis of a new legal approach.[3]

In ordinary speech, while we distinguish between an act and its consequences, the line is drawn very crudely, for some of the consequences of an act are frequently included in the act itself. The average man would say that Jones's act was that of killing Brown; but if we

[1] A. Kocourek, op. cit. 277.
[2] H. C. Warren and L. Carmichael, *Elements of Human Psychology*, 419.
[3] *Infra*, § 82.

confine act to its strict sense of muscular change, then Jones's act was merely to exert certain pressure on the trigger, the flight of the bullet to its objective and the death of Brown being consequences of that act. For purposes of analysis, the strict use of terms is necessary.[1]

In the typical legal analysis of an act, there are the following factors to be considered:[2]

(*a*) A certain psychic awareness sometimes called volition. The legal analysis was founded on the old assumptions that there is a will and that it is largely, if not entirely, free. Certain actions the law would clearly regard as involuntary (for example, sleep-walking)[3] but, unless a man's conduct falls within certain narrow categories, it is assumed that his act was voluntary. In many legal systems there is little psychological analysis of the nature of volition, and hence there is a certain crudity in the legal approach.

(*b*) The motive with which the act was done.

(*c*) The intent. The average man considers that he has no difficulty in distinguishing between motive and intention, but it is not easy to discover a precise criterion.[4] Literally motive is that which moves a person to a course of action. Thus A and B each intend to commit a murder, A desiring to save his country from a tyrant, B wishing to acquire money. Some writers, however, would regard the motive as ulterior intention.[5] Thus A's immediate intention is to murder, but his ulterior intention is to save his country. This approach is confusing. The law, when it considers A's conduct, asks: did he mean to murder (intention)? and why did he murder? The law cuts the inquiry short at the particular act which it is investigating. If we take a person's conduct as a whole, we see that in an ordered life many actions are but stepping-stones to others, but the law cuts short the

[1] For a different view, see A. Kocourek, op. cit., ch. xvi. The *Restatement of the Law of Torts*, § 2, says that the term 'act' is used in the Restatement 'to denote an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate and intended'.

[2] A valuable discussion is that of H. L. A. Hart, *Punishment and Responsibility*, ch. iv. See also *R.* v. *Payne*, [1970] Qd. R. 260, which treats the act of the prisoner as that of pulling the trigger, the resulting death being a consequence of that act.

[3] Thus the *Restatement of the Law of Torts*, Comment, § 2: 'There cannot be an act without volition.'

[4] For a short survey, see G. J. Stokes, *Encyclopædia of Religion and Ethics*, viii. 859.

[5] e.g. J. W. Salmond, op. cit., § 90. For a discussion of Salmond's view, see J. Hall, *General Principles of Criminal Law*, 149 et seq. T. A. Cowan, 97 *Univ. of Pa. L. R.* (1949), 502, criticizes the separation of intent and motive.

sequence by investigating one particular act. To Bentham the intention covers all the contemplated origins of the act, both those for the sake of which and those in spite of which we do it. The motive covers only the former. In the complicated web of life there are few actions which are 'sheer profit', and we must balance the advantages and disadvantages of a particular course of action. I may desire a gold cup offered to the winner of a certain race, and count the training loss—in such a case the motive for my entry is the gold cup. Or I may enjoy running for its own sake—then my motive is the interest in running; or I may hate running, and have no love for cups, but appreciate the increased fitness which running brings—in this case my motive is a desire for health. Morality considers both motive and intent: the law normally disregards motive in civil cases: in criminal cases, proof of motive may be practically important as leading to an inference of guilt, but evil motive is not essential to liability. A good motive is no defence, though it may be considered in regard to punishment.

(*d*) The circumstances in which the act was done.
(*e*) The consequences which result from the act.

Holmes regards intent as made up of two factors: foresight that certain consequences will follow from an act, and the wish for those consequences which determines the act.[1] To judge a person's action from the subjective point of view, we must know what were the circumstances as they appeared to him at the time of action and what were the consequences which he expected to follow. If we see a person fire into a bush and discover that the shot has killed someone, it is vital in a court of morals to know whether the actor knew the circumstance that a human being was in the bush. To press a trigger may be laudable, careless, or unethical, according to the circumstances known to the actor. One who runs his sword through a curtain and kills a man may prove as an extenuating circumstance that, although he knew there was a person behind the curtain, he thought that he was a felon about to attack him. Similarly, to judge an action ethically, we must understand the consequences which an actor appreciated as likely or possible. A child who, pretending to be a physician, administers a dose of poison to his brother is blameworthy, if at all, only for touching that which does not belong to him, for he does not appreciate that

[1] *The Common Law*, 53. O. W. Holmes actually describes the last clause as 'the wish for those consequences working as a *motive* which induces the act', but this use of the term 'motive' seems to introduce unnecessary confusion.

death is a likely consequence. From a purely subjective point of view[1] we could distinguish between:

i. *Action*

(*a*) Intention[2] where the particular consequences which result from the act are foreseen and desired. A consequence may be intended, although the chance of its happening is very remote. Smith, a crack shot, may shoot at his enemy from such a distance as to render it very unlikely that he will be successful, but if he does succeed in killing him, the consequence is intended. On the other hand, a consequence may be almost inevitable and yet not intended. A doctor may undertake an operation although it is almost certain to cause death, because surgery provides the only chance of removing a dangerous growth which will inevitably be fatal. A general may order his troops to attack a strongly fortified post although he knows that it is inevitable that thousands will be killed. Intent does not necessarily involve expectation and expectation does not necessarily involve intent.[3]

(*b*) Recklessness where the actor foresees the consequences, but cares not whether they result from his act.[4]

(*c*) Rashness where the actor foresees possible consequences, but foolishly thinks they will not occur as a result of his act.

(*d*) Heedlessness where a person acts without bothering to advert to the possible consequences.

ii. *Inaction*

(*e*) Forbearance—the intentional refraining from an action.

(*f*) An omission to carry out an act because it is not realized that there is a legal duty to act.

But no legal system adopts such a subjective approach, for there is a tendency to use external tests, although the actual degree to which this

[1] J. Austin, Lects. XIX, XX; W. E. Hearn, *Legal Duties and Rights*, 104–5.

[2] 'Wilful' is a word which should be avoided because of its ambiguity. 'Wilful is not a term of art and is often used as meaning no more than a high degree of carelessness or recklessness. It is not necessarily limited in its use to intentional or deliberate wrongdoing': per Lord Wright, *Caswell* v. *Powell Duffryn Assoc. Collieries*, [1940] A.C. 152 at 177. Talbot J. uses it as synonymous with intentional, *Wheeler* v. *New Merton Mills Ltd.*, [1933] 2 K.B. 669 at 677.

[3] J. W. Salmond, *Jurisprudence* (12th ed.), § 89. See G. Marston, 'Contemporaneity of Act and Intention in Crime', 86 *L.Q.R.* (1970), 208.

[4] There is dispute as to the meaning of recklessness, as is shown in the decision of the C.A. in *Herrington* v. *British Railways Board*, [1971] 1 All E.R. 897: is recklessness more akin to intent or to gross negligence? The view stated in the text is more logical.

is carried differs from one system to another. The law may compel men of full age to know at their peril the teachings of experience, and may treat them as having foreseen the consequences which a reasonable man would foresee. Thus in the law of tort the law sets up the standard of the reasonable man and, instead of delving into the mind of the defendant, asks what would a reasonable man have done in those circumstances. Failure to act up to this criterion is termed 'negligence'.[1] If we examine the subjective analysis set out above, we see that negligence includes acts as well as omissions, and that certain examples of recklessness, rashness, heedlessness, and forbearance would be covered by the comprehensive test of failure to conduct oneself as would a reasonable man. In the older books of English law there is a distinction between gross and simple negligence, but in the general law of tort today, 'gross negligence has no more effect than negligence without an opprobrious epithet'.[2] In the law of gratuitous bailment, the concept of gross negligence has striven hard to maintain itself. Roman law did distinguish between different degrees of care, but the terms used indicated 'courses of conduct, not states of mind'.[3] *Culpa levis* was failure to take the care which a *bonus paterfamilias* would take; *culpa levis in concreto*, the failure to show the care which that particular person exercised in his own affairs; *culpa lata* the failure to take the obvious precautions that any ordinary man would take; and finally *dolus* entered the realm of intentional wrongdoing.

Since in the civil law the object is not to punish a wrongdoer but to award compensation to one who has suffered injury, the adoption of an external test may easily be justified. In the criminal law it is necessary to take more account of the guilty mind of the wrongdoer, if punishment is not to be unjustly inflicted. But we shall see that even here the law has in some measure adopted an external test, and in certain cases there need be no *mens rea* at all.[4]

Malice is a most unfortunate term and it has many different meanings in English law:

(*a*) in murder it merely means that there is present one of the various forms of *mens rea* necessary to constitute the crime;

[1] *Infra*, § 105.
[2] Per Lord Wright, *Caswell* v. *Powell Duffryn Assoc. Collieries*, [1940] A.C. 152 at 175.
[3] W. W. Buckland, *The Main Institutions of Roman Private Law*, 300.
[4] *Infra*, § 82.

(*b*) in certain statutory offences it means that there must be either an intention to cause results of the particular kind prohibited by the statute, or at least a recklessness which cares not whether the prohibited consequence occurs or not;

(*c*) sometimes the word is otiose, a pleading relic, as in the allegation that defendant maliciously defamed the plaintiff, since even proof that there was no malice is not a defence;

(*d*) sometimes the word means spite or actual ill will or other improper motive, for example malice in this sense may be proved to rebut a defence of qualified privilege in defamation;

(*e*) sometimes, as in the phrase *malitia supplet aetatem*, it means that the act was done with the knowledge of its nature.

An interesting case from New Guinea is that of *Timbu Kolian* v. *R.*[1] The prisoner quarrelled with his wife and left the hut to secure peace. She followed him, continuing her tirade. He picked up a stick and gave his wife a blow which would not be likely to cause an adult a significant injury. By the law of the Territory of New Guinea, it was unlawful for a husband to beat his wife. The wife was carrying her baby—it was dark and the prisoner did not see the child which died from the effect of the blow. Three judges held that under the Criminal Code the act of killing occurred independently of the exercise of his will, and three held that the act of the prisoner was an event which occurred by accident. Had the act been likely to kill the wife, the decision would have been otherwise.

How far is automatism a defence?[2] It has been defined as involuntary action performed in a state of unconsciousness not amounting to insanity. Theoretically the defence is that no act in the legal sense took place at all—the plea is that there was no volition or psychic awareness.[3]

§ 69. Juristic Acts

By juristic acts legal persons create, modify, or destroy rights and duties and thereby affect legal relations between legal persons. Some writers term these manifestations of the human will acts in the law.[4]

[1] [1969] A.L.R. 143.

[2] *Bratty* v. *A.-G. for Northern Ireland*, [1961] 3 W.L.R. 965.

[3] N. Morris and C. Howard, *Studies in Criminal Law*, 62. The onus of proof differs from the position in a defence of insanity. The accused must show a proper foundation for the plea of automatism; it is a question of law for the judge whether there is evidence to go to the jury, but if the jury are in doubt, they should acquit. See *R.* v. *Joyce*, [1970] S.A.S.R. 184.

[4] The *Rechtsgeschäfte* of German law, *actes juridiques* of French law.

Here the question is whether a person within the framework of the law has been successful in creating rights and duties. There are four elements of a juristic act:

(*a*) *The Will*

The actor must direct his will to the end in question. The main emphasis under this head is on those factors which may prevent the free functioning of the will of the actor.[1] Thus duress by a third party may exercise such effective pressure that the will is overborne, for example by a threat to prosecute a near relative.[2] Fraud may create such a false situation that the will is not effectively directed to the true state of affairs. One party may have such a predominant influence over the other that what is termed 'undue influence' results. 'No court has ever attempted to define undue influence',[3] but 'the principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed'.[4] A mistake by C caused either by the conduct of the other party or C's own carelessness may raise difficult problems for the law. But this issue is best discussed under the law of contracts.[5]

(*b*) *The Expression of the Will or Declaration of Intention*[6]

The will must be expressed or made manifest. It is true that in some cases 'silence is consent', but this is only because the situation calls for action, if consent by remaining silent is not to be inferred. Thus a meeting may remain quiescent when the chairman says: 'If no one speaks against this proposal, I will take it that you all agree that this course of action is approved.'

The expression of the will may be either formal or informal.

The law may lay down that in order to effect a particular result the will must be expressed in a formal way and that, if the precise form

[1] *Vices de la volonté* of French law: M. S. Amos and F. P. Walton, *Introduction to French Law* (2nd ed.), 21.

[2] Cf. *Kaufman* v. *Gerson*, [1904] 1 K.B. 591. For a case of marriage declared void because of fear not caused by other party, see *Szechter* v. *Szechter*, [1970] 3 All E.R. 905; for a case of a foreign divorce declared void because of duress, see *Meyer* v. *Meyer*, [1971] 1 All E.R. 378.

[3] Per Lindley L.J., *Allcard* v. *Skinner* (1887), 36 Ch. D. 145 at 183; *Re Craig*, [1970] 2 W.L.R. 1219.

[4] Per Lord Kingsdown, *Smith* v. *Kay* (1859), 7 H.L.C. 750 at 779. See W. H. D. Winder, 3 *Mod. L. R.* (1939), 97.

[5] *Infra*, § 100.

[6] The *Willenserklärung* of German law. For a historical note on the juristic act in Roman law, see H. Lévy-Bruhl, *Archives de phil. du droit* (1939, 1–2), 75.

is not carried out, the juristic act will have no effect. The required form may be signed writing attested by two witnesses. A transfer of *res mancipi* in Roman law required the oral repetition by the parties of set words and the carrying out of certain gestures.

In other cases the law cares not how the will be expressed, so long as its expression is clear and unambiguous. A nod in an auction room may be accepted by the hammer of the auctioneer. Law is at first very fluid, but then it passes through a stage of technicality where there are set forms for most legal transactions. In the modern world the tendency is to abolish formal requirements, save where they are useful for particular reasons. Thus the form of a will is strictly laid down in order that clear evidence of the testator's wishes may be available, and to make forgery more difficult.

In a unilateral act it may not be necessary to publish the intention at once, provided that clear evidence of it be put in writing. Thus the contents of a will may remain secret until the death of the testator. In a bilateral act (one which is the result of an agreement between two or more parties) it is clear that the will of each must be communicated to the other. An offer to sell certain shares may be made by Jones in Paris, to Smith in London, and accepted by the latter by telegram. At what moment is the contract made? When the offer is accepted? When the telegram is sent? When the telegram is received? Or when the telegram is read? The rules of each system may vary, but the needs of business demand definite rules upon this point.[1]

(c) *Power to Bring About the Legal Result Desired*

A juristic act can be effective only if the actor is empowered by the law to act in this way. The term 'capacity' is frequently used in this connection, but it is preferable to use *power*, in the sense in which that word is defined above.[2] Thus a minor in English law had at common law no power to make a binding contract save for necessaries —a statutory company can make valid contracts only within the ambit of the powers bestowed upon it.[3] From the physical angle, an infant may perform similar acts when he buys on credit jewellery and food, but in the one case the law will not hold him bound and in the other it will force him to pay on the ground that food is a necessary commodity.

[1] *Infra*, § 97; E. J. Schuster, *Principles of German Law*, 86–7.
[2] The doctrine of *ultra vires* is now being reconsidered.
[3] *Supra*, § 63.

(*d*) *Material Validity*

The object which it is desired to achieve must not be prohibited by the law. An agreement to pay a certain sum as the price of the vote of a member of the House of Commons would be invalid on the grounds of public policy. In one sense such a prohibition may be put under the head of power, since it may be said that no member of the community has power to create a valid agreement contrary to public policy. But it is convenient for some purposes to distinguish between power and material validity. If only a limited class is prevented from attaining a particular result, that falls most easily under the head of variations of power. If everyone in the community is prohibited from achieving a particular result, then it is easier to class it under the head of material invalidity. Thus the topic of infants' contracts falls under power, whereas the rules nullifying certain contracts on the ground of public policy relate to material invalidity.

A defect may make a juristic act either void or voidable. If the defect is such that the act is devoid of the legal results contemplated, then the act is said to be void.[1] A void act is sometimes said to be a nullity in law, but this is not strictly so, as an act void in its primary intent may nevertheless have an effect in another way.[2] Thus the Infants Relief Act, 1874, declared that certain contracts shall be absolutely void. Yet there is authority for the view that the property in the goods passes to the infant[3] and possibly the infant can enforce the contract if he desires.[4] In systems which even in regard to chattels distinguish clearly between the contract of sale and the conveyance, the distinction is easier to draw. The contract of sale of a chattel may be entirely void, but the conveyance may be valid until it is rescinded. In English law where the mistake of a party to a contract is so fundamental that the contract is avoided, so is the conveyance. Thus if a rogue obtains goods on credit under circumstances which are held to make the contract entirely void, the rogue obtains no title—hence an innocent third party to whom he sells the goods also obtains no title.[5] On the other hand, a voidable transaction is

[1] W. Markby, *Elements of Law* (6th ed.), 143. *Lewis* v. *Averay*, [1971] 3 All E.R. 807.

[2] E. J. Cohn, 64 *L.Q.R.* (1948), 324 at 325–6; F. Pollock, *First Book of Jurisprudence* (4th ed.), 165.

[3] *Pearce* v. *Brain*, [1929] 2 K.B. 310, see now, Family Law Reform Act, 1969.

[4] G. C. Cheshire and C. H. S. Fifoot, *Law of Contract* (5th ed.), 342–4. Also if the infant has paid for the goods, he cannot recover the money.

[5] It has been suggested that where one of two innocent parties must, under present law, suffer as the result of the fraud of a third, the rule should be adopted that the loss

valid for all purposes, until steps are taken to avoid it. If a marriage, because of failure to comply with some rule of law, is entirely void, theoretically, no judgment of a court is necessary to declare it so.[1] If the marriage is merely voidable, it remains valid until a court avoids it at the instance of one of the parties to the marriage.[2] If a contract is voidable only, it cannot be avoided so as to prejudice a third party who has in the interim honestly and for value acquired an interest in the *res* which is the subject-matter of the contract.

§ 70. Types of Juristic Acts

A juristic act may be unilateral or bilateral. A unilateral act, as the adjective implies, is one in which the will of only one party is operative, for example a testamentary disposition. A bilateral act is the result of an agreement between two or more parties. It is preferable to use the word 'agreement' in a broad sense rather than to confine it to one specific type of agreement such as a contract. Contract may be one of the most important forms of agreement, but the possible types of agreement are numerous. Gareis defines an agreement as 'a declared concurrence of will of two or more persons whereby a change in their legal spheres is intended'.[3] We should distinguish between the agreement itself and the obligations to which it gives rise. Agreements may create, transfer, or extinguish rights. The problems that arise can most easily be discussed in connection with the law of contract.

Another meaning sometimes given to the terms 'unilateral' and 'bilateral' is based not on a study of the means by which the agreement is made but of what remains to be done by the parties. If the agreement binds both parties by a duty, it is said to be bilateral, but if only one party has an active duty, it is unilateral.[4] This, however, is not the sense in which the term is used in this work.

should be divided: see G. Gardiner and A. Martin (eds.), *Law Reform Now*, 156. Thus in tort where there is negligence on both sides, the loss may be divided in proportion to fault.

[1] For practical purposes a judgment may be desirable, e.g. if the parties are not agreed that the marriage is void or if one of them wishes to marry again, and to place on record the nature of the first 'marriage'.

[2] If a marriage is merely voidable, then the 'wife', even after a declaration of nullity, remains an incompetent witness against her 'husband' for crimes (e.g. forgery) committed during coverture—*R.* v. *Algar*, [1954] 1 Q.B. 279; *contra*—where the marriage was void *ab initio*.

[3] *Science of Law* (trans. A. Kocourek), 162.

[4] J. W. Salmond, *Jurisprudence* (12th ed.), 336.

§ 71. Acts of the Law

A juristic act is thus the result of a voluntary manifestation of the will and is sometimes described as an act in the law (i.e. an act done within the legal framework).[1] In these cases the law makes the human will effective. But the law may also bind a person against his will, e.g. there is a general duty not to defame others, a liability to pay compensation if a court so orders. Some writers put such examples under the heading of acts of the law, contrasting this term with juristic acts which are acts *within* the law. This distinction between duties voluntarily incurred and duties imposed by the law is a fundamental one.

§ 72. Representation in a Juristic Act

A declaration of intention may be made either by A in person or by another acting as agent on his behalf. The agent is more than a mere messenger—a servant who conveys a letter from A accepting an offer made by B is not an agent. In English usage the term 'agent' is used very widely,[2] sometimes almost being coextensive with employment, but strictly the term should be confined to employment for the purpose of bringing the employer into legal relation with a third party.

Representation first develops in connection with persons of restricted capacity. A baby a few days old may have much wealth and yet he is clearly physically incapable of performing a juristic act—hence the device of appointing a guardian or tutor to represent the will of the infant and to take effective steps for the protection of his property. Nowadays the guiding principle behind the restriction of the legal powers of certain classes of human persons is that of protection. It is in the best interests of an infant (or minor as termed by the Family Law Reform Act, 1969)[3] to deprive him of some of the powers which an adult possesses. But in early law guardianship frequently was a right and not a duty. The guardian was he who would succeed, if the ward died intestate, the maxim being *ubi beneficium successionis ibi onus tutelae*: thus he had a direct interest in restricting the powers of the infant. The wardship of feudal times protected the interests of the lord, and the ward might find that the utmost had been ruthlessly extracted from his estate during his

[1] But cf. H. L. A. Hart, *The Ascription of Responsibility and Rights*, vol. xlix, Aristotelian Society Proceedings (1949).

[2] Thus an independent contractor is sometimes called an agent.

[3] This Act reduced the age of minority from 21 to 18 years.

minority and that he was then forced to pay a fine for the privilege of succeeding. We see an illustration of the fact that tutorship was regarded as a right in the rules concerning the age at which tutorship ceased at Rome. Since a male could found a family at the age of fourteen years, the nearest agnate then lost interest in the *spes successionis*, and tutorship ceased.

But by the time of the Republic the newer conception of tutorship as a duty imposed in the interest of the ward was accepted. Stringent rules were enforced to ensure that the tutor acted fairly, and, instead of being a right, tutorship became an onerous duty which the law in some circumstances would enforce even on an unwilling person in the absence of proof of one of the specified 'excuses'.

At Rome males between the ages of fourteen and twenty-five were so protected by the power of the praetor to annul transactions that were disadvantageous to them that they found it difficult to enter into any legal negotiations at all. Hence arose the custom of obtaining the opinion of a temporary adviser that the transaction was a fair one. A form of curatorship gradually arose, not so much to protect the minor as the third party, by providing evidence which would make it more difficult to annul the transaction.[1]

Lunatics were given a curator, partly in their own interests, partly in the interests of the family in order to prevent the dissipation of the property. The curatorship of prodigals illustrates an institution that is foreign to the individualistic common law. It was strongly felt in Rome that property was held, not for individual satisfaction alone, but for the benefit of the family, and a *paterfamilias* who extravagantly squandered his patrimony might find that his powers of administration and alienation were curtailed by the appointment of a curator who would ensure that the family property was preserved. Some continental systems have adopted this institution from Roman law.[2]

In English law the powers of a guardian are somewhat vague and there is no clearly developed theory of agency by which the guardian can exercise the will of the infant. This lack has been made tolerable by the institution of the trust, since, if there is property concerned, it would normally be invested in trustees for the benefit of the infant—and being legal owners of the trust property, the trustees would have full powers of administration.

[1] The later development of *cura minoris* is discussed by W. W. Buckland, *The Main Institutions of Roman Private Law*, 84.

[2] e.g. French and German law.

These forms of agency are sometimes called tutorial representation, or to use the language of modern codes, the guardian is the statutory agent of the ward. From such tutorial representation, which arises because of the restricted powers that pertain to certain forms of status, we must distinguish that form of agency which arises because of business convenience. An agent (in this sense) is one who acts as a conduit pipe through which legal relations flow from his principal to another. Agency is created by a juristic act by which one person (the principal) gives to another (the agent) the power to do something for and in the name of the principal so as to bind the latter directly. If the agent acts within the terms of his authority and contracts in the name of an existing principal, then, in general, the agent is not personally liable on the contract.

The germ of agency in the business sense may be found in the particular organization of the Roman family. The *paterfamilias* by a rule of law acquired the ownership of property received by his children, for they were in his power. The slave was not a legal person, and since he was in the possession of his master, it was natural to say that the master possessed what was held by the slave. The slave could be used to acquire possession if the master gave a specific order.[1] There was a tendency to use the slave more and more as a means for the acquisition of property and the administration of business. So far as the master and slave *inter se* were concerned there was no real problem. One was a legal person and the other was a chattel; one had complete legal power over the other. But where third parties were concerned, it was necessary to develop rules stating precisely the master's liability on contracts made by the slaves: especially was this essential when it became usual to set a slave up in business with a particular sum of money (the *peculium*) as capital. The detailed Roman rules cannot here be discussed. All that can be said is that a maxim which gave extraordinary protection to the master—slaves can make the master's position better, but not worse—was gradually modified on grounds of business convenience. The master became liable in *solidum* if he ordered a particular transaction, and the *peculium* itself became liable to execution for contracts made in connection with it.

So long as these principles were confined to the bonds of the family no difficulty arose—as was the case in early law. But if a master freed a slave and set him in charge of a particular business,

[1] *Infra*, § 123.

should not the same rules apply, even though the manager was no longer a slave? Thus there was a gradual extension of the master's liability in contract and a recognition that even a free procurator might be used as a means of acquiring possession or title.

But Roman law provided no explicit theory of agency. 'As to transactions by sons and slaves, we must keep clear of the notion of representation, apart at any rate from authorised alienations.'[1] The extension of these rules to free persons made it impossible to seek the explanation in terms of the peculiar structure of the family, but Roman law never quite reached a coherent doctrine.[2] Perhaps the nearest approach to modern doctrine was the theory of mandate. Caesar might give a mandate to Antony to buy a certain estate from Cleopatra. But in reality, when Antony carried out the request there were two transactions, one between Caesar and Antony, one between Antony and Cleopatra. This was no mere academic point, for Antony himself was liable to Cleopatra for the purchase price; and strictly Cleopatra could not directly sue Caesar. The praetor, however, allowed an *actio institoria* against one who appointed a man to contract in relation to a business, and if we can accept a text of Papinian, such an action might lie even where the mandate was for a single transaction.[3] Caesar could sue only by taking an assignment of Antony's rights against Cleopatra. *Obligatio* could not be assigned, but a mandate could be given to Caesar to sue on Antony's claim. These clumsy devices conclusively show that Roman law had not achieved the simplicity of a working theory of agency.

Holmes maintains that modern law is based on the fiction that within the scope of the agency principal and agent are one, and that the starting-point is still the *patria potestas* of ancient Rome.[4] However true that may be, modern law has travelled far along the road, and agency is now a most important conception of commercial law. In the case of master and servant, the former is extensively liable for the negligence and even the wilful frauds of the servant in the course of employment, and it was inevitable that this should affect the liability of those who employed agents who were not technically servants. Identification of the principal and agent sometimes, however, led to absurd results. An agent honestly makes a statement which he believes to be true; the principal knows facts which render

[1] W. W. Buckland, *Main Institutions of Roman Private Law*, 161.
[2] Ibid. 167.
[3] W. W. Buckland, *Textbook of Roman Law* (2nd ed.), 519.
[4] *Select Essays in Anglo-American History*, iii. 368 et seq.

the statement false, but is unaware that the agent has made the statement. To hold the principal to the agent's representations in an action for breach of contract may be reasonable—but common sense, as well as the law, recoils from allowing an action for fraud, although if we identify the principal and agent, that is a logical result.[1]

It has been said that agency normally arises from a juristic act. In some cases agency of necessity may arise—the agent may exercise a power which has not specifically been bestowed. Thus a wife left without means of support may pledge her husband's credit for necessaries. In such a case the wife need not show that this power has been granted by the husband, for it flows directly from the marriage relationship itself. Possibly the development of this rule was helped by the early tendency to treat a wife as a mere servant, or the later identification of husband and wife as one person at law.[2] But the doctrine of agency by necessity is not confined to the family. The master of a ship may, if circumstances render it imperative, pledge his employer's credit. A carrier may have authority to effect a sale if the goods are perishable and action is necessary to avert a total loss.

§ 73. Assignment

Where a chose in possession is concerned, e.g. Blackacre which A owns and possesses, A may transfer to another either all or some of the rights which A possesses. Thus A may surrender possession but retain ownership, surrender both ownership and possession, or transfer title but remain in possession with the consent of the new owner. Such cases are discussed in the chapter on property.[3]

Where a contract is concerned, A may wish to transfer to C the rights which A has to a performance of the agreement by B. This raises more difficult questions which are discussed below.[4] In early systems the notion of obligation was intensely personal, and it was inconceivable that it could be transferred, but modern business convenience has demanded a modification of these rules.[5] In England

[1] Cf. *Anglo-Scottish Beet Sugar Corp. Ltd.* v. *Spalding Urban District Council*, [1937] 2 K.B. 607 at 625. 'I cannot myself see how a principal can be held liable for fraud when there has been no element of fraud either on the part of himself or on the part of anyone for whose acts he is responsible': per Atkinson J. and see *Armstrong* v. *Strain*, [1952] 1 K.B. 232 and discussion of that case in 68 *L.Q.R.* (1952) at 148–50.

[2] O. W. Holmes, op. cit.

[3] *Infra*, Ch. XXI.

[4] *Infra*, § 114, 'Chose in action'.

[5] If A wishes to transfer to another his liability to B, A can do so only with B's consent and only if A can find another who is willing to assume liability. This is really a case of *novation*, i.e. the destruction of the old agreement by creating a new one: *infra*, § 112.

the common law courts did not at first recognize the assignment of a benefit under a contract, but equity would permit it in certain cases and force the assignor to allow the use of his name if an action to enforce the contract at common law became necessary. The common law kept to its theory that choses in action were not assignable, and thus any action must proceed in the name of the assignor. In 1873 the Judicature Act simplified the problem, but to discuss the detailed provisions is not in point. There are, however, certain types of right which cannot be transferred: the assignment of a mere right to sue for damages in tort would have infringed the rules of maintenance and champerty before these relics of the past were abolished.[1] A right to personal services cannot be transferred without the consent of the person bound.[2] Assignment has proved a useful device for modern commerce, but unfortunately English law has not dealt with the problem comprehensively and has created a statutory patchwork quilt of particular enactments dealing with specific problems.

[1] Criminal Law Act, 1967, c. 58, s. 13.
[2] *Nokes* v. *Doncaster Collieries Ltd.*, [1940] A.C. 1014.

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