

THE RATIONAL STRENGTH
OF
ENGLISH LAW

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THE HAMLYN LECTURES

THIRD SERIES

THE
RATIONAL STRENGTH
OF
ENGLISH LAW

BY

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HAMLIN LECTURERS

1949. The Right Hon. Sir Alfred Denning

1950. Richard O'Sullivan, K.C.

1951. F. H. Lawson, D.C.L.

THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 aged 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music, and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows :—

‘ The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the Chief European Countries, including the United Kingdom, and the circumstances of the growth of such Jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other

European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them '.

The Trustees under the Scheme number nine, viz. :

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The Trustees decided to organise courses of lectures of high interest and quality by persons of eminence under the auspices of co-operating Universities with a view to the lectures being made available in book form to a wide public.

The third series of four lectures was delivered by Professor F. H. Lawson, in the University of London, in October, 1951.

GEORGE W. KEETON,
Acting Chairman of the Trustees.

November, 1951.

SOURCES AND GENERAL CHARACTER
OF THE LAW

1

SOURCES AND GENERAL CHARACTER OF THE LAW

INTRODUCTION

I HAVE given to these lectures the title *The Rational Strength of English Law* because I wish to correct an opinion widespread not only among laymen but among lawyers that English law is essentially disorderly and irrational. It is, I think, peculiarly incumbent on me as a comparative lawyer to undertake this task because there is a general impression that foreign law, especially the various systems which operate on the Continent of Europe, is very different from English law in this respect, being exceptionally neat and rational. I hope to show not only that foreign law does not invariably have these characteristics, but also that there is at the heart of English law a very strong element of rationality and that it is by no means a mere accumulation of separate rules laid down by statutes, regulations or the successive judgments of the courts.

As the task I am undertaking is a difficult one, involving an approach to a technical subject in an unfamiliar way, I would like first of all to define my terms and explain what I propose to do.

When the Hamlyn Trustees invited me to give this course of lectures, I felt that it was in the spirit of the trust to praise English law. If therefore you hear much more praise than blame you will know that I do not look upon English law with an uncritical eye. There is

indeed much that needs reform and perhaps a comparative lawyer is in a peculiarly favourable position to see the defects of his own law. I shall therefore not withhold criticism of English law where it is relevant to my purpose, but there are times for blame and times for praise. I only ask you to remember that I am not living in a fool's paradise.

I shall try to achieve clarity and give relief to my discussion by an extensive use of the comparative method. On the whole I shall contrast English law with foreign systems, not always to the disadvantage of the latter ; but occasionally I shall use foreign experience to show that there is a general consensus in favour of the solutions adopted by English law.

CIVIL LAW AND COMMON LAW

For this purpose I must place English law in a world perspective. Western law is usually divided into two great systems, known respectively as the civil law and common law, the former of which consists of a large number of national or local laws each of which has as its core a civil code based largely on Roman law. The latter consists of other national or local laws the common feature of which is a central body of doctrine which is not contained in a code but is continually being distilled from the decisions in an immense number of cases decided by the courts of law, at first exclusively in England, but later in England and in other parts of the Commonwealth and the United States of America. This judge-made law is again divided into two parts, which bear the technical names of common law and equity, both of which are from time to time modified by legislation,

mainly of a fragmentary kind, passed by the national or local legislature.

The division between these two great systems is neither sharp nor exhaustive. The Scandinavian laws stand outside both systems, having very little connection with English law, but living under codes so old as to be far removed in style and content from the codes of other Continental countries : they have not been greatly influenced by Roman law. There are also important hybrids such as Scots law and the Roman-Dutch law of South Africa and Ceylon, which, though largely Roman in origin, are not codified and have received a considerable admixture of English law. Finally, much of the law in force in India, Pakistan and Burma, though of English origin, is codified.¹

However, the gap between the common law systems and the civil law systems is not easily bridged. The two groups have different traditional techniques which make it difficult for a lawyer brought up exclusively under a common law system to read a law book dealing with a civil law system, and vice versa : it is like learning a new language only distantly related to one's own. It should be a consolation to English lawyers to know that even the very general knowledge of Roman law that almost all English lawyers acquire at an early stage in their legal education gives them a distinct advantage over lawyers brought up only in the civil law ; but it would seem that the greater interest that the latter have in our law and their greater willingness to learn, have already gone far to cancel that advantage.

¹ Notably in the Indian Penal Code, Succession Act, 1865, Contract Act, 1872, Transfer of Property Act, 1882, and Trusts Act, 1882.

Within the common law group there are of course many variations. Inside the Commonwealth common law and equity, the parts of the law which depend entirely on judicial decisions, are virtually uniform. Each State of the American Union has its own system of common law and equity, and is uncontrolled by any outside authority ; but each State has been influenced by the other States, and by the common law and equity in jurisdictions outside the United States. Thus there is a strong family likeness between the laws of the various States, and indeed both common law and equity are everywhere very much alike. Nevertheless, the American courts have at many points moved ahead of the courts of England and other parts of the Commonwealth.² This is not always the case where statute is concerned : as I hope to show later, honours are pretty even in that field.³

I cannot hope in the short time at my disposal to deal with more than a few parts of English law ; and I think you will agree with me that I shall do better not to run very rapidly over the whole field but to illustrate fairly fully selected topics which seem to me to be of exceptional importance. I can best explain how and why I shall limit my field if I say a little about some peculiar characteristics of law as a whole.

CONTRADICTIONS OF LAW

‘ Those of us who have learnt humility have given over the attempt to define law.’ So said a well-known

² Cf. pp. 71, 104 below.

³ Cf. pp. 104, 144 below.

American jurist who died only last year.⁴ I shall assume that although we cannot define law we all know more or less what law is and try to call attention to some of its main features. Above all it is full of paradoxes and contradictions. It must be stable and yet it cannot stand still.⁵ It is made by men, and yet it seems to have a life and reproductive capacity of its own. It exists in large part in order to canalise and restrain the exercise of power, and yet it can be made and administered only by the use of power. It should be like the perfect guest, there when it is needed and not there when it is not. Nevertheless, although it should normally not get in the way when men are about their ordinary business, it should sometimes appear when least expected, lest its power, majesty and indispensability should be disregarded.

I want to talk about one particular contradiction. In order to satisfy our rational impulses law ought to give answers which everywhere fit the facts like a glove : the law ought to spring naturally out of the facts. But at the same time it should be reasonably certain and predictable, so as to enable persons to regulate their conduct in accordance with it. There is not much difficulty in reconciling these two demands where morality gives an obvious answer. But this is by no means always the case, and the law then often appears arbitrary. Some rule has to be laid down, and the legislator or the judge does his best : it is not always a perfect best. For life is not long enough to achieve perfect answers, and the

⁴ Max Radin, 'A Restatement of Hohfeld', 51 *Harvard Law Review*.
1145.

⁵ Roscoe Pound, *Interpretations of Legal History*, p. 1.

legislator and the judge have not the freedom to experiment that the scientist has in his laboratory. The law is largely built up out of decisions in very difficult cases, where the parties pleading for opposite solutions of a legal problem are equally honest and reasonable and are represented by advocates of equal learning and ability. Thus the element of accident must always be taken into account. Moreover, the maker of legal rules is in practice in somewhat the same position as the builder of an Atlantic liner : when he has built it he must put up with it. In most cases it cannot be seriously altered for years to come. This conflict between the rational and the arbitrary is very old and seems inseparable from law. It was noticed by Aristotle, who distinguished between the natural and the conventional elements in law, the former being eternal, the latter relative to time and place.⁶

No practical lawyer would now try to distinguish the natural from the conventional elements in any legal system. He would feel that all of it should aim at perfect justice and he would not expect any part of it to succeed. He would however tend to regard some parts of the law as having more or less settled down. He would say, if he thought at all consciously about them, that their rules and principles had been determined or should be determined by the exercise of reason and common sense, and above all, that all fresh determinations should be arrived at impartially. Even where acute controversies occur they should not be settled by the will of a party majority, whether organised or not, but by a simple con-

⁶ *Nicomachean Ethics*, v. 7.

sideration of right and wrong ; and in so far as they should conform to anything, they should conform to the inner logic of the pre-existing law, not to any actual or supposed view of policy. On the other hand, he would tend to say that there is a great deal of law, perhaps most of what he has to handle in the exercise of his profession, which finds any justification it may have in policy, which at its best is determined by technical considerations of finance, art or natural or social science of one kind or another.

Now the lawyer may be deeply interested in the formation or execution of a policy of any one of these kinds, but hardly as a lawyer ; and in our type of society at any rate he will not get far in a court of law with arguments based on the need for such a policy. In so far as Parliament has expressed a particular policy in a statute, the court will apply the policy ; and, in case of doubt, and for the purpose of interpreting the statute, will listen to arguments tending to show the exact nature of that policy. It will not consider whether the policy is right or wrong. It will not take any responsibility for it.

LAWYERS' LAW

With the other kind of law lawyers have a much more intimate concern, so intimate that it has often been called 'lawyers' law'.⁷ It has usually been made by themselves, though often under the unacknowledged influence of some notion of policy which they have acquired as members of society. Most of what is commonly called civil law is of this kind, and in particular the

⁷ I have discussed the meaning of this term more fully in 61 *Juridical Review*, 18-20.

law of property, contract and torts. It is by no means immune from interference on grounds of policy. At the present day such interference is normal and extensive. No one can really understand the modern law of property in land without considering the Town and Country Planning Act, 1947, which has nationalised the 'development value' of land. One would get a very false view of the law of contract if one neglected the existence of controls which make the validity of many contracts dependent on the approval of a Government department. Sooner or later, if these policies persist, they may affect the whole nature of these branches of the law ; but for the time being the greater part of them remains unaltered, though operating in a new setting.

I shall therefore confine myself to what I have called 'lawyers' law', and shall leave on one side the law which is determined by the sort of policy for which Parliament and not the courts takes responsibility. The latter kind of law has its own kind of logic : its technique must conform to the requirements of foreign policy, defence policy, economic or medical science, or what you will. It is not for the lawyer, as such, to say whether the technique is well or ill adapted to its purpose, except in so far as for its effectiveness it depends on recourse to the courts ; for then the lawyer may properly have his own opinion whether it is well or ill adapted to make use of the courts. This usually means that he has a right to criticise the drafting of legislation, a right of which he regularly avails himself, whether as advocate, judge or academic lawyer. But generally speaking it is not for the lawyer as such to examine the extent to which this kind of law is rational.

I must ask your indulgence for further omissions. Much of the law relating to government is 'lawyers' law'. I shall neglect it for the simple and sufficient reason that Lord Justice Denning devoted to it the first lectures given under this trust.⁸ I shall neglect commercial law, criminal law, the law of evidence and the law of civil and criminal procedure, because I am not qualified to discuss them, but in the hope that properly qualified persons will be invited to lecture in the future on these very important subjects, in which English law has made contributions of extraordinary value to the law of the world.

THE MEANING OF 'RATIONAL'

I have still to say what I mean by rational in the context of these lectures. By rational I do not mean rationalist. I certainly do not wish to go back to an unhistorical, eighteenth century mode of thought, or to deny the claims of tradition as a factor in the administration of justice. I should not think of denying that men often act in an irrational manner or that the law must deal with men as they are, with all their prejudices. I do not commit myself to any particular way of looking at reason. For my purpose I shall be able to avoid considering whether ultimately reason can be said to govern any of our actions, or whether, as Hume said, reason is, and ought only to be, the slave of the passions.⁹ This is because I do not propose to deal with the policies, often called Ideologies nowadays, which are perhaps the ultimate bases of legal systems.

⁸ *Freedom under the Law*, Stevens, 1949.

⁹ *Treatise of Human Nature*, Bk. II, pt. II, sect. III.

I suppose it would be possible to ask how far the policy that lies behind lawyers' law is rational, how far, that is to say, it is informed by reason rather than by blind instinct or obedience to tradition. But this would involve a sociological investigation and would take us too far afield. My judgments will be almost entirely concerned with legal technique, and not with the policies which lie behind it ; and should it be said with justice that policies are often only part of the technique for putting more remote policies into effect, then I shall answer that I shall as far as possible deal only with the technique which is actually expressed in the law. Within those limits I shall regard law as rational in so far as it serves in a sane and intelligent way to further a policy which is either acknowledged or can be easily detected from internal or external evidence.

This means, on the one hand, that I shall not be satisfied with any explanation of a rule of law which is purely, or even mainly, historical. Generally speaking, historical explanations lead one back to rational explanations, in the sense that there was a time when the rule in question was a sane and intelligent adjustment of means to an end. But I shall not for the purpose of these lectures consider a rule rational merely because it was rational at some time in the past.

On the other hand I shall not treat the rational as synonymous with the neat or the symmetrical. The aesthetic impulse is often strong in the theoretical jurist, who, like the mathematician, prizes highly what is called 'elegance'. It is well that it should be so ; for draftsmanship is an important part of the lawyer's craft, and should at least aim at the standards of literature.

There is also a deep-seated feeling that utility implies order, and that order, when raised to a high plane, implies beauty. I shall say nothing of order or beauty in the expression of the law : there is indeed little of them in English law. Of the inner elegance that comes from an orderly connection of ideas I shall incidentally say a good deal. There is more of it in English law than is usually recognised. But it is not my main business. There is moreover a common tendency on the part of jurists—it has been very strong at many periods in the past—to feel that a legal system can be rationally satisfying by its mere elegance and the internal logic governing the relations between its parts. From this point of view a legal system is a sort of logical machine ; and a machine may be judged by the simplicity and smoothness of its running. I think everyone will sympathise with this point of view ; but there is a danger of becoming fascinated by the beauty of a machine which one makes constantly more perfect for a specialised purpose. The machine tends to exist in and for itself and to acquire a greater importance than the purpose it was meant to fulfil ; and the purpose itself often disappears. A good deal of the history of Roman law in medieval and modern times could be re-written to point a moral of this kind. English law has not entirely escaped the danger. There was a time when the conveyancers seemed unduly concerned with the nice logic of the law of real property and to neglect the rational adjustment of means to end. Luckily we have now, as I hope to show, arrived at a truer view of this part of the law. Moreover we have never thought of English law as a single logical machine. Nevertheless a law should be something of a logical

machine and, so long as it avoids over-specialisation, it may lay claim to consideration on account of its beauty and elegance.

I shall therefore devote myself primarily to the examination of various portions of our law with a view to discovering the policies which they are intended to fulfil and the extent to which the law serves those policies in a rational way.

In the rest of this lecture I shall consider the sources of English law and the ways in which it is developed from day to day. The second lecture will deal with the law of contract, the virtues and defects of which, though not easily discerned, can I think be thrown into relief by a comparison with Scots law. In my third lecture I shall essay the very difficult task of describing what, somewhat eccentrically perhaps, I regard as one of the most brilliant creations of English law, our law of property. In my fourth lecture, after endeavouring to rationalise the law of torts, I shall sum up briefly some of the most important conclusions to which I have come.

SOURCES OF LAW

The rules governing the application of most Continental systems were at one time very simple. The civil law was comprised in a single civil code, which might have been altered or added to by later statutes made by the legislature. Only this body of written law possessed binding authority, and it was the duty of the judges to interpret it according to the best of their ability and apply it to the facts which they found upon the evidence before them. They were, however, at liberty to make such use as they thought fit of certain aids to interpreta-

tion. They could refer to any material which had been before the draftsman or the legislature before the legislation was passed¹⁰ or to commentaries written by jurists for the purpose of clothing the statutory skeleton with flesh and blood, or to the reported decisions of the courts. But none of these authorities, if they could be called such, made law : they had only persuasive force. This being so, there was no need to draw up any order of priority among them. The judges could choose among them as they wished. The only rule of priority that existed decreed that a later statute repealed an earlier one to the extent that it was repugnant to it.

It is not at all correct to say without qualification that English law is not codified. We have many partial codes, several of which are excellently drafted ; but what may, in the strict sense of the term, be called codes exist almost entirely in commercial¹¹ and criminal law.¹²

UNWRITTEN LAW

The peculiar character of English law comes largely from the fact that much of the doctrine which forms the very core of the system is not contained in any authoritative written statement but has to be pieced together from a large mass of judicial decisions. We apply to this body of doctrine the technical name of unwritten law, as opposed to the written law which is contained in statutes and other enactments.¹³ It may seem a little surprising

¹⁰ These are called *travaux préparatoires*.

¹¹ E.g., Bills of Exchange Act, 1882 ; Partnership Act, 1890 ; Sale of Goods Act, 1893 ; Marine Insurance Act, 1906.

¹² E.g., Perjury Act, 1911 ; Forgery Act, 1913 ; Larceny Act, 1916.

¹³ Blackstone, *Commentaries*, I. 63.

that we should call it unwritten when we could not possibly have any knowledge of it unless we searched for it in the printed reports of judicial decisions. But that is not the meaning of the distinction. The point is that where law is written it is enunciated in words which are themselves authoritative and which have to be interpreted by the judges. Moreover, in England the most important rule governing the interpretation of statutes is that their words must be interpreted according to their grammatical meaning, and so the judges have no great power to control written law. One may say that the written words themselves constitute the law.

On the other hand, the actual words in which judicial decisions are reported are certainly not themselves the law but merely describe it in the manner that seemed best to the judges at the time.¹⁴ It is therefore always open to anybody at a later date to try to express it in a clearer and more exact way ; and evidently there may

¹⁴ Very rarely the actual words in which a famous judge formulated a rule are treated almost as equivalent to a section of a statute. Cf. on the formulation by Willes J. of the duty of an inventor in *Indermaur v. Dames*, several passages in the speeches of the noble Lords in *London Graving Dock Co. v. Horton*, [1951] 2 All E.R. 1 : Lord Normand : 'The exposition by Willes J. of the duty owed to invitees has been adopted in many subsequent cases and it has even been treated almost as if it were a section in a statute and as if all questions could be solved by construing and applying it' (at p. 8) ; Lord MacDermott : 'The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge, but the inquiry is to ascertain the applicable rule of the common law and cannot, as I regard the position, be confined to a problem of construction' (at p. 14) ; Lord Reid : 'I do not think, however, that this judgment was meant to be, or can properly be used as, a codification of the law' (at p. 25).

be a certain imprecision about law the substance of which is not enunciated in an authoritative form. Thus the judges can commonly handle unwritten law with considerably greater freedom than written law.

Moreover the two types of law differ in their treatment of what lawyers call the *casus omissus*, that is to say, the type of case which has not so far been provided for in the books. If the words of a statute cannot be interpreted so as to cover a particular case the statute cannot be extended to cover it by analogy. Unwritten law, however, can always expand so as to cover every fresh case, and indeed it must so expand, for the judges have to find a solution for every problem.

Unwritten law is therefore potentially complete, although at any given moment it may not be actually complete, whereas written law is always regarded as fragmentary ; and where a statute clearly does not deal with a case with which it might have been expected to deal, the judges have to fall back on the common law for a solution. It would be wrong to regard this as a distinction without a difference, for the main purpose of written law in this central field of the law is to modify and reform unwritten law ; and, accordingly, if the statute does not deal with the *casus omissus* the common law continues to apply to it, although it is sometimes extremely probable that Parliament intended to modify it.

This implies another important truth, namely, that in England it is unwritten law that is regarded as normal and written law as exceptional. Most lawyers think it a distinct misfortune that the legislature should have had to intervene to modify the general principles of common law and equity. They do not for the most

part suggest that the interventions were ill-advised, but they feel that it would have been better had they been unnecessary.

Not only does our unwritten law seem to correspond to Aristotle's natural justice, in contrast to the conventional justice according to Acts of Parliament, but written formulations of principle do not as a rule fit very well into a large mass of unwritten law. Perhaps this is partly due to our style of legislative drafting, which has aimed at a precise enunciation of rights and duties. So different is the style of the French Civil Code that one is sometimes tempted to regard English draftsmanship as a symptom of some extra dose of original sin appertaining to English law and perhaps even to the English language. That this is untrue must be apparent to anyone familiar with the magnificent draftsmanship of the American Constitution or with the codes, such as the Sale of Goods Act, in which the late Sir Mackenzie Chalmers restated parts of English commercial law. Parts of the American Constitution have started new doctrines which are extraordinarily similar to doctrines of common law ; while the Sale of Goods Act seems to operate almost as a part of common law, hardly checking the judges in their stride and merely dispensing them from referring to the mass of older cases decided before the Act was passed. Nevertheless, most English legislation is not of this kind, and where it amends common law or equity it seems to jut out like rocks in the even swell of the sea.

Even Continental lawyers brought up under a code may dislike authoritative formulations of doctrine. I commend to your notice the fascinating volumes in which are recorded the proceedings of the Committee

for the Revision of the French Civil Code.¹⁵ There the question arose at the very start of the discussions whether a new French code should include a preliminary statement of the general principles which should apply throughout. The chairman said that such a statement would be perfectly appropriate to a course of lectures on civil law but not to a code, which should contain only the solutions of the most important key problems that might arise : it was advisable to avoid statements of doctrine, since doctrines grow obsolete ; and, in any case, had not French civil law gained greatly from the absence of such formulations from the Civil Code, and French administrative law from not having a code at all ?¹⁶ One could not find better proof of the existence of a distinct common law point of view outside the common law systems ; for the chairman, M. Julliot de la Morandière, is Dean of the Paris Faculty of Law and has only a nodding acquaintance with English law. I do not think I need say any more to show that our distinction between unwritten and written law is at least rational.

CONTINUITY

One great advantage that lawyers obtain from codification is that they soon become dispensed from referring to the earlier authorities. But codification is apt to break continuity, an extremely valuable element in law.

CONTINUITY OF TIME

English law has a most remarkable sense of continuity. In this it does not differ from a number of other English

¹⁵ *Travaux de la Commission de Réforme du Code civil, années 1945-6, 1946-7, 1947-8, 1948-9* (Librairie du Recueil Sirey).

¹⁶ *Ibid.*, pp. 138-142.

institutions such as the Constitution and that intensely English institution, the Church of England. The Constitution in a sense exists only by virtue of the continuity of government within this country for many hundreds of years : and indeed if one seeks for a basis of political obligation one can find nothing more suitable than the continuity of government. The importance of continuity in the Church of England can hardly be exaggerated, especially in a period when the Church includes adherents who hold many shades of doctrine, but are none the less devoted members of the Church.

What is the peculiar importance of continuity in the law ? I think it is that if you make it the most important force binding together your legal system you will enjoy the benefits which usually result from a traditional pattern of behaviour, without being led into an unreasoning conservatism or becoming entrapped in the close framework of a logical system.

It is a commonplace of history that the wholesale breaches of continuity which we call revolutions are regularly followed by attempts on the part of the successful revolutionaries to secure their position by enunciating a constitution or a creed which shall canalise the future activity of the nation. Thus a new orthodoxy and a new conservatism replace what went before.

We Englishmen are commonly regarded as very conservative. No doubt we are sometimes conservative and in certain parts of our national life. But the slightest examination of our history shows that any general accusation of the kind is the purest nonsense : I need only recall the fact that the Industrial Revolution started in England. What really characterises us is a dislike for

breaking off and starting afresh. We are not in the least averse to replacing in practice something old by something new. But on the whole we prefer either to alter what is already in existence in such a way as not to destroy its identity, or to set up something new beside the old and let the old live or die according to its capacity for survival.

This emphasis on continuity links us consciously with the past, but it also links us, as it were, to the future. In spite of the use of codes, Continental law is often more flexible than English law and affords a wider field of discretionary action to the judges. But most codes create a closed system of thought and confine the administration of the law within a limited space. It is as if a person were told he could walk about more or less as he liked inside a room, but could not go outside.

Now the genius of the common law is quite different. It is of its nature to spread without any predetermined limits. It exemplifies Cromwell's remark that no man goes so far as the man who does not know where he is going. I do not wish to exaggerate or to set up clearly defined boundaries between different legal systems. It is impossible to predict for long ahead the line of development that any system of law will take. New facts always make new law, and future facts are unpredictable. Some codifiers proclaim this truth while at the same time trying to sum up what has gone before and to canalise in some measure the future progress of the law.¹⁷ The

¹⁷ Cf. Portalis, *Discours préliminaire sur le projet de Code civil* : ' Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. . . . D'ailleurs, comment enchaîner l'action du temps ? Comment s'opposer au cours des événements ou à la pente insensible des mœurs ? Comment

common law systems do not even pretend that their future development can be predicted—though they sometimes set up obstacles to future development which are not easily side-tracked or removed.

CONTINUITY OF SPACE

The common law possesses also continuity of space. It is true that in the Supreme Court of the United States Mr. Justice Holmes once protested against the habit of talking of the common law as though it existed everywhere and always. In a famous phrase he said 'the common law is not a brooding omnipresence in the sky', and he insisted that the common law of every State was a different entity.¹⁸ Nevertheless, there is a very close connection between the common law of one jurisdiction and the common law of another, and it is often found that the courts of one jurisdiction are more likely to maintain continuity with the courts of another jurisdiction on a matter of uncodified common law than in the interpretation of statutes, even though they are couched in identical terms and even though they purport to restate the common law.¹⁹

connaître et calculer d'avance ce que l'expérience seule peut nous révéler? La prévoyance peut-elle jamais s'étendre à des objets que la pensée ne peut atteindre? . . . L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière.' (*Discours, rapports et travaux inédits sur le Code civil*, pp. 7-8.)

¹⁸ *Black and White Taxi Co. v. Brown and Yellow Taxi Co.*, 276 U.S. 518, at pp. 532-3 (1928).

¹⁹ Thus the unifying work of the American National Conference of Commissioners on Uniform State Laws has to some extent been stultified by varying interpretations of laws which various States had adopted on their recommendation.

CONTINUITY OF CONTENT

There is another side to the continuity of the common law. It dislikes the tendency, prevalent in codified systems and still more among the academic lawyers brought up under them, to put the several parts of the law into watertight compartments. It does not object in any way to the imperceptible transformation of contractual into property rights. Hence it has no difficulty in admitting a hybrid institution like the trust, which always shocks Continental lawyers. It makes no deep-rooted distinction between public and private law.²⁰ It is well to notice tendencies in a contrary direction: thus although civil and criminal procedure are much more alike than in civil law countries, the two jurisdictions are kept wider apart; the victim of a criminal offence cannot join himself to criminal proceedings as a civil party and obtain damages, but must bring a separate civil action.²¹ Nevertheless, on balance I would say that a keen sense of continuity is a hall-mark of English law, and that one symptom of it is a strong generalising tendency, which is held in check only when there are differences of jurisdiction.

I do not wish to suggest that other laws lack a spirit

²⁰ Thus an Australian judge can speak of a minister or government official to whom a discretionary power has been given as the donee of the power, a term usually applied only at private law to one who is given a power of appointment, *i.e.*, a power to choose a person to succeed as owner of property; and it is obvious that he was assimilating an abuse of such a discretionary power to a 'fraud on a power', which occurs when a person who has a special power to choose within a limited class, *e.g.*, of his own children, makes his choice in such a way as to secure a private benefit for himself—Rich J., in *Reid v. Sinderberry* (1944), 68 C.L.R. 504, at p. 514.

²¹ Amos and Walton, *Introduction to French Law*, p. 214.

of continuity, still less that they do not generalise. The point I wish to make is that the perpetuation of law in an unwritten form facilitates the maintenance of continuity in all its varieties better than formulation in a code. All lawyers value continuity in their saner moments. The wisest codifiers have done their best to make their codes break the continuity of history as little as they can, and many Continental lawyers are anxious to avoid anything that will prevent the free flow of ideas from one part of the law to another. Moreover, the older one's civil code the more one tends to become a common lawyer in spirit. Many French jurists of the present day are extraordinarily close to us. They are, however, apt to be involved in difficulties of a logical and even, dare one say it, of a moral kind, when it is necessary to introduce new ideas or modify the law in ways that are not contemplated or even, perhaps, are disapproved of by the words of the code.²² French judges, and later, French jurists, have been extraordinarily daring in their interpretations of the code, but I feel they would have been much more comfortable if they had been dealing with unwritten, rather than written, law.

PRECEDENT

Are we not also troubled by our doctrine of precedent? Each judicial decision forms a precedent for future cases and a rather intricate doctrine has grown up according to which these precedents are arranged in a sort of hier-

²² The most famous example is the introduction of the contract for the benefit of third parties (*stipulation pour autrui*) by a most benevolent interpretation of art. 1121 in opposition to the words of art. 1119 of the Civil Code.

archy, the general rule being that decisions of a court bind all inferior courts and also itself. The doctrine seems at first sight to engage the judge in a prison of pre-existing authority, but its force is considerably mitigated by the fact that only the decisions of the High Court and upwards are considered authoritative and that even so only the principle of a decision possesses binding authority, obiter dicta having only persuasive force.

Codification obviously makes a doctrine of precedent much less necessary and until recently it was generally thought in this country that there were no such things as binding precedents in civil law countries. I do not want to waste your time by discussing in any detail or comparatively the doctrine of precedent. It has been well discussed in the past and there is no danger of its escaping the notice of jurists in the future. All I would like to say is that all the more advanced countries now report the decisions of courts, that the practices of all legal systems tend to converge and that in all countries the handling of judicial precedents is an art of which the rules vary a good deal but which constantly tends to escape those rules in practice. It must however be admitted that we still apply precedents more strictly than civil law or even American courts.

Academic lawyers are apt to disapprove of the doctrine of precedent as strictly applied in England. Practising lawyers do not take so hard a view of it. There is a very good reason for the difference of opinion. The academic lawyer is constantly thinking of the great general principles of law and often becomes impatient when some old decision seems to present an obstacle to their adjustment to new conditions. The practising lawyer on the other

hand is far more often concerned with questions of detail which might well be decided one way or the other without any obvious failure of justice. For him it is extremely important that he should be able to resort to precedent with a full knowledge of the relative force behind each past decision. He rarely comes into contact with cases where the older decisions seem to compel an unjust solution. Thus he is inclined to regard past mistakes as inevitable and the necessity for accepting them as a price which the law pays for certainty and predictability in the ordinary affairs of everyday life. On the whole he is perhaps not far wrong, because the number of cases which one feels certain to have been wrongly decided and to have no rational justification is very small. Moreover there is always the chance that Parliament may pass a reforming statute and to its power no limit is imposed by law. Taking all these various factors into consideration I do not think that the doctrine of precedent is an irrational doctrine or one that binds us too closely to the past. For all its apparent rigidity it has not prevented the common law from keeping closely in touch with the changing needs of everyday life, and although French civil law seems to have proved rather more flexible than English civil law in the past century and a half we have Professor Gutteridge's word for it that of the two systems of commercial law English law has moved more readily with the times.²³

JUDGE AND JURIST

It used to be thought that codified systems gave more opportunities for systematic thought and, indeed, there is

²³ *Comparative Law*, 2nd ed., p. 103 n.

no doubt that for some time after the enactment of a civil code the purely exegetical work of jurists is abnormally important. But as a code grows older there is a gradual tendency for the authority of case law to assert itself and the law tends to lose its logical symmetry. The works of the jurists are not often cited except in the highest courts. Reliance is placed almost exclusively on judicial precedents. We must not therefore think that the gulf between the academic lawyer and the practitioner, of which we are so painfully conscious, is peculiar to ourselves. It exists everywhere and I am not at all certain that the direct influence of the academic lawyer is much greater elsewhere than here, at any rate in countries where there is a fully developed system of law reporting.

One difference does, however, seem to have survived from earlier times. It is not entirely unimportant even for the present age that in civil law countries the prestige of the jurists *vis-à-vis* the judge was greater than in this country. The jurist came to look upon himself as an independent agent who was entitled to state the law in his own way and to give it the best possible form. Here that has only rarely been the case. Formerly legal writers in England felt it their duty to follow the lines sketched out by the judges, and it is only recently that academic writers of textbooks have come to recognise their duty to criticise and even to create.²⁴ On the other hand, in England the judgments of superior courts have always been fully argued, at any rate so far back as the existence of verbatim reports allows us to judge. They

²⁴ Sir Frederick Pollock was the pioneer. He enjoyed a peculiar prestige, probably not unconnected with his membership of a great judicial family.

have usually been delivered orally and the judge has perpetuated on the Bench the type of free conversational argument which he learnt to use when at the Bar. Nothing is omitted which he feels may be necessary in order to convince the suitors and the Bar of the correctness of his decision, and most judgments have a literary power which in the best instances is raised to a very high level. Thus a good English judgment is not at all unlike the type of argument which one can find in an article or note written by a French professor.

The style of French judgments however is extraordinarily terse and dry. The reasons for the judgment, or *motifs*, as they are called, must be given, but they are rather thrown at the reader and no pains are taken to connect them together by a continuous argument. The portrait that they give of the reasoning of the court is at best a silhouette, whereas the corresponding English portrait is full of life and colour.²⁵ In other words, the French judgment is essentially a document, the English judgment a work of art. German judgments stand somewhere between the English and French models: the reasoning is more fully expressed but it remains dry and businesslike. It is interesting to note that the full flavour of an English judgment is not usually to be found even in the United States, where judgments, except in very rare instances, are now apt to consist of a string of dogmatic statements interspersed with citations of authority.²⁶ But the English model is followed, sometimes to very great effect, throughout the countries which are subject

²⁵ I have reprinted a number of French judgments in *Negligence in the Civil Law* (Clarendon Press, 1950). See also *ibid.*, pp. 233-4.

²⁶ Cf. S. E. Baldwin, *The American Judiciary*, pp. 262-4.

to British influence—some Australian judgments, for instance, are of extraordinary interest and power.²⁷

The great strength of judge-made law is that it is the product less of a formal system of thought than of a diffused wisdom derived from the collective tradition of a profession and from long personal experience in the handling of legal problems. Dare I suggest that this tradition and this experience are shared also by academic lawyers, who at many points may be better guides than the judges themselves? The general conditions of practice are very different from what they were in the middle of the last century, when great judges like Blackburn and Willes built up what has proved to be a most durable core of the common law. Those judges were constantly handling fundamental problems which came to them for the first time; they could not help being conscious of what their judgments would imply. But at the present day such problems arise but seldom. The judges spend almost all their time interpreting enactments or private documents; and the problems of common law or equity they have to solve tend to be marginal. Whether they are marginal or not, they very often come to the judge 'out of the blue'. Well-known judges have come to recognise that in the changed circumstances of the time it is unsound to repeat the old lawyers' advice to pick up one's law as one goes along. It will pass very well for the early or middle years of practice, but does not equip one to handle the really difficult questions of principle. Hence a thorough academic training in the law is no longer despised.

²⁷ E.g., *N.S.W. v. Bardolph* (1933-4), 52 C.L.R. 455; *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee* (1945), 72 C.L.R. 37.

It is less readily acknowledged that academic lawyers can make a peculiar contribution of their own to the actual practice of the law. For the academic lawyer, unlike the practitioner and the judge, is most interested in mastering and reconsidering the great general principles of the law. Accordingly, when these principles are in question, the academic lawyer can bring to bear on them a specialised experience far superior to that of any practitioner or judge who is not prepared to keep up his systematic study of the law. A much greater part is played by juristic literature in the administration of American than of English law. There are good and sufficient reasons for that, which I cannot go into. Nevertheless there are signs of a change even here, notably the prestige that attaches to the notes in *The Law Quarterly Review* and the references to review articles which are a regular feature of *Current Law*.

EQUITY

Our unwritten law is divided in a peculiar manner quite unknown to civil law countries and also to hybrid systems such as Scots law and the Roman-Dutch law in force in South Africa and Ceylon. A distinction is made between common law and equity.

The idea of such a distinction has always been present to the minds of lawyers, for they have always recognised that the best general rules may lead to injustice in a small minority of cases, which, if they are to be dealt with at all satisfactorily, must be decided according to rules of natural justice or morality overriding for the moment the doctrines of strict law. Equity in England started in the Middle Ages with applications to the Lord

Chancellor to exercise an equitable jurisdiction in such cases and the Chancellor did justice by asking whether the defendant had disobeyed the dictates of his conscience in exercising what were his undoubted rights at common law. Eventually by the accumulation of precedent, which acquired a more and more binding character, equity became a systematic body of law, by and large as strict as the common law though administered in a different court. However, three-quarters of a century ago the common law and equitable jurisdictions were merged and they are now exercised in the same courts. This distinction between common law and equity is one of the most difficult in English law. It has always proved a stumbling block to lawyers brought up in foreign legal systems and it is not very easy for English lawyers to explain to themselves.

Equity is not now more obviously equitable than common law : indeed earlier in the present century a well-known Chancery judge said solemnly in court : ' This court is not a court of conscience ' .²⁸ More recently common law judges have been known to complain of the technical view of both law and equity taken by their brethren in the Chancery Division ; while I have heard a Chancery practitioner say of the equity administered by a common law judge that it could not be equity but must be a queer sort of common law of which they had never heard. Joking apart, one is as likely to find conscience working in the law of torts, which is entirely common law, as in the law of trusts, which is entirely equity. I am inclined to think that the stiffening of

²⁸ *Re Telescriptor Syndicate*, [1903] 2 Ch. 174, 195.

equity may owe something to the preoccupation of Chancery judges with the law of property since the Judicature Act came into force in 1875. Before that, much of the law of property was administered on the common law side.²⁹ Now the law of property deals, as I hope to show in my next lecture, with precise and exact concepts, and leaves very little to the discretion of the judge. The law of torts, on the other hand, and large parts of the law of contract, have relatively vague outlines, and above all the finding of fact leaves considerable freedom of action to the judge, or to the jury if there is one.

Any law that has or has had a separate jurisdiction administering equity must meet attacks from two quarters. The Scots lawyer says that in his country the same courts have always administered both law and equity, and have always got on very well. On this much might be said. Much was said early in the eighteenth century in a famous controversy between Lord Chancellor Hardwicke and the Scottish judge Lord Kames.³⁰ We have of course given way to the Scottish point of view, but there is much to be said for the argument that we should not have many of the most characteristic and valuable portions of our law, had we not had an equity systematically developed in separate courts. If the Scots say that they also have the trust, which is the greatest product of English equity, I should reply that the Scottish trust, though perhaps born on Scottish soil,

²⁹ The only part of the law of real property that regularly comes at the present day before judges of the King's Bench Division is the law of landlord and tenant.

³⁰ Cf. Holdsworth, *History of English Law*, xii, 583-601.

has owed much of its elaboration to imitation of the English model.

Certain Continental lawyers might well say that their law is so rational and so impregnated with equity that there has never been any reason to think of equity as a separate body of law to be administered in the same courts or elsewhere. I should admit that at various periods that was true enough of certain systems. But specialised notions of equity seem to creep in. The most obvious case is German law. The Civil Code provides that contracts must be performed in accordance with the requirements of good faith³¹—a harmless looking provision copied from the French Civil Code.³² But when an inflation occurs problems of a wholly unprecedented kind arise concerning, for instance, attempts to pay off mortgages in worthless currency. The court has then to make up its mind whether to enforce the contract strictly or to ask whether the mortgagor is acting in accordance with dictates of his conscience, and so in good faith.³³ In other words an equitable jurisdiction based on conscience is introduced six or seven hundred years after it was introduced in England.³⁴ Although such phenomena are not so easily found in the administration of French civil law, it is one of the advantages possessed by the administrative courts over the civil courts that, unencumbered by a code, they have been able to apply such notions very freely to contracts made by public

³¹ § 242.

³² Art. 1134.

³³ *Manual of German Law* (H.M.S.O. 1950 : Mr. E. J. Cohn), pp. 60-1.

³⁴ Professor H. C. Gutteridge has much to say about these 'super-eminent equities' : *Comparative Law*, 2nd ed., pp. 94-100.

authorities for the supply of goods or services by private persons.³⁵

I believe therefore that overriding considerations of equity cannot for long be excluded from a legal system. In so far as English law frankly recognises the distinction between common law and equity, it is acting most rationally. I have, however, two reservations to make.

The first is that, contrary to what is usually believed by English lawyers, much of what the old Court of Chancery developed in the exercise of its equitable jurisdiction is perfectly well known to foreign laws. It had to be developed separately in England because the common law was too stiff to develop it without the aid of equity. The most obvious case is the equitable remedy of specific performance, which has always been the normal way of enforcing a contract on the Continent and in Scotland and South Africa. At common law the only remedy that could be obtained for a breach of contract was an award of damages in money. Equity sometimes forced the defaulting party to perform the contract specifically.

My second reservation is that the judges are not always as astute as they might be to use equitable institutions for the development of the law. I must leave the detail for consideration later. All I shall say for the moment is that the Americans, with the same heritage as ourselves, often do better.

³⁵ René David, 'The Treatment of Frustration of Contract in Foreign Legal Systems: French Law' (*Journal of Comparative Legislation*, 3rd series, vol. 28), p. 13.

PROFESSIONAL CHARACTER OF LAW

I have already hinted at the extraordinary maturity of English law and I should like now to emphasise one or two examples of it.

English law is the most professional body of law in the world. The great German jurist Savigny held that all law is the product of the popular sense of right—a theory that has much truth in it, however it may have been misused, especially by the Nazis—and when faced with the argument that much law is far too technical to be even understood, much less created by popular action, he said that at a certain stage the professional lawyer becomes as it were the mouthpiece of this popular sense of right.³⁶ If that is so then that stage was reached in England at an abnormally early date ; for as early as the first half of the thirteenth century the professional activity of Bench and Bar had become by far the most important agency in the development of the law.

If one looks for a contrast to this professional mode of thought one has only to go to France, where, despite the gradual disappearance of all obstacles to royal absolutism in matters of government, the law remained curiously democratic in texture. There was a constant preoccupation with proverbial statements of the law, aids to memory which are often of a most popular kind. Such maxims are common enough in England, but they have rarely had any influence on the actual administration of the law.³⁷ In France they have been deeply influential

³⁶ Cf. J. W. Jones, *Historical Introduction to the Theory of Law*, p. 56.

³⁷ Cf. Lord Alness's short chapter on Brocards in *An Introductory Survey of the Sources and Literature of Scots Law*, published by the Stair Society, 1936.

and the habit of stating the law in a gnomic fashion encouraged the production of short, semi-authoritative books of maxims which were the forerunners of the Code Civil, the least technical in style of all codes.³⁸

The professional character of our law has had curious effects. The law has undoubtedly been a mystery, the preserve of a small number of experts ; and it has become much more institutionalised than any other system, by which I mean that it resembles much more such an institution as a Church than Continental law. This quality has of course had some bad effects. The law has often been too technical and too expensive. On the other hand it has, I think, tended to become much more sacrosanct than in most other countries. It is much harder to get at, much harder to alter, and when one remembers the enormous inroads that have been made elsewhere on the free and pure administration of justice, and the degradation of the law into a mere instrument of policy, it is something to have a legal system which at least exists, and exists as something intangible in more than one sense of the term.

It has however been altered from time to time, and much of it was subjected to a thorough revision at the hands of Bentham and his followers over 100 years ago. Their work, while it shows how irrational some of the law had become, also shows, first that English law presents no obstacle to amendment when amendment can be shown to be needed on rational grounds, and secondly, that the irrational parts of English law were mainly concerned with procedure and not with the substance of

³⁸ A. Esmein, *Cours élémentaire d'histoire du Droit français*, pp. 706-8, 721-3.

the law.³⁹ There could be no greater testimony to the inherent rationality of our law.

WHY IS ENGLISH LAW NOT RECOGNISED AS A RATIONAL SYSTEM ?

Why is English law not recognised as being the rational system it really is? I believe it is because practitioners very properly take very little interest in the analysis and systematic description of law, and the jurists have hitherto been so badly bemused by the foreign analysis of legal concepts that they have tried to trace its results in the very different context of English law. They have also tended to think of anything that cannot easily be related to Roman law as eccentric and only fit to be apologised for. There is another more special reason which has not, so far as I am aware, been noticed hitherto. The English analytical jurists have not been specialists in the law of real property, but have been common lawyers more particularly versed in the law of contract and torts.⁴⁰ Now in those branches of the law we have had a fair amount to learn from Roman law and the systems derived from it. Moreover, the modern systems appeared at this point to be much more symmetrical and logical than English law. Hence there was a natural tendency to exalt them at its expense.

³⁹ Moreover, at a later date the abnormal rigour of pleading favoured by Baron Parke never seems to have prevented him or his brother judges from administering and developing the law in a thoroughly just and practical manner.

⁴⁰ This is not so true of Sir William Markby's *Elements of Law*, which, however, has never been so influential as other works of the school. At pp. 166-71 he gives an admirable short sketch of the most remarkable features of Real Property law.

Had the analytical jurists been disposed to examine the foreign law of succession, and still more the proprietary relations between husband and wife, they might have discovered that English law had progressed far beyond the laws of the Continent.⁴¹

⁴¹ Mr. Justice O. W. Holmes saw it (*The Common Law*, p. 210 : 'Hence I say that it is important to show that a far more developed, more rational, and mightier body of law than the Roman, gives no sanction to either premise or conclusion as held by Kant and his successors').

CONTRACT

CONTRACT

THE law of contract was perhaps the most important part of the law in the nineteenth century, and its predominance gave the occasion for two famous, even hackneyed, remarks. Sir Henry Maine noticed as one of the most characteristic features of modern societies a movement from status to contract, while the great legal historian Maitland branded contract as the greediest of legal categories. These judgments were as true of other Western societies as of England. Everywhere contract came to occupy the centre of private law, and even public law was made to depend as far as possible on actual or hypothetical agreement. In a century dominated for the most part by the doctrine of *laissez faire*, this would in any case have been likely to happen ; the tendency was reinforced by another development which forms one of the main threads of nineteenth-century legal history, the enactment of uniform codes which superseded local variations of law and custom over large areas. Where variations were none the less felt to be necessary, contract had to be called in aid ; and it is not surprising to find that new branches of law of a conventional origin grew up side by side with the law made by legislatures or in the courts. Sometimes this formation of new law by way of contract even led to the creation of new uniformities, for example in the field of maritime law or in the export trade, far

transcending the sphere of operation of any national code or common law system.¹

This particular tendency would have been greatly thwarted had not the law of contract been essentially the same throughout the Western world. It is therefore not very easy to find particular excellences in English law which are not also found elsewhere. Indeed a comparison of the English law of contract with other systems of contract law is apt to breed dissatisfaction with it. At many points the dead hand seems to check progress. Mistakes made by Victorian judges cannot be cancelled outright, and the present-day bench is not always as astute to turn their flank as some of us would wish. At times, moreover, one is ashamed not to be able readily to lay one's hands on statements comparable to the manifestos contained in foreign codes which insist on good faith in the performance of contracts²; and the law sometimes seems to show a hardness, especially towards those who are unable to take care of themselves, which is no credit to a civilised nation.

SCOTS LAW AS A STANDARD OF EXCELLENCE

Yet it would be surprising if the final verdict on our law of contract should be one of dispraise, especially when we consider, not only the world-wide reputation for honesty of English business men, but also the willingness of foreigners to have their contracts construed according to English law and not infrequently by arbitrators in the City of London. We have in fact near at hand an excel-

¹ P. Arminjon, B. Nolde et M. Wolff, *Traite de Droit compare*, I., pp. 95-6.

² French C.C. art. 1134; German C.C. § 242.

lent way of testing the value of this portion of our law for in Scotland lives a people which took care in the Act of Union to insist on the perpetuation of its traditional system of private law but has never allowed national pride or pedantry to forbid the reception of such foreign elements as seemed worthy of adoption in a changed or unchanged form. *Pace* Professor Gibb,³ who scourges his countrymen for submitting to an alien domination in the matter of their law, I cannot help feeling that they have had the best of both worlds, and that, with a very few exceptions, they have, whilst taking from English law certain institutions which they could not have found elsewhere, contrived to exclude what was of inferior metal. I would even be rash enough to say that England would gain much and lose very little if it merely substituted for its own law of contract that of the sister nation.

THIRD-PARTY RIGHTS

The most notorious doctrine of English contract law which has been rejected in Scotland is that which prevents any person who is not a party to a contract from suing on it, or—to put it in another way—which prevents the parties to a contract from conferring rights upon third parties by their contract. The common law of England has enunciated this doctrine in the most downright fashion, and the hesitant attempts of equity to sidetrack it and confer rights on third parties have certainly not achieved as yet any definite result.⁴ The doctrine has never been accepted at all in Scotland,

³ *Law from over the Border*, 1951.

⁴ Cheshire and Fifoot, *Law of Contract*, 2nd ed., pp. 329–330.

though in course of time Scottish courts have become more cautious in admitting that a third party who stands to benefit from the performance of a contract has actually an enforceable right to have it performed.⁵ But there is never any doubt in Scotland that if the parties to a contract clearly intend to confer a right upon a third party, a so-called *jus quaesitum tertio*, he can sue on it in his own name. Whether the under-development of such a right in English law causes much practical inconvenience is perhaps open to question. I am inclined to think that most of the important cases are sufficiently covered in one way or another.⁶

If we ask why Scots lawyers have never suffered from the inhibition which has restrained English law from admitting the *jus quaesitum tertio*—a curious thing to find in so uninhibited a system—we shall have little difficulty in concluding that the principal reason is that Scots law has never attached the same importance to consideration as English law.

CONSIDERATION

The doctrine of consideration and its influence beyond the Border afford an excellent opportunity for testing the worth of one of the most characteristic elements of English contract law. Stripped of its technicalities and certain peculiarities of detail which distort it occasionally in its application to particular states of fact, the doctrine serves to distinguish between bargains and gratuitous

⁵ W. M. Gloag, *Law of Contract*, 2nd ed., pp. 235 et seq.

⁶ I very much doubt whether the courts would refuse to enforce bankers' commercial credits, so regular a method have they become of financing foreign trade.

promises. It makes bargains in principle valid irrespective of the form in which they are couched, but rejects all gratuitous promises unless made by deed. Since a deed is a highly formal instrument to which a seal is attached, as such instruments are hardly ever used except for the purpose of transferring property, and as the ordinary layman acting without professional advice hardly ever knows anything about the law on this subject, it may be said that gratuitous promises are generally not binding. If a person wants to make a gift, let him do so out and out, but a mere promise will not bind him. On the other hand, if he has actually made the gift, he can never recall it.

It will be observed, however, that not only promises of gifts in the strict sense of the word are left to the unaided conscience of the promisor, but also gratuitous promises in the nature of gratuitous options to purchase land and gratuitous promises of services, both of which are perhaps more likely to occur in practice.

Many systems of law draw a line between formal and informal promises, but not always at the same place. The civilian tradition of the Continent draws it so as to segregate gifts from all other contracts, and, in French law at any rate, it is easy to see that the dominant concern is for the family of the donor ; all donations, like legacies, reduce the estate which is available for the family of the donor on his death. Hence, in many cases, the family can bring proceedings in order to make the donee disgorge in their favour. Hence, too, a certain prejudice against promises of gifts, which shows itself in a rule that such promises need to be evidenced by a formal instrument executed by a notary. On the other

hand a mere promise of gratuitous services is not held to prejudice family expectations and so is not subjected to any particular form.⁷

THE SCOTTISH DOCTRINE

The peculiar line, however, drawn by English law between bargains and gratuitous promises is reproduced in Scotland.⁸ The law has taken a form which commended itself to the Law Revision Committee in 1937,⁹ that of insisting on written evidence for gratuitous promises. This may seem close to the present unreformed state of English law, which insists on a deed. It is however very different, for whereas the execution of a deed is a very abnormal act outside the ordinary habits of an uninstructed layman, the writing of a letter promising a gift is by no means abnormal. It is therefore very interesting to consider the justifications set out in the older books for the Scots practice.

It is felt, and rightly, I think, that anyone who pays for a promise with money or money's worth means business, and so in such circumstances does the maker of the promise. And this must be held to be true even if the promise is by word of mouth. On the other hand, it is by no means easy to distinguish a firm promise of a gratuitous kind from a mere indication of possible future conduct ; nor is it always easy to know in which sense the recipient of the declaration has taken it. It is

⁷ Colin et Capitant, *Cours élémentaire de Droit civil français*, 10th ed., II, 19-20. Such a contract is said to be, not *à titre gratuit*, but merely *désintéressé*.

⁸ See generally Gloag, *op. cit.*, ch. III ; Lord Normand, *Consideration in the Law of Scotland*, 55 L.Q.R.358.

⁹ Sixth Interim Report, para. 50.

not unreasonable therefore for the law to insist on imposing some test by which to recognise a firm promise of a gratuitous character. No one can have any complaint to make if the test is in fact somewhat artificial, and the English requirement of a seal is not objectionable on that account. On the other hand, here as elsewhere, the law seems to work most smoothly and does least injustice if it is simple and makes of its formal requirements the slightest possible obstacle, consistent with certainty, to the free exercise of the human will.

Scots law seems to conform better than any other law to this requirement. The average man, in this island at least, thinks twice before he sets pen to paper, and is not likely to commit himself to what may appear to be a promise without contemplating the possibility of being bound by it. But the real strength of the Scottish rule which requires written evidence of a gratuitous promise is that it ensures that the judge shall not be left to infer the meaning of a declaration from the evidence of witnesses, who may, with the utmost honesty, draw unwarranted conclusions from the tone and manner in which it was made, but has only to construe a written document. He is thus confronted with the best, the primary evidence of the alleged promise, the written declaration itself, whereas, if he had to interpret spoken words, he would be interpreting not the facts themselves but the interpretation which witnesses had, consciously or unconsciously, put upon these facts. I cannot imagine a simpler or more efficacious way of solving what is not at all an easy problem.

Scots lawyers usually say that their contract law knows no doctrine of consideration ; and indeed one

can see that there is some justification for this point of view. Most seriously intended promises are now evidenced in writing, whether they are gratuitous or given for a consideration, i.e., are the elements of a bargain. Therefore the natural tendency of a Scots lawyer is not to ask at all whether a promise is supported by consideration, since if it is in writing the question cannot arise. It is only in the rare case where he encounters an allegation that a gratuitous promise has been made orally that the notion of consideration enters his head ; and even in such a conjuncture he is at liberty to put the alleged promisor on his oath and ask him to swear whether or not he ever made the promise. Thus the requirement of consideration is only evidentiary, and it comes into play only on the rare occasions when a promise is not evidenced in writing. Thus one need not be surprised if one finds Scots lawyers denying the existence of a doctrine of consideration in their law.

I think however that they are wrong. I am convinced that the final form of the Scots law owes much to the English doctrine of consideration. Before the nineteenth century the line between contracts needing to be evidenced in writing and contracts which could be proved by any available evidence, was not drawn precisely at the point where it is now drawn.¹⁰ That in the process of rationalisation which the Scots law of contract underwent in that century the line came to be drawn exactly where it is, must, I think, be set down to strong influences from English law, and I have no hesitation in saying that Scots law has now a doctrine of consideration,

¹⁰ J. Erskine, *Institute of the Law of Scotland*, ed. 1873, p. 1114.

looser and more rational than that of English law, but none the less a doctrine of consideration.

That doctrine therefore, exaggerated as some of us think it to be, can be made to serve rational ends. It has also performed, for Scots law as well as for English law, a service of the utmost value.

GENERALISATION OF CONTRACT

Anyone who has the most elementary knowledge of Roman law knows that the Romans hardly developed a general law of contract. They thought in terms of particular contracts such as sale, hire or partnership, and those contracts were limited in number. Although it was possible to make contracts which fell outside these typical figures, a deliberate effort was required ; and indeed the Roman law of the ancient world never accepted the doctrine that any seriously intended promise, however lacking in form, was binding. Although the modern systems based on Roman law have long since passed that stage, and in principle accept the binding force of any seriously intended promise, it seems that modern civilians still tend to think primarily in terms of the particular contracts and are apt to be a little unhappy if they encounter an agreement which does not naturally fall within any one of them.¹¹

No English lawyer is in the least worried if he finds

¹¹ Phanor J. Eder, *A Comparative Survey of Anglo-American and Latin-American Law*, p. 133. Thus one difficulty—albeit a minor one—which many Continental lawyers have found in accepting the trust as an admissible institution has been that, being irrevocable—at least in practice—it cannot be brought within the bounds of mandate, which is in essence revocable and yet is the only civil law contract which at all resembles it.

himself in such a situation ; and the historical reason for his nonchalance is to be found in the doctrine of consideration, or in certain developments which are hardly to be separated from it.

The English lawyer and, if I mistake not, the Scots lawyer too, does not on the whole trouble himself much with the particular pigeon-hole into which a contract goes. He asks first of all, is there a contract, and then, what are its terms ? If the terms expressly agreed on by the parties do not suffice to give him a complete answer to the second question, he tries to find a case dealing with a similar contract, or he has recourse to the customs of the trade in question. Failing all of this he says that such additional terms are implied as are absolutely necessary if the contract is to make sense as a business transaction. It is true that there are, in English law as elsewhere, many stock types of contract, such as sale of land or goods, which contain a full apparatus of terms implied at common law or by statute, but no lawyer expects such typical contracts to cover the whole ground, and there is nothing to prevent new stock contracts from growing up from time to time.

There can I think be no doubt that we owe this way of looking at contract to an accidental development in the old forms of action. Both the Roman law of the Republic and the Early Empire and the old English common law were essentially based on a system of actions. In both the existence of a right was tested by asking whether an action could be brought to enforce it, and there was a tendency to assign to each right which had an easily identifiable, typical source its own specific action. Thus at Rome the buyer had his own

specific action and the seller his. The lessor could not use the seller's action, nor the lessee the buyer's. The only contractual actions of a general character lay upon formal contracts, and the informal contracts were strictly canalised and furnished each with its own special action or actions. Although the Romans gave a very wide scope to each of these stock contracts, and added to them from time to time new informal contracts each with its own actions, they never generalised to any great extent, so that their law remained one of contracts rather than of contract.¹²

Something similar might easily have happened in England, had not the old contractual forms of action been awkward to use.¹³ When it became necessary to sidetrack them it proved easiest, and at the same time sufficient, to treat as analogous to sale all agreements in which one party, as it were, bought the other's promise by giving a consideration for it in the form of money or money's worth or a promise of money or money's worth, and to devise a single form of action for all simple agreements. It was apparently impossible to gather into the fold of a single action all seriously intended promises, and so such promises as could not be regarded as bargained for were left on one side, to be enforced by another action if they were contained in a sealed document. But almost all agreements that are encountered in daily life are bargains, and so the requirement of a consideration left very little outside. On the other hand, the assimilation of all bargains to sales gave

¹² Buckland and McNair, *Roman Law and Common Law*, pp. 154-5.

¹³ See generally Fifoot, *History and Sources of the Common Law: Tort and Contract*.

just enough specific quality to them to enable them to be enforced by a single form of action.

Whether, once the old forms of action were abolished in 1875, and no specific quality was required for any action, there was any need to retain the doctrine of consideration, is a question that must be resolved on other, non-historical and practical, grounds. But it is well to pay honour where honour is due, and this means to acknowledge the great liberating power which the doctrine exercised in the sixteenth century. If I am not greatly mistaken, Scots law has been liberated in precisely the same way. There was a time when the only contracts for more than a very small value which could be proved by oral evidence were contracts with known obligations arising from them, that is to say, contracts belonging to stock types.¹⁴ All others required writing. Under the influence, as I must assume, of the English doctrine of consideration, all bargains have in principle been emancipated from this requirement, and only one slight and scarcely known trace of the old particularity is left behind : the courts may call for written evidence of any alleged contract which appears to them to be of an unusual nature — which seems to be a polite way of telling a litigant not to tell a cock-and-bull story.¹⁵

This generalisation of contract is perhaps the most important special contribution that the common law, as opposed to equity, has made to the theory of contract. It does not go so far as the corresponding generalisation in the civil law, but it has left no inhibitions behind.

¹⁴ Erskine, *op. cit.*, p. 1114.

¹⁵ Gloag, *op. cit.*, p. 196.

STRICTNESS OF CONTRACT LAW

It has been said that contracts are interpreted more strictly in England than elsewhere; and some authorities go so far as to make a clear distinction between English contracts, which are said to be *stricti juris*, and civil law contracts which are said to be *bonæ fidei*.¹⁶ Certainly we have no overriding principle that contracts are to be performed in accordance with the requirements of good faith.

There seem to be two ways in which the obligation of performance may be relaxed. It may be held to be discharged if performance becomes impossible, or if the purpose of the contract is frustrated by events which happen after it is made. Or a person may be made liable for non-performance only if it was due to his fault. English law was once very hostile to any defence arising out of impossibility or frustration. Such defences are now admitted, and it is not easy to exclude the inference that whether an action is to be held to be frustrated depends on the judge's discretion.¹⁷ But our courts are still stricter than in many countries, especially where, as in Germany, inflation has rendered it almost impossible to insist on performance in widely changed circumstances.¹⁸

It is German law too that makes a person liable for non-performance only if he is to blame for failing to perform.¹⁹ Doubtless the promisee does not have to

¹⁶ C. J. Hamson, *The Reform of Consideration*, 54 L.Q.R. 246.

¹⁷ See generally Cheshire and Fifoot, *op. cit.*, pp. 413 et seq.

¹⁸ *Manual of German Law*, p. 61.

¹⁹ *Ibid.*, p. 75.

prove that the promisor was at fault : it is for the promisor to prove the contrary. But the atmosphere is favourable to the development of doctrines which weaken the strict duty to perform. On the other hand, there has never been any suggestion that fault has anything to do with the performance or non-performance of an English contract. It may well be that in certain contracts all that a party promises, expressly or by implication, is to exercise diligence, and in such a case he will be liable only if the promisee proves that the promisor was at fault ; but this is not so much the faulty failure to perform a contract in terms absolute as the unqualified failure to perform a promise to act without fault.²⁰ Here Scots law seems to be imbued with the same spirit as English law.

Perhaps however a more serious difference is to be found in varying modes of interpreting contracts, more especially when they have been reduced to writing. In all countries a court will try to discover the intention of contracting parties and will try to give effect to that intention. It is said that English courts treat the parties as having intended what they have said and therefore construe the words of the contract. It is said, on the other hand, that Continental courts regard themselves as less bound by the actual words which have been used and try to go behind them to the actual intent of the parties. One often hears allusions to our superstitious reverence for words. I doubt whether we can still draw

²⁰ Some French jurists distinguish between *obligations de résultat*, where the promisor guarantees a result, and *obligations de moyens*, where in effect he promises to do his best. The emphasis in English law is generally on the former class.

such a sharp distinction,²¹ though the bias in favour of strictness remains. In any case English judges have not the same means as their Continental brethren of going behind the written word.

English law never admits oral evidence to show that the words of a written contract do not mean what they say, though oral evidence is admitted to show that the parties had not expressed the whole of a contract in writing or had intended to contract with reference to trade customs and usages. However, a party can apply in equity for a rectification of a written contract and he will succeed if he can prove by the strongest oral evidence that it does not properly reproduce the terms of an oral agreement which had been entered into by the parties and which it had been intended to reproduce exactly in writing. There seems to be no doubt that Continental law allows fairly freely the production of oral evidence to explain the meaning of a written contract. But it must always be remembered that in France and in certain other countries of the Continent, although oral evidence can be given, the judges have the greatest suspicion of it and disregard it whenever they can. I suspect that written contracts are handled in France not very differently from the way they are handled in

²¹ The decision in *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works*, [1950] 1 All E.R. 208, certainly is hardly compatible with an exaltation of the letter of a contract at the expense of its spirit; and the House of Lords, in reversing the decision of the Court of Appeal in *British Movietonews Ltd. v. London & District Cinemas Ltd.*, [1951] 1 K.B. 190; [1951] 2 All E.R. 617, while reprobating any suggestion that the courts can exercise any power to 'qualify the absolute, literal or wide terms of a contract', did not conceive that they were in any way upholding the letter of the contract in defiance of what the parties had actually intended.

England, and that for this purpose the Rhine is a much more significant frontier than the Channel. However, I regard this question as extremely difficult and there are few persons whom I would trust to give a correct answer to it.

If the English interpretation of contract is stricter than on the Continent, if we are more careful to hold the parties to exact performance of their contracts according to the written words in which they are expressed, I think we should be rather proud of our system than otherwise. It is always open to the parties to relax their requirements of each other if they wish, but there is a very great deal to be said for having things in black and white if there is a serious dispute. I think that our attitude, of which we shall see more examples in the law of torts, is an expression of our peculiar sense of liberty.

ISOLATION OF CONTRACT

It will have been noted that we keep a contract, once it has been reduced to writing, very strictly apart from any oral evidence of the parties' intentions. A fortiori the common law does not concern itself with the negotiations, once a contract has been made. Except for admitting evidence of relevant trade customs, the law abstracts a contract very sharply from its surrounding circumstances.

It seems that we take more seriously than the French the famous provision contained in art. 1134 of their Civil Code: 'Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites' — 'Agreements legally contracted take the place of law for those who have made them'. We think of the contract as

something resembling a statute in its isolated and binding character, but differing from it in that it has been made by the parties and can be cancelled by their mutual consent, and that it operates only between the parties. Just as an English court must interpret the statute itself without reference to the process of legislation, so it must interpret a contract without reference to the negotiations that preceded it. Moreover, the court is really as little concerned with the actual intentions of the parties as with the actual intention of the legislator : it interprets, in the one case the contract, in the other the statute ; and each instrument possesses, as it were, an objective existence.

We shall see shortly that this way of looking at a contract leads to certain probable conclusions in relation to the law of mistake. For the moment I would like to call attention to two other points : The first is that if one thinks of a contract as being essentially a sort of private law between the parties, it is not necessary that the parties should have settled the terms — it is in fact notorious that the terms are most often imposed by one party on the other on the ' take it or leave it ' principle. Secondly, the abstract nature of English contracts is closely connected historically with the doctrine of consideration. The great competitor of that doctrine is the doctrine of ' cause ', and ' cause ', however one may solve the difficult problem of defining it, certainly implies regard for the circumstances surrounding a contract. The doctrine of consideration, however, is fully satisfied by proof that the promisee has bought the promisor's promise for money or money's worth.²²

²² Eder, *op. cit.*, p. 133.

EQUITY IN CONTRACT

You will notice that the advantages which I regard the English law of contract as having derived from the common law are rather nebulous, and I have been a little hard put to it to make firm distinctions between English and Continental law. On the other hand the contribution of equity is, I think, very clear, and its influence can be traced very well in Scots law. Here English law looks very different from Continental law and is, I think, superior to it. The English law of contract owes several special remedies to equity, which I shall not discuss here, and around them have grown two doctrines which are peculiar to English law. Those doctrines relate to undue influence and innocent misrepresentation.

UNDUE INFLUENCE

No law will enforce a contract the assent to which can be proved to have been extorted by violence or duress. Common law allows the party who has been compelled to enter into the contract to avoid it. It takes, however, a rather narrow view of duress, which it confines to actual or threatened violence to or imprisonment of the victim, his wife or his child. Foreign law throws the net more widely and often relieves a party where there has been lesion, that is to say a considerable disproportion between the value of the performance on the one side and on the other.²³ Here also the common law has occasionally been prepared to take undervalue into account, but only as evidence of fraud. Equity has supplemented the common law in a completely new way

²³ *Manual of German Law*, p. 46.

and to an extent which goes far beyond the protection given by Continental law to a victimised party. Equity says that a person cannot call upon a court to enforce a contract which he has obtained by exerting undue influence over the other party, and that the other party can apply to the court to rescind such a contract. Further, equity presumes that undue influence has been exerted by one party where by virtue of some special relationship or otherwise the other party has been in some way subjected to his power or influence, and in such a case the party who is in a superior position must, if he is to maintain the contract, show that the other party had had the benefit of independent advice. Many persons who stand in a confidential relationship to other persons are included among those who must produce such evidence—for instance, solicitors, doctors, and spiritual advisers. But even where undue influence is not presumed it may yet be proved by the party who wishes to have the contract set aside. This doctrine of undue influence has exerted some effect on Scots law, but the Scottish doctrine may have an independent source and is not strictly in line with English equity.²⁴ The English doctrine has attracted the notice of Continental lawyers, some of whom think it superior to anything that they themselves have got.

INNOCENT MISREPRESENTATION

All laws do their best to penalise a person who has fraudulently induced another person to enter into a contract with him ; the fraudulent party can never enforce the

²⁴ Cf. W. H. D. Winder, *Undue Influence in English and Scots Law*, 56 L.Q.R. 97.

contract against the person whom he has defrauded. But to be fraudulent a misrepresentation must have been made with knowledge at the time it was made that it was false, or recklessly, without any genuine belief in its truth. In other words, a party cannot suffer the consequences of fraud unless he has in one way or another told a lie. All civilised laws also give effect in some cases to simple mistake. They all admit that a party can sometimes say 'I made a mistake and therefore I am not bound'. Only English law interpolates between fraud and mistake a third category known as innocent misrepresentation, and it is an undoubted sign of English influence that this category should be fully accepted by Scots law and the Roman-Dutch law of South Africa. Innocent misrepresentation occurs when one party has induced another party to enter into a contract by representing to him as true something which was false, but which he did not know to be false at the time when he made the representation. In such a case equity says: 'We take our stand upon conscience. Admitted that you did nothing against conscience when you induced the other party to enter into the contract, yet you are acting against conscience when you attempt to hold him to the contract now that you know that your representation was false'. And therefore equity refuses to allow such a person to enforce a contract specifically and rescinds the contract at the suit of the other party. It does not, however, perhaps unfortunately, give damages to the other party as it would have done had the representation been fraudulent.

The law relating to innocent misrepresentation is not yet, as it seems, perfectly clear. In particular, no one

can be quite certain how much authority to attach to a doctrine laid down in 1911 to the effect that rescission will not be granted of an actual conveyance of property as opposed to an agreement binding a party to convey. Perhaps the present position, so far as it can be gauged, is as follows : the courts will rescind a transfer of movables but not of land. But it may be that the courts will, before long, have the courage to overrule the doctrine entirely. ²⁵

As I have already said, rescission for innocent misrepresentation is unknown in Continental systems. How then do they deal with such cases ? The clue to a solution of this problem is to be found in the obvious truth that all misrepresentation, whether fraudulent or innocent, induces mistake, and mistake may be dealt with either as such or by way of the lack of genuine agreement between the parties which results from it, or by way of the representation by which it was induced. Put quite shortly and rather crudely, the difference between English and Continental law seems to be the following. English law on the whole dislikes dealing with mistake as such. It is prepared sometimes to say that a contract induced by mistake is void because there is no genuine agreement between the parties. In such a case it considers as relevant the result of mistake rather than the mistake itself. Or on the other hand, as we have seen, it deals with the misrepresentation which induced the mistake. On the whole the tendency of Continental systems, at any rate of French law, is to attack the mistake, and not to bother so much with the lack of

²⁵ See *Leaf v. International Galleries*, [1950] 2 K.B. 86.

agreement which it has induced, and not at all with an innocent misrepresentation by which it is induced. The result is that Continental law tends to be much more favourable than English law to the party who merely says 'I am entitled to be released from my obligation because I acted under a mistake'.²⁶ English law is very unfavourable to such a plea, but it is on the other hand able to deal with a certain number of the cases under the head of innocent misrepresentation.

Accordingly, if we ask how Continental law deals with innocent misrepresentation the answer will be that either the notion of fraud will be somewhat extended so as to cover them—perhaps against the words of the Code—or the mistake induced by the innocent misrepresentation will be regarded as itself warranting a rescission of the contract. I suspect, however, that there are a number of cases in which an English court would rescind for innocent misrepresentation whereas a Continental court would not rescind for mistake.

Scots law states in civilian terms a rule which is substantially that of English law, namely, that certain types of error which would not of themselves be sufficient to annul a contract may yet be sufficient if induced by the other party.²⁷

The admission of innocent misrepresentation and undue influence as independent concepts by equity ought to have made it clear that we look upon questions of consent differently from Continental systems. The French Civil Code treats of fraud and duress under the

²⁶ Amos and Walton, *op. cit.*, pp. 155-8.

²⁷ Lord Watson in *Menzies v. Menzies*, 1893, 20 R. (H.L.) 108, at p. 142.

general heading of consent. If those had been the only defences which an English promisor could set up arising out of the promisee's conduct it would have been at least excusable in us as English jurists to consider them as affecting consent, but it is evident that equity in giving effect to innocent misrepresentation and undue influence is not really denying that the promisor consented to the proposals of the other party. It has really refused to help the latter and protected the former because it would be unconscionable for the latter to take any advantage from a consent obtained in such a way. This seems to afford a much sounder basis for dealing with all cases where the conduct of one of the parties has been exceptionable at the time the contract was made. It seems better not to talk about vices of consent, for such language suggests that the conduct of such a party should render the contract void. We know that in fact it does not do so. All it does is to make it impossible for such a party or for a person who has knowledge of his conduct to take an advantage from the contract. Thus all that happens is that a disability is created in certain persons and the contract as such is not affected.

MISTAKE

Is it possible to apply equitable remedies to mistake in cases where it has not been induced by innocent misrepresentation? I have already mentioned that equity is prepared in a case where the court is satisfied by oral evidence that both parties intended something other than what has been given written form, to rectify a contract. Can equity go farther and rescind a contract

where although it contains the actual agreement made between the parties, it was made under a mistake? The question is a very important one, as will be seen if the general law of mistake is examined.

MISTAKE AT COMMON LAW

That law is not perhaps entirely consistent, and it is not completely free from doubt. I do not wish to enter upon a controversy at this stage, but I think the following statements would be accepted. First, the common law does not encourage a plea of mistake. No one wishes to allow a party to get out of a contract which has proved unfavourable to him merely by saying that he had entered into it under the influence of a mistaken belief. But, secondly, the common law does in a very few instances allow a party to say that he never really agreed to a contract even though on the face of it he had done so, and in these instances the contract is treated as void *ab initio*, i.e., as though it had never come into existence. Thirdly, there is some doubt what those instances are, and very fine distinctions are sometimes made in coming to a decision: thus the outcome of a lawsuit is very difficult to predict. For instance, it is not always easy to say whether a party who says he was mistaken as to the identity of the other party was really mistaken as to his identity, or as to some quality he was supposed to have, the most important quality usually being that of solvency. If it is also necessary for the other party to be aware of his mistake there is the additional difficulty of determining whether he knew that the other person was mistaken as to his identity or merely as to one of his qualities.

Thus at common law the effect of mistake, if held to be relevant, is to avoid the contract entirely. On the other hand, if it is not held to be relevant, the contract stands in its entirety, unless, that is, it can be rescinded for misrepresentation. These are often very crude solutions which fail to do justice between the parties.

MISTAKE IN EQUITY

What we really want is some method of dealing with problems of mistake which will treat all apparent agreements as valid contracts, will allow a mistaken party in a proper case to apply for rescission to a court, but will also allow the court to do substantial justice between the parties by putting a successful applicant on terms : that is to say, the court should be able to say to the mistaken party 'We are prepared to excuse you from performance of this contract as it stands, but only upon the terms that you shall either compensate the other party in whole or in part, or that you shall offer him a new contract upon reasonable terms, if necessary to be approved by the court'.

It does not seem at all impossible for the courts to adopt some such solution by returning to the fountain-head of equity, that is to say, to the notion of conscience as the basis of all equitable jurisdiction, and to decide that wherever it would be against conscience for one party to hold the other party to a contract which he entered into under a mistake then some remedy must be given, but at the same time to say that the mistaken party must not act against conscience either. There are old cases in the middle of the eighteenth century which seem to allow the remedy of rescission where a mistake

was common to both parties, and the technique of putting a successful party upon terms has a precedent where the other party is allowed the alternative of rectification or rescission.²⁸ The superiority of the equitable remedy of rescission over the common law solution, which involves an absolute avoidance of the contract is best shown in cases where an innocent third party has acquired goods from a person who has himself acquired them in virtue of a contract into which the original owner of the goods had entered under the influence of a mistake. If the mistake makes the contract void, as will always be the case where it operates at Common Law, then the contract is treated as though it had never existed at all and hence the party who acquired the goods under the contract is treated as though he never got a title to them. As he never got a title he could pass no title to the person who acquired them from him even though the latter was in perfect good faith. On the other hand, if the contract is rescinded for mistake, the rescission takes effect only from the moment that judgment is given in the action, and the title acquired by the innocent third party is not affected retrospectively. This is surely a fairer solution of the problem.

The equitable treatment of mistake was brought into question in one of the most controversial cases of recent times, *Solle v. Butcher*.²⁹ Unfortunately the decision of the Court of Appeal in that case was only by a majority and of the two judges who decided in favour of

²⁸ *Garrard v. Frankel* (1862), 30 Beav. 445.

²⁹ [1950] 1 K.B. 671.

the mistaken party only one decided the case according to equitable principles. The other decided that the contract was void at law, but he then—somewhat illogically as it would seem—proceeded to put the successful party upon terms to offer a new lease to the other party. However the lack of logic is perhaps cured by the fact that the successful party had himself offered to grant a new lease if he were released from the contract he had entered into under a mistake. The case is evidently most unsatisfactory authority for any proposition, but it is to be hoped that it will be accepted as the starting point of a new development by which an increasing severity in the Common Law treatment of mistake will be balanced by a treatment in equity which will depend very much upon the view taken by the judge of the moral conduct of the parties and will include a power of putting a successful party upon terms.

The question arises whether too wide a discretion will be committed to a judge if he is allowed to weigh up the conduct of the parties and to put a successful party upon terms. There can be no doubt that in general English judges do not welcome opportunities for exercising discretionary powers. They much prefer to find the facts according to the evidence and to follow pretty closely older authorities in deciding questions of law. Indeed they are probably less inclined to exercise discretionary powers than the public is to commit such powers to them. They think that the law should be certain and should depend as little as possible on the free choice of any human being. And indeed it is almost a maxim that it is better for the law to be certain than to be just.

PROSPECTIVE AND RETROSPECTIVE LAW

But this maxim ought not to apply throughout the whole range of a legal system. There are parts of the law that are essentially prospective in the sense that they exist for the purpose of telling people how to act and how not to act, and for the further purpose of assuring them in the most certain manner possible what will be the effects of particular lines of conduct. There are, on the other hand, parts of the law which are essentially retrospective in the sense that they exist for the purpose of cleaning up messes. The former type of law finds its highest point in the law of conveyancing, where it is most essential that the experts in regulating the transmission of property shall know exactly what are the capabilities of the particular tools they are using. It also governs the drafting of contracts and company documents. There is little doubt that in all these cases the law improves by being laid down in ever greater detail and that if a court has made a mistake in interpreting a document it is much better for it to adhere to its mistaken interpretation than to try to correct it in a future case. The strict doctrine of precedent is at its most useful where people are in the habit of regulating their business upon the faith of past decisions.

On the other hand, there is by no means the same need for certainty or for a strict adherence to precedent where the law is not essentially prospective ; and the law relating to what may be called in the very broadest sense of the term accidents is not prospective. What has happened in these cases is that something has gone wrong and that the court is faced with the problem how

to readjust the relations between the parties involved. Suppose there has been a motor accident. Is the loss to lie where it falls or is one party to be allowed to claim damages from the other, and if so on what scale? Even in these cases an element of certainty is required because one does not usually want to tempt parties into litigation where, if the law is reasonably certain, they will be able to adjust their differences without recourse to a court. On the other hand there is by no means the same need for certainty since, to take an obvious example, no man ought consciously to drive his car on the faith of the existing law relating to motor accidents.

Now this type of law ought to govern not merely what we call torts but also the whole part of the law of contracts which comes into play when something has gone wrong otherwise than where there has been a breach of contract by one of the parties. There seems to be no good reason why it should not be left to the courts to decide, by the exercise of a fairly free discretion, whether a contract should be rescinded for mistake or declared to be discharged by frustration. We are gradually coming to the view that where a contract is discharged by frustration it is essentially by the operation of a discretionary power vested in the judge. It is even more certain, for it is so declared by Act of Parliament, that the consequences of frustration are to be determined by the judge's discretion.³⁰ Why should not the same rules be applied not only to determine whether mistake shall be held to be operative but also to decide what are to be the effects of operative mistake. The essential similarity

³⁰ Law Reform (Frustrated Contracts) Act, 1943.

between the two situations is to some extent masked by the fact that the books usually treat of mistake in close connection with the formation of contract, and at some distance from discharge of contract ; and there is a natural tendency to think that anything remotely connected with the formation of contract should be a matter entirely for the parties and not for the judge. But in actual fact no one makes a contract upon the faith of the continued existence of a particular doctrine of mistake, or indeed of misrepresentation, whether fraudulent or innocent. These are all, like frustration, cases where something has gone wrong, and it is essentially a question for the judge to prescribe what is to be done in the circumstances.

EXCESS OF LOGIC IN ENGLISH LAW

The Common Law doctrine of mistake discloses a fault in the English law of contract which is not usually recognised as such. It is usually regarded as illogical but on the whole giving good results. I believe that here at any rate the truth is the exact reverse and I am reminded of a remark made by a member of one of my audiences. He had been a judge in Germany and had afterwards studied law in Italy, and he uttered a sentiment which I was just ready to accept as true, namely, that where English law seemed to go wrong it was nearly always through an excess rather than a defect of logic. I believe that the present common law doctrine of mistake is thoroughly logical and bad. Changes along the lines that I have suggested would perhaps introduce a line of approach just as logical and far more rational.

CONTRATS D'ADHÉSION

Perhaps I ought to end my characterisation of contract by one remark. On the whole one is not accustomed to regard the United States as a country where there is much solicitude for the weak individual in face of powerful interests, and one expects to find English law more benevolent than American law. It comes therefore as something of a shock to find that as early as 1873 the Supreme Court of the United States decided that a railway company which enjoyed something of a monopoly of transportation could not contract out of its liability for damage caused to a passenger by its own negligence or the negligence of its servants³¹; whereas even to this day at common law there is nothing to prevent such a course in England. In certain cases such exoneratory clauses have been outlawed by specific Acts of Parliament, but the most that the courts have actually decided at common law is that the company must give reasonable notice of such clauses to the other party to the contract. This is all very much connected with a disinclination on the part of the courts to treat contracts as void on the ground that they are oppressive or against public policy. Perhaps if the cases had arisen for the first time in the present century the decisions would have been different, for in more recent times the courts have shown themselves extremely hostile to clauses which appear to them to be in restraint of trade, especially where an employer attempts to restrain an employee from competing with him after leaving his service. But the problem of exoneratory clauses is only part of a

³¹ W. L. Prosser, *Handbook of the Law of Torts*, p. 381.

much wider problem which has long been stated by French jurists under the head of *contrats d'adhésion*, that is to say, of contracts in which one of the parties is in a position to say to the other 'Take it or leave it'.³² There are obvious objections to a doctrine which would prevent parties from contracting out of common law liabilities. For one thing it might tend to raise prices. For another it would present no inducement to a party to substitute for an obligation he would fall under at common law, another obligation which might on balance be more favourable to the other party. But the present position where the drafting of the terms is in practice left entirely to one type of party which always has superior bargaining power, is not satisfactory.

³² Amos and Walton, *op. cit.*, 149.

PROPERTY

PROPERTY

THE analytical jurists of the nineteenth century and those who spoke to the public about the law always apologised for the state of the English law of property, and more particularly real property, that is to say the law relating to property in land. There were two special reasons for this attitude of mind. In the first place the law of real property had been developed to suit the needs of the nobility and the great landed gentry, whose settlements had become instruments for withdrawing land from the free circulation of the market. The conveyancers had bent their efforts in order to render land as far as possible inalienable, and it was not always remembered that they had produced something of a counterpoise by inventing methods whereby settled land could be rendered alienable for specific purposes by the person in actual possession. Thus the policy enshrined in real property law was suspect, even though England, with its tendency to keep land together in large aggregations, contrasted in some ways favourably with the minute subdivision which seemed inseparable from the current arrangements in France. The jurists were inclined to contrast the stiffness of English real property law with what they conceived to be the suppleness of the civil law.¹

¹ By the time the later jurists were writing, many defects had been, or were being, removed; but they could not escape from the mental atmosphere of the time when they were learning their law. Moreover, Markby never really brought the later editions of his *Elements of Law* up to date.

In the second place the analytical jurists had all received some training in Roman law, and some of the more famous of them, in particular Austin and Holland, had either been trained in Germany, where the study of Roman law was pursued to the greatest effect in the nineteenth century, or had at least a considerable knowledge of German legal writings. Now the Roman law of property is remarkably, not to say deceptively, simple. It contains very few complications, and it seems at first sight to contain all the different notions which are necessary for a system of land holding and no more. Certainly to a person brought up in the ideas of Roman law the English law of real property appeared extraordinarily complex. It was a veritable jungle of concepts, many of which seemed to be merely the doubles of other concepts, and in any case to be unnecessary.²

The nineteenth-century jurists had therefore every excuse for denouncing the English law of real property as it then was, and it is not surprising to find that they were for the most part blind to its real merits. Now that Parliament has, in the great property legislation of 1925,³ enormously simplified this branch of the law, its merits have begun to stand out, and I hope to convince you a little later on in this lecture that it is not only one of the finest parts of our law, but that in its main principles and structure it is superior to all foreign laws dealing with this subject.

The nineteenth-century jurists did not criticise so

² See especially Markby, *op. cit.*, pp. 166-173.

³ There are seven Acts, most of which are fully discussed in all general books on real property law. I do not give authority for most of the statements on that law which occur in this lecture. They can be found, in one form or another, in any of the books.

severely the law relating to property in movable things, but they disparaged it in comparison with the more simple and, as it would seem, more logical arrangements on the Continent. Here, too, time has brought changes, not so much in the law itself, which has indeed altered very little, but in our way of looking at it, though here perhaps the change has taken the form not so much of enhanced appreciation of English law as of a recognition that Continental law is not quite so perfect as we were inclined to think it.

What I have said suggests that the laws of real and personal property, that is to say the laws relating to land and to movable property respectively, are entirely divorced from one another : they certainly had not much in common in the last century. The distinction was one of the features which called down upon English law the fiercest denunciations of the jurists and, indeed, for the most part it had become quite unjustifiable. Here again there was a tendency to contrast the disorderly English law, with its excess of distinctions, with the logical simplicity of Continental law. Actually Continental law was not always quite so simple as appeared on the surface, but it was much simpler than English law. This fundamental distinction, however, between the laws of real and personal property was abolished by the great property legislation of 1925, though unfortunately it still survives in the interpretation of wills.

ABSTRACT AND LOGICAL CHARACTER OF REAL PROPERTY LAW

I have one more prefatory remark to make before I descend to detail. English property law, for the most

part, differs very remarkably in its general character from most other parts of English law. Continental lawyers are apt to characterise English law—and in this way they are merely following our teaching—as illogical, disorderly and empirical. It has no clear concepts. Its concepts, such as they are, seem to have no defined boundaries. They have a sort of hard inner core and from this they seem to spread so as to take up such territory as may seem to need their services. Accordingly their character seems to change from time to time according as they spread or are restricted in scope. Then again they seem to have no permanent relation to each other. On the whole the generalisations which they represent are rather limited, being what the practitioners and judges seem to require at any given moment. Since the academic lawyer has had very little influence, there has been very little tendency to construct wider generalisations covering the narrower generalisations which are all that practice requires. One result of this intellectual lethargy, if it was such, is that there are a tremendous number of loose ends. Considerable portions of the law can be arranged, as the late Sir William Holdsworth once said, only in alphabetical order.⁴ No one has tried seriously to classify the law so as to leave nothing over ; for the general schemes evolved by the analytical jurists of the nineteenth century never contain enough detail to be of real interest. On the other hand English law in general is held—and probably with justice—to possess the great virtue of lending itself to experiment.

⁴ 39 L.Q.R. 37-9.

Now the law of property, and more especially the law of real property, presents in almost every respect a marked contrast to the rest of the law as so described. It is logical and orderly, its concepts are perfectly defined, and they stand in well recognised relations to one another. It is no longer easy to make any remarkable inventions, though new combinations of concepts are constantly being worked out. Above all, this part of the law is intensely abstract and has become a calculus remarkably similar to mathematics. The various concepts had, and still have, when properly understood, a very necessary relation to the economic facts of life, but once created and defined they seem to move among themselves according to the rules of a game which exists for its own purposes. So extreme are these various characteristics that they make of this part of the law something more logical and more abstract than anything that to my knowledge can be found in any other law in the world. More than anywhere else we seem to be moving in a world of pure ideas from which everything physical or material is entirely excluded.

REAL AND PERSONAL RIGHTS

The Romans made a very clear distinction, which in their best days was absolute, between real and personal rights. It was one thing to say 'I own this thing' and something quite different to say 'Marcus owes me this thing'. In the former case my right was absolute, and was thought of as creating a relation between me and the thing—in Latin *res*—and hence it was said to be 'real'; in the latter case my right was only against the one person Marcus, and hence it was called 'personal'.

The distinction was inherited by all the countries which received Roman law, and it came to be considered an essential part of the grammar of the law : all rights had to belong to one class or the other ; there could be no hybrids.

The distinction had a rational basis, which has always brought it back into favour if by any chance it has been neglected ; for there are good practical reasons for differentiating between rights which must be respected by all the world, the principal of them being property rights, and rights, such as those which arise out of contract, which are the concern only of those by whom and in whose favour they have been created. Sometimes, indeed, the distinction is obvious and need not be laboured. If X promises to sell Y a particular horse, obviously Y cannot call upon Z to deliver it to him, should he be the present owner of the horse. If X cannot make Y owner he breaks his contract with him and is liable to pay him damages. The personal right created by the contract between X and Y cannot affect Z's real right to the horse.

A slightly less obvious example is the following : Suppose A, on buying a horse from B, promises B that he will not resell it to anyone without giving him the first refusal. If A now sells and delivers it to C, he clearly breaks his contract with B and is liable to pay him damages, but one could not expect C to be liable also, since he was not a party to the contract. But is the transfer to him valid, so as to make him owner of the horse ? The answer to this question depends on whether A, in promising B the first refusal, created a real right in his favour or merely a personal right good only against himself.

PROPERTY AS MERCHANDISE

Now if the question has to be put in that unqualified form, if the right has to be put in one class or the other and no hybrids are allowed, practical considerations make it almost inevitable that it will be regarded as merely personal. Otherwise no one can safely buy anything from anyone else for fear that sooner or later a third person may prove that he had a right to prevent the property in it from passing to him : the buyer cannot be expected to investigate the seller's contractual relations with other persons. The most he can be expected to do is to investigate his title. Some laws go so far as to confer, in principle, on a mere possessor, who is not also owner, the power to pass the title in goods in his possession to a person who buys them in the belief that the possessor is entitled to sell them, leaving the owner to sue the possessor for damages.⁵ Our law does not go so far, but, like all other laws, it does not favour the creation of limited real rights over movable property.

The other great reason for this attitude is that it does not like any arrangement which will make goods inalienable, or even restrict their alienation to any great extent. The Romans felt the force of this argument even more strongly than ourselves, and so in very early times the only genuine real right they admitted was ownership, which was held to rest on an absolute title and to confer absolute power to enjoy the thing in question,⁶ and to alienate it to someone else. The only restriction on freedom of alienation was intended to secure that

⁵ E.g., French Civil Code, art. 2279. See further pp. 101, 128 below.

⁶ Subject to very limited exceptions established by public law. Cf. W. W. Buckland, *Text-book of Roman Law*, p. 187.

freedom: the only interest that could be alienated was full ownership, which carried with it full freedom of alienation. Nothing less could be carved out of the ownership and alienated to someone else. The only exception to this principle was that an owner of land could confer on another owner certain rights, such as rights of way,⁷ to be exercised over his own land in order to perfect the enjoyment of the other owner's land. But such rights were really a part of a *modus vivendi* between the use and exploitation of the two plots of land, and might even be regarded as extensions of one plot over part of another.

The result was that the ownership of a thing was virtually identified with the thing itself.⁸ The only possible division of ownership was a division of the thing itself, provided it was physically divisible, though two or more persons might postpone division and hold the thing in common.

PROPERTY AS ENDOWMENT

Most movable things are so essentially perishable that they may fairly be treated as the objects of use or consumption or as merchandise to be bought and sold at will. But certain things, such as land, have a permanence which suggests their use as endowments over a long period of time. The Romans felt the force of this suggestion first when they wished to provide a life interest for

⁷ The usufruct, and other forms of what we should call limited ownership, were invented later. See p. 83 below.

⁸ This led to confusion in theory also. See Gaius, *Institutes*, II, 12-14. His distinction between corporeal and incorporeal things finds a parallel in the equally illogical distinction of English law between corporeal and incorporeal hereditaments.

a widow. They accordingly allowed an owner to give another person the right to use and acquire the profits of a thing for a period not exceeding the lifetime of that person. This very important right they called a usufruct: it plays a prominent part in all the laws descended from Roman law.⁹ It was real, in the sense that anyone who acquired from the owner the thing over which such a right existed was bound to respect the right. In other words, the existence of the right in effect cut down the content and value of the owner's own right, and it was only this reduced content and value that the owner could alienate. But a lessee who took a lease of land for a term of years had only a personal right against the lessor.¹⁰

In Roman law—and in this Roman law has been followed by most systems outside the common law—the number of admissible real rights was strictly limited, whereas the variety of personal rights which could be created by contract was virtually unlimited except by rules forbidding the formation of contracts for purposes

⁹ The right was sometimes reduced in content, by excluding the acquisition of fruits.

¹⁰ Hence, if he was evicted by a person who had purchased the land from the lessor, he could only sue the lessor for damages for breach of his warranty of quiet enjoyment. This is not true of the modern civil law: nowhere now can he be evicted. But he is still thought to have only a personal right of a contractual nature, though in Germany this has at last ceased to have any real meaning. In France, however, whatever be the case in Germany, the fact that his lease is not a real right makes it incapable of being mortgaged. See *Manual of German Law*, p. 89; Amos and Walton, *op. cit.*, p. 104 *n.* In England the lease has had a completely different history, and ever since the end of the fifteenth century has conferred a real right in the fullest sense of the term. See T. F. T. Plucknett, *Concise History of the Common Law*, 4th ed., pp. 540-3.

which were illegal or immoral or against public policy. Moreover, real rights of the nature of usufruct were never properly fitted into the logic of the law of property. This logic was even more obviously neglected when testators directed¹¹ that certain things should not be alienated but should be passed on intact from one heir to another for several generations ; for although each heir in his turn was regarded as full owner, he had no right of alienation.

The idea of using land as an endowment, which had, as we have seen, been only grudgingly allowed in ancient Rome, became all-important in the Middle Ages, and has never ceased to play an important part in English life. We have, moreover, so worked it into our law of property that it may even be said to dominate it. It started as an essential part of feudalism.

We need consider only three kinds of endowment. First there is the kind of endowment which alone is strictly feudal. This existed for the purpose of maintaining a permanent army on the land and took the form of giving to members of each rank of the army permanent interests in the land which they held of their superior officers, whilst at the same time providing for the cultivation of the land by free or unfree tenants who performed agricultural services. Secondly, a family could be endowed with land by ensuring that the land should pass intact to the eldest son in each generation, smaller interests in money being given to other members of the family for a single generation. The difference

¹¹ By fideicommissary substitution.

between these two types of endowment may be expressed as that between a principle of simultaneous and a principle of successive endowment of several persons from the same land. The former principle is worked out as a theory of tenure, the latter as a doctrine of estates. The former needs no further elucidation : it now applies only sporadically and has lost almost all its former importance. The latter, which is not feudal, though often called so by those who dislike it, will be elucidated later.

A third kind of endowment may be described as an endowment, not of persons, but of purposes. Sometimes an institution is established, like a college, or enriched, like a church, for certain purposes ; and then the purposes may become somewhat vague, the institution being turned into a corporate body and endowed as such. Sometimes there is no actual institution, and the purpose is endowed, *qua* charity, by a grant of property to trustees for strictly defined charitable purposes.

THE ANALYSIS OF OWNERSHIP

Now if, as was the case in the Middle Ages, land is regarded essentially as an object of endowment and not as merchandise, it is obvious that there can be no ownership in the Roman sense of the term. In order to make sense of the system and formulate a grammar by which it can be expressed and understood, real rights must be very different from such a crude, isolated, but necessarily complex, notion as the ownership of Roman law : they must be the products of an analysis, which in the end is bound to become subtle and complete. The analysis became much more subtle and complete here than on

the Continent because here there was no reception of Roman law to prevent its being worked out in the most ruthless manner.

Let us consider the various ways of analysing ownership.

One way is to distinguish three rights or powers. The full owner of a thing has, first, the right to recover the thing from anyone into whose possession it has come. This he does by virtue of his title to the thing. Secondly, he may dispose of it either for a time or permanently. In other words, he has the power of management, including the power of alienation and the power of destruction. Thirdly, he may enjoy it by using it and by taking its fruits or produce. In other words, he has the income arising from the thing, or the right of beneficial enjoyment. This form of analysis is therefore into title, capital and income.

A second analysis, which cuts across the former, relates to tenure. I shall neglect it, since the only relationship of landlord and tenant still subsisting arises out of leases and tenancy agreements, which are only a pale reflection of feudalism.

ESTATES

A third analysis has reference to time. This is the most difficult to understand both for the layman and for the student who is beginning to read law.¹² If, like the Romans, you admit very grudgingly interests which are limited in time, such as usufruct, you hardly need to

¹² An excellent account will be found in Professor A. D. Hargreaves's chapter 2 on 'The Doctrine of Estates before 1926', in the first volume of *Stephen's Commentaries on the Laws of England*, 21st. ed.

analyse in respect of time. You can say that the owner has the thing, but the usufructuary has a right over something belonging to the owner. In England, however, the landed classes have always had the desire and the power to settle their property for a long time ahead, and the superabundance of interests which could be created made it necessary to devise a special form of logic or grammar according to which they might come into existence and then move amongst themselves. Above all, it appeared impossible either to single out one of a number of successive holders of land as owner, or to give the title of owner to all of them.

The solution was to interpose an abstract entity between the holder or holders of land and the land itself. To this entity was given the name 'estate in the land', and the right of ownership was attached to the whole of this estate in the land or to successive slices which are carved out of it and are themselves called 'estates'. Such estates may be of different durations and may be strung out one after another in a temporal series.¹³ But the important thing to realise is that although they will, as lawyers say, fall into possession one after another, so that one person will have to wait to enjoy the land itself until another has ceased to enjoy it, each slice exists here and now as an estate which has a present value capable of actuarial calculation and can be freely alienated.

Thus a further analysis discloses two ways of classifying estates, the first according to their duration and the second according as they carry with them a right to

¹³ Pollock and Maitland, *History of English Law*, II, 10 : ' Proprietary rights in land are, we may say, projected upon the plane of time '.

immediate possession of the land—in technical language, are vested in possession—or only an expectation of such possession in the future.

The estate which has the longest duration is the fee simple, which is now in almost every case perpetual and is equivalent to full ownership. A life estate endures only so long as the person to whom it is given lives : there can be no succession to it. A special place has to be found for the fee tail—an essential part of the aristocratic family settlement popularly known as an entail—which if left alone will descend to one eldest son after another in the direct line until the line runs out, but which, as the result of a very strange historical development, can usually by a special procedure be turned into a fee simple. Moreover, in contrast to all of these estates which are of indefinite duration—for although we know that a life estate must come to an end, we do not know when—leasehold estates are of fixed duration, say for a term of five years, or can have their duration fixed by the parties, by giving notice on one side or the other.

An estate which entitles its holder to immediate possession of the land is said to be vested in possession, whereas an estate which gives him only an expectation of possession is said to be vested in interest. Thus, if Blackacre is given to A for life, with remainder to B in fee simple, A has a life estate in possession, whereas B's right to possess is postponed ; but since B is an ascertained person who is ready to take the land if A dies, the remainder, as his right is called, is already vested in him, and he has a present estate in Blackacre.

But a person can direct that the land shall go in the future to a person whose identity is not yet determined

or who is to take it only on the happening of some event which may perhaps never happen, or who is not yet even in existence. For instance, Blackacre may be given to A for life, remainder to the eldest surviving son of X, who already has children ; or to Y when he reaches the age of twenty-one ; or to the eldest son of Z, who is still a bachelor. All these remainders depend for their coming into effect on a contingency, the ascertainment on A's death of X's eldest son, Y's reaching twenty-one, and Z's marrying and having a son who survives A ; and accordingly the remainders are said to be themselves contingent. Since there is no ascertained person who can have them when the life estate is given to A, they are not vested even in interest and so are not strictly speaking estates. They have no actuarial value. Such contingent interests are extremely common.

A full statement of the law would require a description of other types of analysis.¹⁴ But this will suffice for our purposes.

It may fairly be said that our real property lawyers discovered the ultimate products of analysis. This would of itself have been merely proof of their quality as analytical jurists, and would not necessarily set them above the best analytical jurists elsewhere. What is much more important is that all these ultimate products, these elements or component parts, have actually been disengaged in practice and combined together in innumerable ways to form complex wholes of a variety and an originality that would have been quite beyond

¹⁴ E.g., the various ways in which several persons can hold the same land at the same time, as joint tenants or tenants in common.

the powers of either the Roman jurists or their Continental successors.

It would, indeed, be incorrect to say that these component parts are not to be found elsewhere. In German law, for instance, a testator may appoint several heirs in succession to each other, and so create interests which are comparable in many ways to our life interests and remainders; but these arrangements are confined to the law of succession.¹⁵ The French law regulating the proprietary relations between husband and wife contains several ideas which correspond to parts of our law of trusts, but they are not found outside this branch of the law.¹⁶ The other great feature then of this analysis is that it is completely generalised. The component parts which it has disengaged can be used wherever they are found to be useful, for the regulation of succession after death, or in order to make settlements *inter vivos*, whether upon marriage or for any other purpose.

We have seen that the Roman law of property was characterised by the extreme poverty of the concepts it admitted, in contrast to the law of contract, which accorded the utmost liberty of invention consistent with respect for morals or the fundamental policy of the law. The English law of real property always worked with a generous apparatus of concepts, though at one time it hardly permitted the invention of new concepts, and regulated the movements of those which already existed by a grammar of great technicality and strictness. The admission of new concepts at a later date¹⁷ added to the

¹⁵ *Manual of German Law*, pp. 193-5.

¹⁶ E.g., the *remploi*. See Amos and Walton, *op. cit.*, p. 285.

¹⁷ By the development of the medieval use, the Statute of Uses and the introduction of the modern trust.

complexity of the system without diminishing either its technicality or its strictness, so that by the second half of the eighteenth century the discussion contained in such a classical book as *Fearne on Contingent Remainders*¹⁸ resembled a treatise on the higher mathematics. The system had indeed become too luxuriant and needed pruning. After a century of tinkering, it was drastically simplified by the great property legislation of 1925; but the result has not been to assimilate it to the Roman or Continental law of property. One part of it has actually been put into a strait-jacket perhaps even tighter than the Roman, but another part is almost as free as the law of contract.

LAND, THE MARKET AND THE FAMILY

It will be remembered that if land is to be a fully marketable commodity, the ownership should be unlimited and undivided, so as to enable a single person or closely associated group of persons to give the full ownership, the land itself, to a purchaser with the least amount of trouble to both parties. Considered as an endowment, it should be capable of division into various interests over a considerable period of time. These purposes may seem to be incompatible; yet the legislation of 1925, which in great part merely simplified and rendered more elegant a regime introduced in the years from 1882 onwards, has effected a reconciliation between them. This result has been achieved by a thorough-going application of the distinction between two aspects of ownership, the beneficial interest, which consists of

¹⁸ First published in 1772: tenth and last edition 1844.

the right to enjoy the income of the property, whether in money or in kind and for a shorter or longer period, and the power of management, which includes the power to defend the title and the power to dispose of the property temporarily by way of lease or mortgage, or permanently by way of sale or exchange. The latter is called the legal estate in the land, the former the equitable interest ; and the holder of the legal estate is a trustee who holds it in trust for any beneficiaries there may be who have equitable interests.¹⁹

If we leave on one side certain survivals of an older mode of thought, which could easily be described in different terms,²⁰ equitable interests are all now, in the technical language of the law, overreachable. This term requires explanation.

An overreachable interest in a particular plot of land is in essence an interest in a capital fund invested for the time being in that plot of land. So long as it is so invested the person who has the interest is entitled or will probably be entitled to the income from the land, and to use the land itself ; but he cannot complain if the investment is varied by a sale of the land and a reinvestment of the proceeds in some other land or in other trustee securities. All he is really entitled to is to draw the income produced by the fund now or in the future, and to have the fund properly administered. The land is therefore vested in trustees, who hold the legal estate, and there are of course

¹⁹ There are two distinct techniques, the strict settlement and the trust for sale, which are explained in all the general works on real property law. What I have expressed, perhaps a little loosely, applies to both.

²⁰ Such as restrictive covenants and mortgages by deposit of title deeds.

technical safeguards against wasting the fund ; but the trustees can sell the land and a conveyance by them 'overreaches' the equitable interests, that is to say, lifts them from the particular plot of land and attaches them to the proceeds of the sale, whatever the form the reinvestment may take.²¹

This technique evidently allows a settlor to reconcile the two apparently irreconcilable impulses, to endow a charity or successive members of his family whilst at the same time keeping the land itself as a marketable commodity.

Moreover, it may be the policy of the law to insist on making the landed investments of endowments over-reachable on the ground that all land should be freely marketable. The technique I have just described makes that possible, though the legislature may not choose to apply it for that purpose.

It did so choose in 1925. It enacted that only two estates in land, the fee simple absolute in possession and the term of years absolute could henceforth be legal estates, and so secured against being overreached. The former is what the layman calls ownership of the land, and implies full powers of management and alienation. The latter comprises leases and tenancies of a similar kind. These estates may be made overreachable if the person creating them so wishes : he can, in the language of the law, create an equitable fee simple or term of years if he wishes. But they can exist as legal estates and their holders can then insist on retaining them in specie.

²¹ Strictly speaking, the term 'overreaching conveyance' applies only to the strict settlement, but my general use of the term is convenient and common.

In addition to these two admissible legal estates there are also certain legal interests in land, the most important of which are mortgages and easements such as rights of way.

All other estates and interests, such as life estates, estates tail, and all future estates and interests such as remainders, were made equitable interests and so over-reachable. Thus the 'doctrine of estates' was, as it were, pushed back into equity.

What is the rationale of the distinction between interests which can and interests which cannot be protected against overreaching? The point is hardly, if at all, discussed in the books, but a rapid examination makes it clear that, with the exception of the fee simple (which obviously must be permitted to exist as a legal estate, otherwise the whole system would be without a foundation and no land could be managed or alienated), the permitted legal estates and interests are all such as have relation to the land itself and could not serve their essential purpose if transferred to the proceeds of a sale. A tenant farmer cannot plough up and sow his seeds in a capital fund, which may at any time take the form of government stock or shares in a public utility, or exercise rights of way over such a notional entity. Doubtless the legislature could, if it had wished, have insisted that mortgagees should submit to the overreaching of their mortgages, but that was felt to be inadvisable, since the maintenance of credit seems to demand that a mortgagee shall be able to choose his own security and to insist that its specific form shall rest unchanged. The 1925 legislation also left standing a large number of permanent

burdens on land in the nature of rentcharges. These however become progressively less burdensome with successive falls in the value of money. The most unpopular of them, tithe rentcharge, was abolished not so very long ago.

The rigour with which the legal estates were regulated in 1925 is very noteworthy, for all family interests have, as it were, been taken off the land itself and have become interests in a notional entity, a capital fund. The solution is far more radical than any that have been attempted elsewhere, for everywhere except in England and Wales, a usufruct, or life interest, can be constituted in land so as to fetter the free alienation of the land by the owner, and indeed in France the immovables comprised in a wife's *dot*, an institution which is in many ways assimilated to usufruct, are expressly made inalienable.²² The odd thing is that the French are familiar with the idea of a capital fund, which they call a *patrimoine*,²³ and they give the name *subrogation réelle* to the process of substituting one specific object for another as a component part of the fund, in other words, 'overreaching'.²⁴ But they make very little use of either idea outside the proprietary relations between husband and wife.

We have therefore been far more ruthless than even the Romans in making land freely marketable, and we have been able to be so because we have detached the management, including the alienation, of land, from the beneficial interest in it. Of course the latter is not always used for endowments, whether of charities or of families.

²² Amos and Walton, *op. cit.*, p. 300.

²³ German *Vermögen*.

²⁴ Amos and Walton, *op. cit.*, pp. 16, 298.

There is nothing whatever to prevent the owner of the legal estate from enjoying the full beneficial interest. After the social changes which have taken place in recent years, there must be much land that is free from equitable interests and held by persons who have both the legal and the equitable fee simple, though in many cases they have let the land out to leasehold tenants or have mortgaged it.²⁵

PERPETUITIES

Once we have removed equitable interests, which are mostly in the nature of family endowments, from the land itself, there is no reason to limit the variety of types which they may assume. On the contrary, settlors may be allowed to enjoy the full freedom which is enjoyed by persons entering into contracts. There must however be some limit to prevent a settlor from determining the devolution of the capital for an unduly long time. The 'dead hand' is still to be feared, even if not so much as where the alienation of the land itself is concerned. Accordingly the so-called rule against perpetuities still applies to equitable interests. That rule applies only to contingent interests and says, in substance, that if a settlor is trying to create such an interest he must be able to say at the moment the settlement starts to operate that the identity of the person or persons to be entitled to it will be known, and that they will be fully qualified to take it, within a period called the perpetuity period, which is made up of the lives of specified persons alive

²⁵ E.g., to a building society.

at the time the settlement starts to operate plus twenty-one years.²⁶ In other words, it must be certain from the start that the contingent interest will become a vested interest within the perpetuity period, or it is void *ab initio*. It is not necessary that the persons entitled shall actually get possession of the property before the end of the perpetuity period, so long as they are ready to take it should all prior interests have ceased to exist. The rule works well on the whole, though in exceptional cases it may render interests void which one would not expect to be too remote, and on the other hand it is possible to think out bizarre examples where the equitable interest may be validly kept divided for an astonishingly long period. But the worth of a rule should be tested rather by its application to ordinary cases, and on the whole the rule against perpetuities puts a reasonable curb on the possible eccentricities or 'posthumous avarice' of persons trying to endow their families. A corresponding rule prevents unreasonable accumulations of income.

I regard this wholesale combination of a rigorous regime for the land itself with an astonishingly free regime for the endowments to which it may be devoted, as one of the most brilliant feats of the English mind. It applies *a fortiori* to movable property, and especially to such permanent or relatively permanent things as stocks and shares. We could not have done it had we received Roman law. Our law of property is, on this side at least, far richer, far more practical, and at the same time far more generalised and more logical than any other.

²⁶ If the land is to go to a number of persons, by what is called a class gift, the number must be ascertained within the perpetuity period, so that the amount of each share may be ascertained.

Moreover, this is one point at which English law is ahead of all the other common law systems, whether in a substantially pure form, as in the common law countries of the Commonwealth and the United States, or hybrid, as in Scotland.

OWNERSHIP AND POSSESSION

So far I have said hardly anything about the title element in ownership and have not even alluded to the concept of possession, which is very closely associated with it. All systems that I know anything about make heavy weather of possession. Everyone, even the un-instructed layman, knows what possession is in a general way, but even the most learned lawyers can easily be floored by exceptional cases involving problems of possession. On the whole I think our law of possession is no better and no worse than any other. The answers to the questions which are most important and most likely to occur in practice are well enough known and accord fairly enough with the demands of common sense.

This is as it should be, for we use possession a great deal as a basis of rights, more than in civil law countries, where the owner often takes the place occupied in England by the possessor ; and I may just mention in passing that the generalised concept of bailment, which covers all cases where one person transfers possession temporarily to another, is unknown to other systems, which have to deal separately with hire, deposit, pledge etc. But ownership, or rather the title element, which differentiates it from possession, is important in English law, and it is quite wrong to accuse us of having hazy notions of ownership and possession, even where movables

are concerned. What is very odd is that English legal terminology hardly makes use of the noun 'ownership' or of the verb 'to own', though both words are very commonly on the lips of laymen. It is still odder to find that although French law makes full use of the concept of ownership, and has indeed a word for it, '*propriété*', a Frenchman cannot say 'I own': he can only say '*je possède*'.²⁷

But although English lawyers hardly talk of ownership, they do often talk about the right to possess, and although this is often implied in the right which possession itself confers, it is not the same thing. There are occasions where a former possessor of either land or a movable object cannot recover it from the present possessor merely on the strength of his former possession—as he can if the present possessor has himself taken it from him—but must prove that he has a right to possess.

Where we differ from other countries is that we have never suggested that this right must be absolute. For a long time we even said that it need only be better than the right of the defendant, the present possessor. Eventually we allowed the defendant to succeed if, notwithstanding that the plaintiff's right to possess was better than his, he could prove that there was outstanding in a third party a title unconnected with and better than either the plaintiff's or his own.²⁸ Thus the plaintiff, though he has only to prove a better title, can be defeated if this title is proved to be not the best title in the

²⁷ A German, unless he uses the periphrasis '*zu eigen haben*' ('to have as one's own'), can only say, likewise, '*ich besitze*' ('I possess'). Here is an interesting problem for the philosophers who concern themselves with the relations between logic and language.

²⁸ The so-called *ius tertii*.

world. But the best title, whoever has it, is only relatively the best ; it is not absolute.

A brief consideration however will convince the inquirer that an absolute title can be produced only by artificial means. The traditional way of doing it—it dates back to the Romans—is to say that a person who has possessed a thing for a certain period of time acquires an absolute title to it, subject perhaps to certain conditions such as good faith. We need not consider the special difficulties that these conditions may create. English law gets rid of them by making possession for the required period merely lop off the title of the person to whom the possession is adverse. Anyone who dispossesses another obtains a title, which is defeasible, until the limitation period has elapsed, not only by the person whom he has dispossessed, but by anyone else who subsequently comes into possession by peaceable means.

REGISTRATION

However, the modern world does not like these make-shifts. Everywhere there is a tendency to introduce public registers of title to land. A registered title is guaranteed by the State and protects absolutely a purchaser who buys on the faith of it. The whole question of registration is highly technical and I cannot enter into it. It is enough to say that the English system is regarded as one of the best—perhaps the best—in the world, but unfortunately it still extends to only a small portion of the country.

The problem of movables is more difficult and more interesting. The title to some movables such as ships or

motor cars can obviously be registered without difficulty and without interfering with the free movement of commerce, but generally speaking one could not insist on registration of movables without causing a most awkward slowing down of trade. What then is one to do?

THE BONA FIDE PURCHASER

The purpose of registration is to exclude altogether risks as to title. If registration is commercially impracticable, one must face the fact that there will be risks as to title, and where movables belonging to one person come into possession of another person who has bought them in good faith, the problem arises which of the two parties is to bear the risk. Is the owner to be able to recover from the bona fide purchaser, leaving the latter to collect what he can from the person from whom he acquired the thing? Or is the bona fide purchaser to be treated as having acquired a good title once he has got possession of the thing, in which case it will be for the original owner to try to collect from intervening holders? The problem is not easily solved on grounds of logic or experience. What has actually happened is that different laws have gone different ways and have elevated their solutions to the level of articles of faith. Thus French law—in this it is followed by most Continental systems—has adopted the view that the bona fide purchaser shall normally be protected.²⁹ The common law systems have taken the opposite view and normally protect the owner.

Neither party has however had the full courage of its

²⁹ Civil Code, art. 2279.

convictions. French law, which looks at the matter from the point of view of the bona fide possessor, nevertheless allows the owner to recover the thing if it had been stolen from him or he had lost it, though he must act within a year and he loses his right if the bona fide purchaser has bought it at a public auction.³⁰ The most interesting peculiarity is the protection French law gives to a bona fide purchaser from a bailee. In England on the other hand bona fide purchase in market overt³¹ gives a good title, and more often the same result is produced by certain rules contained in the Factors Act and the Sale of Goods Act, 1893.³² Those rules are generally regarded as complicated, confused and unsatisfactory, but it is by no means certain that we are wrong in our general attitude. Ought a person to run the risk of losing the title to his goods merely because he lends them to a friend?

Moreover the whole system of hire purchase is endangered by a rule which protects the bona fide purchaser against the owner.³³ What is there then to prevent the hire purchaser, if we may so call him, from selling the goods to a bona fide purchaser and spending the money? The whole purpose of hire purchase, as opposed to credit sale, is to preserve the title to the goods in the seller until he has received the full price. And yet one can see the difficulty that the Continental rule is

³⁰ Art. 2280.

³¹ Though not in Scotland or the United States. Section 22 of the Sale of Goods Act does not apply to Scotland, and is not reproduced in the American Uniform Sales Act. The term is of more restricted application than the layman would expect.

³² Factors Act, 1889; Sale of Goods Act, ss. 21-5.

³³ Eder, *op. cit.*, p. 71.

designed to meet. Must any would-be purchaser of a car or a radio or television set or of any kind of furniture investigate the would-be seller's title and inquire particularly whether he has acquired it on hire purchase and whether the full price has or has not been paid? This is probably the correct answer, but it is profoundly unsatisfactory, unless hire purchase agreements are publicly registered. This is the practice in most, if not all, the States of the United States.³⁴ It would be interesting to know how the system works.

DOCUMENTS OF TITLE TO GOODS³⁵

The Americans have run ahead of us at another point also. Nowadays the possession of documents of title to goods is often far more important than actual possession of the goods themselves. Now lawyers and business men have long been familiar with certain documents called negotiable instruments, namely bills of exchange, cheques and promissory notes. Their peculiar character consists in the rule that the title to them passes by delivery and in the right of any holder who has paid for a negotiable instrument in good faith to demand payment from the acceptor, banker or promisor, even if the instrument has been stolen or acquired by fraud. In other words, the negotiable instrument itself, and with it the right to demand payment are, even in common law systems, subject to the rule which Continental law applies to movables generally.

Now many forms of documents of title to goods, not

³⁴ See Uniform Conditional Sales Law, reprinted in Zulueta, *Roman Law of Sale*, 223-31.

³⁵ See S. Williston, *Life and Law*, pp. 219-27.

unlike these negotiable instruments, are well known in commercial practice ; for instance, the bill of lading which the master of a ship gives to a consignor of goods is a receipt for the goods and to a great extent represents the goods. Thus a person to whom the bill of lading is delivered acquires title to the goods, and international trade in goods is regularly financed by advancing money on the security of a transfer of a bill of lading. Bills of lading are regularly given in the United States for goods put on rail ; and similar receipts are given by warehousemen, the operators of grain elevators, etc.

These documents are however not negotiable at common law. Hence if any one of them is acquired by a person who has no right to it, and he then transfers it to a bona fide purchaser, the latter gets no title against the true owner. As a result, certain frauds have been facilitated, when a bank, for instance, has advanced money on the security of a document of title, only to be told by the true owner that the person pledging the document had no authority to do so.³⁶

Almost everywhere in the United States the law has now been changed by statute. All these documents of title may now take one or other of two forms, the one being negotiable, the other not. It is customary to print across the face of the document the words ' negotiable ' or ' not negotiable ', so that anybody dealing with it knows what he is dealing with. If no such word appears, then the document is taken to be negotiable. Thus a person who is asked to advance money on the security of one of these documents knows at once whether

³⁶ Cf. *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* [1938] A.C. 287.

his title as a holder will be indefeasible, or whether it can be defeated by proof that the person delivering it to him had no title or authority to do so, and, if it is the latter, he will probably not advance the money.

If we are dissatisfied with our present law of title to goods we ought to look to America rather than to the Continent for salvation. I leave it to those who have more practical experience than myself to say whether the establishment of registers of hire-purchase agreements, with the attendant delays and expense which are almost certainly involved in it, is warranted by the actual or potential frauds which the hire-purchase system itself almost inevitably implies ; but I can see no reason why negotiable documents of title should not be introduced into our law.

To conclude, the analysis of property rights seems to me to be of enormous value, and one of the most brilliant creations of English law. There is nothing in it to force the hand of the legislature or of the courts if they wish to dispense with certain of its products, but at the same time it is of such a nature as to free them from any inhibitions by which they might otherwise be controlled. To adopt an analogy from the field of language, there is nothing that cannot be said in terms of our grammar of real property if the legislature or the courts wish to say it. There are no logical impossibilities—only certain practices which are perfectly logical have been outlawed on practical grounds. If policy changed they could be brought back and other practices outlawed in their turn.

Questions of title, on the other hand, are not so well handled in our law, but, so far as land is concerned, we

have started a system of registration and all that is needed for its complete introduction is time, money, and an adequate staff of officials. As regards movables, we need to learn from our brother common lawyers in the U.S.A.

TORTS

4

TORTS

FOR the subject of my last lecture I have chosen the law of torts.¹ Torts are wrongful acts done by one person to another which are not breaches of contract and give rise to an action for damages. The same act is very often both a tort and a crime. In so far as it is a crime it is punishable in the criminal courts. In so far as it is a tort the victim may have an action for damages and he may also in certain cases sue for an injunction to restrain the wrongdoer from repeating it.

Now it is a common judgment upon the law of torts that it is poor in principle, rich in detail.² On the other hand, throughout the nineteenth century and the early years of the twentieth century the civil law on this topic seemed exceptionally clear and orderly in arrangement. More recent developments, while tending to make English law more orderly, have made the civil law more disorderly, until now there is probably not much to choose between them.

FRENCH LAW

Our starting point must be two well-known articles of the French Civil Code. Art. 1382 says that any human

¹ As in the two previous lectures, I do not normally give authority for elementary propositions of English law. The lawyer will have no difficulty in verifying them from the general books on the law of torts.

² R. W. Lee, *Introduction to Roman-Dutch Law*, 4th ed., p. 320.

act which causes damage to another person obliges that person through whose fault it has occurred to repair it. Art. 1384 enunciates rules regulating vicarious liability for the acts of children, servants and other subordinate persons, and also a general liability for damage caused by things under one's care. This article is followed by two other articles which regulate liability for damage caused by animals and by ruinous buildings.

During the nineteenth century attention was focused almost entirely on Art. 1382 and virtually no attention was paid to the words in Art. 1384, which dealt with damage caused by things under one's care. The result was that, animals and ruinous buildings apart, all tortious liability was based upon fault, which meant acting in a morally reprehensible way, including failure to take the care that one ought to have taken in the circumstances. Liability for the wrongful conduct of subordinates was treated as secondary.

HISTORY OF TORT IN ENGLISH LAW

Now English law grew up around a number of separate actions, each affording a remedy for a specific kind of wrongful act or omission, and there were no very clear connections between the various actions. The practitioners were quite satisfied with this state of affairs, but it offended the jurists with their natural desire for logic and orderly arrangement. They therefore tried to bring some order into the law by insisting first that there could be no liability in tort unless the defendant had acted intentionally or carelessly, and secondly, that wherever he had acted intentionally or carelessly he was liable.

Gradually, however, it was realised, first, that there

were certain awkward kinds of cases where a person was strictly liable for causing damage, even though he had not acted either intentionally or negligently, and secondly, that there were at the other end of the scale certain acts or omissions for which a person was not liable even though he had intended to cause harm. It is not therefore surprising that other jurists gave up the quest for general principles as a bad job and said that there was no general law of tort but only a collection of different torts each governed by its own rules with a very few general rules applicable to all.

Recent developments have enabled us to generalise over a much wider field, and the comparative study of other laws tends to show that some of the apparent lack of order and principle in the English law of torts comes not only from its earlier development and greater maturity at the present day but also from the fact that it deals with various kinds of liability that are not thought by civil lawyers to belong at all to this department of the law.

NEGLIGENCE

Let us start, however, by considering whether we can discover a broad central principle akin to that which is stated in Art. 1382 of the French Code.³ It seems that there is such a principle. The courts now recognise the existence of a specific action of negligence, which can be brought by anyone who has suffered damage owing to the careless conduct of anyone who owed him

³ I take leave generally to refer to my article 'The Duty of Care in Negligence: a Comparative Study' in 22 *Tulane Law Review*, 111-30; and to my book *Negligence in the Civil Law*.

a duty to take care.⁴ But if the principle is to correspond to that expressed in Art. 1382 of the French Code, it must be sufficiently general. Until recently, however, it was not easy to detect any sufficient generality in the duty of care. It seemed safer to enumerate specific duties of one kind or another. Thus a man owed a duty in respect of his movements on the highway. He did not, if he was a manufacturer of things not inherently dangerous, owe a duty of care to persons into whose hands such things might come, other than his contractual duty towards anyone who bought them directly from him. He did not owe a duty of care in respect of representations made to another by spoken words or in writing. It seems, however, that we can now generalise the duty within a very wide field, subject to a few well-defined exceptions. That field covers all positive acts causing physical damage to the person or property of another person. In other words, we must for the purposes of this generalisation exclude all damage caused by simple omissions to act and all damage which is merely pecuniary or financial, that is to say, which causes the injured party to be poorer without involving any physical damage to himself or his property. This is not to say that there is never any liability for damage caused by omissions or for purely pecuniary or financial damage, but only that such heads of damage cannot be brought within a generalisation.

The generalisation is subject to one certain, and two doubtful exceptions: the certain exception is often

⁴ There is moreover no difficulty in seeing that any person who is under a duty of care will be liable for negligence not only if he fails to take care, but also a fortiori if he intends to cause damage.

expressed in the words : ' fraud apart, there is no law against letting a tumble-down house ', and it extends so far as to relieve a builder from liability for damage caused by careless building to any person who is not in a contractual relationship to him, even though he must have known that that person was likely to use the building. However, this exception, though well established, is almost universally condemned.

In the last quarter of the nineteenth century it was decided that a person could not be liable for a careless misstatement if he had genuinely believed in its truth, since he owed no duty of care. Does the rule apply where physical damage results from reliance on the accuracy of the statement? There are indications that it does not. If these indications cannot be trusted, then careless misstatements form a second exception to the generalised liability in respect of physical damage caused by a positive act. It is also possible that an occupier owes no duty whatever to be careful towards anyone coming on his land, unless he has invited them to enter or unless they come as of right, by virtue of contract or otherwise ; but I believe that this exemption from liability concerns only damage caused by omissions, and so is not an exception of the general principle I have just enunciated. I shall return to this difficulty later.⁵

Even with these exceptions the field covered by this general principle of liability is very wide. So much has it now become the centre of the law that all the other actions in tort seem to group themselves around its fringes. The rise of the action of negligence has certainly helped to rationalise the law of tort.

⁵ Cf. p. 138 below.

At this point a French lawyer would ask three questions. He would ask first how purely pecuniary damage and damage caused by omissions are dealt with; secondly, whether there is any general liability for intentional damage; and thirdly, if there are any cases where a person can be made liable for damage even where he neither intended the damage nor was negligent.

PECUNIARY DAMAGE

To the first question, that relating to purely pecuniary damage and damage caused by omissions, one would give some such answer as the following. One would say that in both cases we were on very ticklish ground and a French lawyer would himself agree. German law indeed in principle excludes liability for purely pecuniary damage unless it is caused intentionally, that is to say, it would not in English terminology allow an action for negligence to be brought in respect of it.⁶ French law seems to make no distinction in principle between physical and purely pecuniary damage, but on the other hand French case law seems to show that a large number of the cases where Art. 1382 has not been applied are cases of purely pecuniary damage. English law seems to take a middle position. Actions for negligence in respect of purely pecuniary damage are undoubtedly very rare but few lawyers would care to suggest that they are inadmissible in principle. It seems best to be cautious and to hold that it is for the judge in each case to decide whether the defendant was under a duty of care to the plaintiff. This is not, however, to say that there are not

⁶ Enneccerus-Kipp-Wolff, *Lehrbuch des bürgerlichen Rechts*, II (13th ed.), p. 887.

many kinds of case in which purely pecuniary damage can give rise to a cause of action. All it is intended to assert is that in almost every case the action is not one of negligence. It may for instance be an action for conversion.⁷

OMISSIONS

Omissions again provide the lawyer with very difficult questions ; and whatever may be the theory the practice of most laws is to be very chary of making a person liable for a mere omission. On the whole the tendency in foreign law is to extend liability for omissions. English law makes a person liable only when he was under a specific duty to act carefully in the circumstances.⁸ Such duties are still very uncommon. This is after all one of the most marked differences between contract and tort. If I want another person to come under a duty to me to do some positive act, the normal and natural way of ensuring it is to extract a valid promise from him by contract, and in English law, as we saw in the last lecture, this almost invariably means that I must pay him with money, or money's worth.⁹

INTENTIONAL DAMAGE

The French lawyer's second question would relate to the treatment of damage caused intentionally. Most systems of law enunciate a general liability for intentional

⁷ Cf. pp. 125-31, below.

⁸ It first reduces the scope of the problems by treating a careless omission as part of any careless positive act with which it is closely associated.

⁹ Cf. pp. 44-51, above.

or malicious damage.¹⁰ This will take up, for instance, most cases where the damage is purely pecuniary and it may cover omissions as well. The problem may also arise in a slightly different form. A person who is *prima facie* liable for causing damage may none the less be able to defend himself on the ground that he had a right to act in that way. He may for instance have acted in the way of trade competition or in order to assert his rights by way of litigation. The question will then arise whether a plaintiff can break down such a defence by proving that the defendant has not really acted for any of the reasons just suggested but in order to harm the plaintiff. Most systems of law make a defendant liable in such circumstances.¹¹

The English law on the subject is not at all easy to state. The orthodox doctrine is that if a person has a right to do a thing without an improper motive he may lawfully do it with an improper motive. But this is not a universal rule. For instance a person who prosecutes another person without reasonable or probable cause will be liable if he also did it from an improper motive, but not otherwise. Similarly if two or more persons combine to injure another person in his trade relations their liability or non-liability will, it seems, turn on whether their predominant purpose was to injure him or merely to further their own trade interests. The question therefore arises whether the various cases, of which these two are merely examples, are exceptions to a general principle of non-liability or whether the well-known cases in which it was held that a defendant was

¹⁰ E.g., German Civil Code, § 826.

¹¹ Cf. 5 *Camb. L. J.* 22-45.

not liable are exceptions to a general principle of liability.

In order to answer such a question one has to consider present and future trends in the activity of the courts. Unfortunately we have at present very little to help us. But in the few cases where a defendant was not made liable there were very special circumstances which would serve as a basis for exceptional treatment. In one of them¹² a contrary decision would have involved an interference with trade union activity, in the other¹³ an interference with the rights of a landowner over his own land. Moreover in both cases there was very considerable doubt whether a predominant intention to hurt had been proved. If this is so, one can add to a generalised liability for physical damage committed by a negligent positive act a further generalised liability for damage of any kind caused by an intentional positive act, both liabilities being subject to a small number of exceptions.

STRICT LIABILITY

The French lawyer's third question would relate to cases where damage is caused neither intentionally nor negligently. Art. 1384 of the Civil Code makes a person liable for damage caused by things under his care. This liability has been held to be strict, that is to say, to attach to a person even though he has not been negligent. It has been applied with fairly general approval to damage caused by things such as motor cars, which are undoubted sources of danger to other persons. It has met with

¹² *Allen v. Flood*, [1898] A.C. 1.

¹³ *Mayor of Bradford v. Pickles*, [1895] A.C. 587.

widespread criticism when applied to almost all inanimate objects, and the French have found themselves landed in very difficult problems as to the respective spheres of Art. 1382 and Art. 1384.¹⁴ In other laws, such as German law, proof of negligence is still required in principle, but strict liability is imposed for damage caused by enumerated objects such as railway trains and motor cars or in the course of enumerated operations.¹⁵

Here again the English law is not absolutely clear. As early as 1868 it was decided in a very famous case (*Rylands v. Fletcher*)¹⁶ that 'the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.' This principle was gradually extended to cover quite a large number of different articles and operations, but it was never made to apply to railways or motor cars; and when in 1947¹⁷ an attempt was made to apply a rule fairly prevalent in the United States to the effect that a person is strictly liable, i.e. without proof of negligence, for damage caused by any ultra-hazardous operation in which he is engaged, the House of Lords rejected the argument.

There are of course certain other heads of strict liability which are well known to all civilised systems of law, liability for animals, etc., and English law, agreeing in

¹⁴ Lawson, *Negligence in the Civil Law*, pp. 46-50.

¹⁵ *Manual of German Law*, pp. 108-110.

¹⁶ (1868), L.R.3H.L. 330.

¹⁷ *Read v. Lyons*, [1947] A.C. 156.

this with French law but differing from German law, makes a master strictly liable for damage caused negligently by his servants in the course and within the scope of their activity, in other words he cannot excuse himself by saying he had taken all reasonable steps to choose a good servant.¹⁸

SCIENTER

There is a fourth kind of liability in English law which is not recognised as a separate kind of liability in civil law systems, though I suspect that it exists as such. In certain instances, in order to make a person liable for damage it is not necessary to prove that he intended the damage, nor on the other hand is it sufficient to prove that he was negligent : the plaintiff must prove at the least that the defendant knew of the possibility of the damage. The principal case is deceit. Where one person has misrepresented certain facts to another person who has acted upon the misrepresentation and has consequently suffered damage it is not sufficient for the injured party to prove that the defendant ought to have known that his statement was incorrect. He must prove that the defendant actually knew that what he was saying was untrue or was reckless, not caring whether it was true or false. On the other hand there is no need whatever for him to prove that the defendant intended to injure him. In a well known leading case a person said he had authority to accept a bill of exchange on behalf

¹⁸ I omit all consideration of nuisance, which now seems to hold a position midway between negligence and the rule in *Rylands v. Fletcher*. The problems to which it gives rise are given much the same solutions, and not much more neatly, in foreign law.

of another person knowing perfectly well that he had not that authority but hoping that his act would be subsequently ratified. It was quite clear on the facts that he had not the slightest intention of hurting the plaintiff, but he was none the less liable.¹⁹ This type of liability depending on knowledge occurs also in the law of animals and in one or two other places.²⁰

GENERAL CHARACTER OF LAW OF DAMAGE

One might fairly say that so far the English law is as clear, as rational and almost as elegant as the law of other countries. There is doubtless a general tendency, which is found in most parts of English law, to turn fact into law,²¹ that is to say, to develop firm rules of law distinguishing cases of liability and non-liability where a foreign system might be willing to state the law in very general terms, leaving the detail to the fluctuating decisions of the finders of fact.²² One result of this difference is to make legal exceptions to the general rules where on the Continent the making of the exceptions would be part of the finding of fact. I do not think that in effect the English law is subject to more exceptions than other laws.

Certainly the detail is excessive and embarrassing in some parts of our law of torts. On the other hand, I feel sure that the civil law on this subject is not really clear

¹⁹ *Polhill v. Walter* (1832), 3 B. & Ad. 114.

²⁰ Cf. p. 138, below.

²¹ This is no doubt due to the desire of judges to withdraw cases from juries when there was some evidence in favour of a plaintiff, but to find in his favour would have led to injustice. See also p. 138 below.

²² Cf. Amos, 'Have we too much law?', *Journal of Society of Public Teachers of Law*, 1931, pp. 1-7.

or perspicuous. Even a summary perusal of any of the leading French text-books will show a greater plethora of detail than exists in English law;²³ and, what is more, the detail does not seem to have been so completely mastered as with us, though the highest court, the Cour de Cassation, seems determined not to leave it all to the finders of fact.²⁴

Moreover, although there may be too many distinctions in some parts of the English law of torts, in others they may need to be multiplied. Thus only within the last year²⁵ an action was brought to recover purely pecuniary damage which had been caused by the careless misstatements of a firm of accountants made specifically to and at the request of a person who contemplated investing in a certain company. One would think that an action for negligence should lie on facts such as these. And yet all the judges in the Court of Appeal were of opinion that, apart from any consideration of pre-existing authority, one could not admit anything like a general liability for careless misrepresentations causing purely financial loss. Two of the judges were so deeply impressed by this consideration—they also felt themselves too closely bound by a previous decision—that they rejected the plaintiff's claim. The third thought that a distinction could validly be made between representations made generally and representations made to a specific person or group of persons and for a specific purpose. It would, he agreed, be dangerous

²³ See H. et L. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, a book of three large volumes.

²⁴ *Nourrigat C. Pech*, S.1911. 1. 329, reprinted in Lawson, *Negligence in the Civil Law*, p. 236.

²⁵ *Candler v. Crane, Christmas and Co.*, [1951] 2 K.B. 164.

to attach liability to careless misrepresentations of the former class, since one could not know where the liability would end ; but he followed American opinion in holding that if they belonged to the latter class no such danger existed, and that the person making them should be liable. Logic and reason are as hostile to over-generalisation as to under-generalisation.

At this point we may take our leave of this great body of law which corresponds in the main with the Continental law on the subject. The real difficulties begin when one considers various heads of liability such as trespass, ejectment, conversion and defamation, which play a great part in the English law of torts, but are hard to find in Continental law. It is the presence of these heads of liability that has made the English law of torts appear extraordinarily complicated and illogical. I hope to show that where Continental law does not know such liability at all it is, at any rate to an Englishman's mind, defective, and where it deals with liability in different parts of the law there is no real simplification.

INFRINGEMENTS OF RIGHTS

These various torts are all old and bear the marks of ages which thought in terms of procedural forms rather than a rational treatment of liability. The task of rationalising them is not made easier by the fact that the law has been modified from time to time with more regard for justice and practical convenience than formal consistency or neatness. Thus no general statement can be made about them that does not admit of exceptions. But on the whole this is a part of the law where persons are made responsible for interfering with the rights of

others rather than causing them damage, though once a breach of rights is proved it is followed by an award of money damages, which takes into account any actual damage suffered by the victim. This emphasis on rights tends to make liability less dependent than elsewhere on qualifications of conduct such as are denoted by terms like malice or negligence. The relaxations of liability which are so necessary if human initiative is not to be thwarted, and which in other torts are provided by the need for proving malice or negligence in the defendant, are here provided by an apparatus of special defences by which a defendant may ward off a liability which *prima facie* attaches to him. These defences are almost all excuses or justifications and are based on the need to protect corresponding interests of defendants which are in conflict with those of plaintiffs and need to be adjusted to them. The result is to limit and so to define more closely the rights which this particular part of the law seeks to protect. A person interferes with those rights at his peril, but they are not always so wide as would at first sight appear.²⁶

DEFAMATION

I can illustrate the special character of this part of the law from the tort of defamation, which includes both libel and slander. As the law stands at present, a person is strictly liable for any untrue defamatory statement which he publishes about another person. He publishes, at his peril. It is his business before publishing anything

²⁶ Liability in these cases is what Mr. H. L. A. Hart would call a 'defeasible' concept: *Logic and Language*, edited by A. G. N. Flew (1951: Blackwell), p. 148.

about anybody to make certain that it is true. It is not enough for him to take all reasonable steps to make certain that it is true. Nor is it any defence to prove that he did not know, and could not reasonably have known, that what he has published referred to the plaintiff. But the law recognises perfectly well that some limits must be set to this Draconian regime, and so it carves out, as it were, certain enclaves within which the conflicting interest of free speech shall prevail. It says, first of all, that the tongue cannot be so easily curbed as the pen, and so, with certain exceptions, it imposes liability for spoken words only when they have caused ascertainable damage. It says, further, that sometimes the interest of the public in freedom of speech is so predominant that a speaker or writer shall enjoy an absolute privilege to speak or write what he wishes, even though he knows perfectly well that it is false. Such absolute privilege is enjoyed by members of Parliament during debates in the House, and by judges, parties, counsel and witnesses in courts of law. It is significant that the speaker or writer is very commonly subjected to some discipline of another kind. More often the privilege is qualified, that is to say, it must not be abused by a publication which is intended to harm the plaintiff or of statements not honestly believed to be true. The defence of qualified privilege applies very widely, and covers, for instance, all statements made on a matter which is of common interest to the person making them and the person to whom they are made.²⁷

²⁷ This is not, of course, the historical order : strict liability for defamation was not definitely laid down until long after libel and slander were differentiated, and the defences of absolute and qualified privilege fully developed.

These are only illustrations. Other illustrations could be found in the law of false imprisonment, and in other forms of trespass. They show that we are in a world quite different from that dominated by negligence, nuisance and the rule in *Rylands v. Fletcher*. Such notions as intent and negligence, if not entirely excluded, are much modified in character and operation. Damage, again, when not entirely excluded as an irrelevant factor, plays a subsidiary role.

CONVERSION

In one of these torts, it must be admitted, damage is as much the gist of the action as in the tort of negligence, though it is damage of a peculiar kind. That tort is the tort of conversion, and the wrongful act that is normally complained of is the abstraction of a movable object of the plaintiff. The damage which he suffers is thus purely pecuniary, for it merely causes a loss to his estate.²⁸ Such losses must of course be dealt with in every legal system, and indeed were the object of the oldest and most primitive form of action known to Roman law. The action into which it developed, the vindication, is known to every system of civil law. It is an action to recover a thing from its present possessor on the strength of the plaintiff's title. No proof of fault on the part of the defendant is required, and the action is not regarded as having anything whatever to do with tort. We have an action of that kind for the recovery of land, called ejectment. Its connection with tort is purely historical, and nothing would be lost if it were broken.

²⁸ See pp. 112, 114-5 above.

On the other hand we have nothing that can be said to be a vindication of movables in the strict sense of the term. The action of trover or conversion, which serves the purpose of such a vindication, is always in form and very often in substance an action brought in tort against a defendant for wrongfully converting to his own use a movable object of the plaintiff. It is therefore an obstacle that stands in the way of any attempt to make a clean separation between the law of torts and the law of property.

Since the action serves the purpose of a vindication of movables, the plaintiff must prove that he has a right to the immediate possession of the thing in question. He must also be able to prove that the defendant's act has interfered with his right to possess the goods, that is to say has expressly or by implication denied his title. Thus complete symmetry is attained and the single issue becomes one of title, the plaintiff asserting and the defendant denying the plaintiff's right to possess.

The concentration on this one issue is incompatible with any element of fault in the defendant. If the defendant could be made liable only if he had deliberately converted the goods, or even if he could defend himself by saying that he had reasonably believed the goods to be his own, then the usefulness of the action as a vindication of movables would be destroyed. Nevertheless this peculiarity of the action leads to consequences which at first sight must appear odd and perhaps unjust; for, notwithstanding that the action usually serves the purpose of a vindication, it is still an action in tort and can be brought not only against a present possessor of the goods or against anyone who has got rid of them

in bad faith, but also against any person who has at any time converted the goods, that is to say against any person who has at any time acted in such a way as to deny the plaintiff's title.

The possible effects of this arrangement may be shown by a simple example. Suppose A's goods are borrowed by B, who sells them to C, who knows nothing of what has gone before, and that C then employs an auctioneer D to sell them to E, who now has possession. A can bring an action for conversion against B, C, D or E. Once he has recovered the value of the goods from any one of them his right of action becomes extinguished and the person who has paid him the damages is regarded as having bought the goods. That person may possibly have an action in conversion against one of the other persons in the chain, though it is more probable that he will try to recover damages on the warranty of title which is implied in the contract of sale by which he has obtained the goods. Generally speaking A will demand the goods from the present possessor, E, and if E surrenders them on demand there will be no further question between them. If E will not surrender them the action will give the same results as if it had been a vindication at civil law. But suppose E has consumed the goods or has disposed of them in such a way that their whereabouts cannot be ascertained and suppose he is also not worth powder and shot. A will then try to find out which of the earlier possessors B, C or D, is best worth suing, and in English law he may certainly bring an action against any one of them.

At civil law his rights would be strictly limited. He could certainly sue B, the thief, though this particular

action is likely to be the most useless to him in practice. He could not vindicate against either C or D because they neither have the goods nor have got rid of them in bad faith. He could not bring an ordinary action in damages, for neither is at fault. He is limited to a recovery of the amount by which either or both of them has been enriched at his expense, that is to say he could sue C for the profits on his resale of the goods and D for the net fees he has earned as auctioneer.²⁹

The problem is indeed simplified for instance in France by the operation of the principle which protects a bona fide purchaser of goods.³⁰ In the case I have just described C would have immediately obtained a good title which he could pass on.

I have already discussed in my lecture on property the advantages and disadvantages of a solution which protects the bona fide purchaser against the true owner. I now only want to compare the English solution with that which obtains in civil law countries which do not in principle protect the bona fide purchaser.

The English attitude, though largely caused by a peculiar historical development, can also be explained rationally. Curiously enough it bears a very strong resemblance to the English, and for that matter to the classical Roman, treatment of suretyship or guarantee. There again one may find something like a chain of parties. A for instance may lend money to B on the security of a guarantee furnished by C and D. The problem then may arise whether, if B does not pay on demand, A is bound to sue him first before having

²⁹ This is the law in Scotland and South Africa.

³⁰ Civil Code, art. 2279.

recourse to C or D, and secondly, whether he can sue C or D for the full amount, or each of them only for a share of the debt. Roman law, in its final state, which has been followed in civil law countries, forced A to sue B first and then to sue each of C or D for only a share of the residue which he could not obtain from B. The earlier law of the Roman Empire and English law allow A to choose that one of B, C or D whom he considers the most solvent and to recover the whole of the debt from him without regard to any order of priority. He then leaves that defendant to collect as far as he can from the other parties. The position is really precisely the same in conversion : the plaintiff can sue that person in the chain of converters who seems the most likely to be able to pay, leaving him to collect what he can from anybody else in the chain.

The point of view therefore seems to be the following. One should put oneself in the shoes of the plaintiff who has lost his goods. If one can find the goods anywhere the natural thing is to demand them and upon refusal bring an action in which one can obtain either the goods or the value. If one cannot there seems to be no reason whatever why one should not recover from any person who has done anything to deny one's title. One is not particularly concerned with the identity of that person or with the position he holds in the chain. If, for instance, the last person whose possession of the goods can be traced has no longer got them there seems to be no reason whatever from this point of view why he should not pay the value ; but if he has to pay the value pays as a non-possessor and in that case why should not any other non-possessor in the chain be equally liable ?

It seems to me that one can say a very great deal for a system which combines the notion of a vindication in the strict sense of the term, with a principle which protects the bona fide purchaser of goods. There one is looking at the whole history of the goods from the point of view of the present holder in good faith and one deliberately prefers his interest to that of the original owner. On the other hand I find it rather hard to see the rational basis of a law which makes the plaintiff's right depend almost entirely on whether he can find the goods in the possession of the defendant or can alternatively prove that that defendant has got rid of them in bad faith. This solution seems to depend far more on history and far less on logic or practical considerations than either of the other solutions, for it really goes back to the original Roman distinction between real and personal actions, a pre-requisite of a Roman real action having been that the thing in question should be brought before the Court.

Of course a solution may be just to the plaintiff and yet radically unjust to the defendant ; and it has often been thought hard that the auctioneer in our hypothetical case should be forced to pay the full value of goods which have passed through his hands. In fact it is likely to be harder on C, who has instructed him to sell ; for this particular risk may be considered a normal risk of the auctioneer's trade and one against which he should be able to insure. There is much to be said for concentrating the risk at a place where the probability of its incidence can best be calculated. C is undoubtedly in a worse position but even under a civil law system C would have had to pay had the goods been found in

his hands, and whether he would have recouped himself would in both systems depend entirely on the solvency of the thief B. I therefore fail to see any superiority in the ordinary civil law arrangements, at any rate where they are not modified by a special protection for the bona fide purchaser. On the contrary the English arrangements undoubtedly enhance enormously the value of the right to possess and I think the final conclusion must be that they exemplify for the right to possess the same powerful and energetic protection which the law gives to all other rights including possession itself.

TRESPASS

The great possessory remedy of English law is the action of trespass. It is one of the oldest of our actions and protects not only the possession of land and goods but the integrity of the person. All these forms of trespass are actionable without proof of damage : thus a trespass is essentially an interference with a right. However, at the present day the various forms of trespass differ a good deal in other respects. Although they were all at first actionable without proof of either intent or negligence, it is now certain that in actions for assault or battery,³¹ two of the forms of trespass to the person, and for trespass to goods,³² the plaintiff must prove that the defendant acted intentionally or negligently. None of these actions is normally brought nowadays unless actual damage has been caused by the trespass. It is usual to think of such cases as more appropriate to an action of negligence and accordingly the remedy is

³¹ *Stanley v. Powell*, [1891] 1 Q.B. 86.

³² *National Coal Board v. Evans*, [1951] 2 All E.R. 310.

subjected to the requirements of that action, namely, negligence or an intent to cause harm. Further, most important trespasses to goods are also conversions and actionable as such.

But both false imprisonment and trespass to land remain very important torts, and the latter is as free from the encroachments of negligence as ever. False imprisonment is certainly almost as strict, though problems are often set in examinations which suggest that a person cannot be liable for imprisoning another person of whose presence on the premises he was reasonably ignorant. Of negligence in the sense of carelessness of damage to the plaintiff there is still no question.

This state of the law may occasion some surprise and, indeed, it could not easily be justified but for two considerations. In the first place plaintiffs are not encouraged to bring actions of trespass where they have not suffered damage unless they have some other very good reason for bringing them. They are actively discouraged by the power of a jury to signify its disapproval of frivolous actions by what are commonly called 'farthing damages', on which the judge usually deprives the successful plaintiff of the privilege of having his costs paid by the defendant. Moreover, he will even lose his action for trespass to land, and therefore have to pay the defendant's costs as well as his own, if the defendant had acted negligently or involuntarily, has disclaimed any right to go upon the land, and has made a tender of sufficient amends.³³ In actual fact actions for

³³ This exemption was narrowly construed in the seventeenth century, but it seems doubtful whether it would be so construed now. Cf. *Baseley v. Clarkson* (1681), 3 Lev. 37.

trespass of land are very uncommon at the present day.

Why are actions for trespass ever brought in cases where no substantial damage has been suffered? Actions for assault or battery are occasionally, though rarely, brought where the assault or battery has been attended by insult, for no action is allowed by English law for insult as such. Actions for false imprisonment usually have for their purpose the assertion in as prominent a manner as possible of the ordinary Englishman's right to personal liberty, and very heavy damages are sometimes given by juries if the defendant has acted in a high-handed or arbitrary manner or if some great constitutional issue appears to be at stake.

The action for false imprisonment is not ordinarily necessary to test the legality of a person's imprisonment. That can be done much more effectually by a writ of habeas corpus, but otherwise actions of trespass are usually brought in order to test the existence of a right. Thus if the existence of a right of way is in question, either the landlord will sue for trespass anyone attempting to exercise it or the latter will sue him for using force in preventing him from exercising it.

No system that is not substantially derived from English law knows an action for trespass. All other systems insist on damage as a pre-requisite of an action in tort.³⁴ In French law however the notion of damage has been considerably extended so as to include not merely physical but also moral damage,³⁵ so that both

³⁴ See for South African Law, R. W. Lee and A. M. Honoré, *South African Law of Obligations*, s. 791.

³⁵ Amos and Walton, *op. cit.*, p. 225.

a trespass which contained an insulting element and the bare infringement of a right which did not involve physical damage but was committed in an arbitrary or high-handed manner, could be remedied on the ground of moral damage. The mere testing of the existence of a right would not come at all under this head in foreign legal systems. This is not, however, to say that no legal process can be used for that purpose.

All the civil law systems follow Roman law at this point. Now Roman law had a fully developed system of what are called 'real actions', the earliest and most important of which, the vindication, was used for the simple purpose of asserting one's ownership of land or goods. This action was extended by analogy to the protection of rights of way and other servitudes, and here again the only point in issue was the existence or non-existence of the right. Moreover, the civil law systems have inherited possessory remedies from Roman law. Scots law has even taken over the term trespass from English law, though it does not allow an action for damages in respect of a simple trespass to land, contenting itself with an interdict, or injunction, to restrain further trespasses if there is good reason to suppose that they will occur.³⁶ German law, under the spur of inadequate remedies for defamation, has gone even farther : a course of judicial legislation has developed an action for an injunction on conditions similar to those applicable to the Scots remedy for trespass, but extending to all interferences with rights and irrespective of fault.³⁷

³⁶ G. J. Bell, *Principles of the Law of Scotland*, s. 961.

³⁷ *Manual of German Law*, p. 107.

It seems as though the notion of trespass is essential to modern Western society. Whether it is more civilized to allow a plaintiff, as we do, to act rapidly and drastically, claiming damages for a single trespass, subject to a power in a jury to signify its displeasure in a very practical manner if he is unreasonable in his claim, or, as the civil law systems do, to make him wait until he can convince a bench of judges that trespassing is becoming a habit, leaving, that is to say, inevitably to the judges a certain discretion in the matter, may be a point of nice calculation. I cannot help feeling that the English solution puts a finer edge on rights, which with us are much less principles of morals than spheres of independent action. Perhaps it is from some obscure feeling of this kind that we have hitherto been chary of recognising the abuse of rights.

FAULTY ARRANGEMENT OF FOREIGN LAW

I need hardly say that once a civil law system admits the notion of trespass it loses much of the neatness and symmetry that was still left to it after the acceptance of strict liability alongside of liability for fault. German law, which looks pretty neat in the Civil Code—though not so neat as French law in the Code Civil—owes its neatness to the concentration in the section dealing with obligations arising from unlawful acts of nothing but liability for damage caused by fault.³⁸ The vindication of real rights³⁹ and interferences with possession⁴⁰ are treated as a part of the law of property. Strict liability

³⁸ Civil Code, §§ 823-53.

³⁹ Civil Code, §§ 985-1007.

⁴⁰ Civil Code, §§ 854-872.

for damage caused by dangerous objects or ultra-hazardous operations is left to be regulated by special statutes, even though the model statute, that dealing with railways and mines, had been enacted almost thirty years before the Code came into force.⁴¹ The injunction to restrain interference with rights as such is, as I have already said, in its generalised form a fairly recent creation of judge-made law.⁴² Thus the chapter on tort in a German textbook looks much more miscellaneous in content than the Civil Code; it would look even more so if it were not still the custom to deal with interferences with real rights and possession in the chapters on the law of property.

As we have seen, we cannot divorce property from tort, nor, I think, need we consider it a defect in our law that it prevents us from so doing. The natural thing for a would-be plaintiff to do is to complain of something that the defendant has done. He wants redress. Why not bring together all the various cases where one person has an action to enforce liability for what someone else has done? Convenience forces us to set apart liability for breach of contract, and history liability of what we call a quasi-contractual kind. But it is, I think, a sound instinct that has led English lawyers to separate what is essentially forensic law from the type of law that is of primary interest to the draftsman, whether conveyancer, company draftsman or commercial lawyer. For some time past such a view would have been unpopular because we had such a hard fight to free ourselves from the toils of procedural

⁴¹ Reichshaftpflichtgesetz, 1871, replaced by an Act of 1940.

⁴² See p. 134 above.

forms. Now we need to recognise the strong body of common sense on which those forms had become a parasitic growth.

I hope I have made it clear that different parts of our law of torts address you in different ways. Trespass and its congeners say 'don't touch', and they tell you as precisely as possible what the right is that you are not to touch. Negligence says 'don't be careless in your dealings with your neighbours'; it judges you by the standard of the reasonable man applied by a jury, thus introducing a certain amount of play into the machine; and although it tells you a good deal about the sort of dealings you are not to be careless in, it is not perfectly precise and leaves a good deal in doubt. For a complete statement of the law one would have to add that at certain other places the law tells you 'insure your neighbours against the escape of certain dangerous things'; at others 'do not subject anyone to a known danger'; and at others 'do not do deliberate harm to others': perhaps this last commandment is universal, but for one or two exceptions. However, I want to call attention only to the difference between the sharp outlines of trespass and the uncertainty which is always to be reckoned with when it is the quality of the defendant's conduct that is in question.

RELATION BETWEEN DAMAGE TORTS AND INFRINGEMENTS OF RIGHTS

I have already said that certain varieties of trespass no longer conform to the pure type. An element of fault has been introduced into assault and battery and trespass to goods, but the old specific defences which have nothing

to do with negligence can still be used. What is more interesting is that some of the sharpness of trespass has been introduced into a field where one would have expected to find references to the rather loose standard of the conduct expected of a reasonable man.

One example of this is to be found in the law of deceit, where a person is liable, not for negligence, but for making a statement which he did not *actually* believe to be true. *Actual* knowledge of danger is also an important test in fixing the liability of an occupier of land to a person entering on it. If the latter enters on the occupier's business the occupier owes him a duty of care, but if he enters as a licensee, i.e., by bare permission of the occupier, the occupier is liable only for damage arising from a danger of which he *actually* knew. Towards a trespasser he is not liable at all. Probably these rules apply not only to cases where damage results from mere omissions to act.⁴³ Where it results from a positive act liability probably depends on the general principles which govern the action of negligence.⁴⁴

There is a very widespread opinion that the law on this topic is over-precise, and leads to injustice. It may have arisen from a desire to achieve a symmetrical correspondence with the law of trespass, governing liability to, rather than the liability of, an entrant on land. No doubt a desire to protect landowners against perverse juries also played a part.⁴⁵ We have now got stuck in a complicated body of doctrine.

⁴³ See p. 113 above.

⁴⁴ See pp. 111-2 above.

⁴⁵ For a tendency, especially marked in America, to introduce elements of strict liability into negligence, see A. A. Ehrenzweig, *Negligence Without Fault*, U. of California Press, 1951.

Is it a good thing for the principles of liability to be sharpened, as happened here? I think the answer must depend on time and place. Vagueness and definition have each their place in the law of tort. It may be that one wants to let persons know exactly where they stand. That is the dominant point of view in criminal law, which tends everywhere to as precise definitions as are possible in the circumstances. Sometimes, however, it seems better to leave the crucial question to a jury, partly because the balancing of interests between plaintiff and defendant can be best done by reference to a standard, and the fixing of standards from time to time is a quasi-legislative act best performed by a popular body; but partly, no doubt, because it is felt to be too difficult to be performed by a judge who has to explain his reasons.⁴⁶ I do not think that we can expect the line between the precise and the vague torts to be drawn always at the same spot. But I think it is evidence of the rational strength of English law that it contains both categories and does not have to pervert a single principle of liability from time to time to serve laudable ends.

⁴⁶ Cf. Holmes J. in *The Pollock-Holmes Letters*, I, p. 85: 'I don't like to be told that I am usurping the functions of the jury if I venture to settle the standard of conduct myself in a plain case. Of course, I admit that any really difficult question of law is for the jury, but I also don't like to hear it called a question of fact. . . .'

CONCLUSION

5

CONCLUSION

NOW, as I come to the end of my survey, it is time to recapitulate. I find that, without any intention of paradox, I prize certain features of English law which are not always brought into the account by comparative lawyers, perhaps because at these points comparison has been thought too otiose ; whilst other parts which are commonly praised I do not find particularly praiseworthy, or am inclined to take very much for granted.

I have no great admiration for the common law of contract, which could be completely replaced to our great advantage by that of Scotland. The latter has all its virtues without its defects. On the other hand, the equitable side of contract is very good and the judges can if they wish constantly renew the law by going back to the fountain head, the concern of equity for the conscience of the parties. This is an instrument which, given the right sense of judicial enterprise, offers great possibilities. Yet I suspect that, just as on its common law side the English law of contract is inferior to Scots law, so here it has much to learn from the United States.

The apparent lack of neatness and logic in our law of torts does not trouble me in the least. I believe that this part of the law is, with a few exceptions, as neat and as logical as it need be ; and the exceptions are irrational quite as much because they are unjust and inconvenient as because they break the orderly arrangement of the

law. The real trouble is that we treat with exaggerated respect obstacles to progress which were set up by certain nineteenth century cases. Here again the Americans, some of them at least, are ahead of us ; but I doubt if we have anything to learn from Scotland, or anything from the Continent that we could not learn to better effect from Canada.

In personal property again I doubt whether we have much to learn from the civil law, though American law has run far ahead of us. One may perfectly well decline to penalise a lender of a thing which comes into the hands of a bona fide purchaser, and at the same time create a special category of negotiable documents of title with which the owner parts at his peril. Our law relating to documents of title is in a mess, from which we can be rescued only, as the Americans saved themselves, by legislation.¹

I reserve my greatest praise for the powerful analysis of interests which forms the hard core of the law of property. Registration is another matter. The chief obstacle to its extension throughout the country is the initial expense and the shortage of expert staff. But the general structure of our property law is now the best in the world. We are ahead not only of all the civil law countries, including Scotland, but also of the rest of the Commonwealth, where simpler problems have not called for so drastic a solution, and of the United States, where the law of real property remains a jungle.

¹ There is no excuse for our failure to keep abreast of the improvements made in the law by the American Uniform Laws Commissioners, or for refusing to watch the attempts that they and the American Law Institute are making towards a completely new commercial code.

More generally I should like to remind you of the distinction between unwritten and written law. I believe that we have here a very useful distinction, corresponding pretty closely to the distinction between the parts of the law which should flow naturally with life itself, aiming always at justice but seeking to maintain continuity between the needs of new situations and the experience of the past, and the parts of the law where certainty is all-important and an element of arbitrariness is not entirely out of place. Where a branch of the law belongs entirely to this latter class, it ought to be codified, and the codes should be periodically overhauled to keep them up to date.

Where the need for certainty is less important, I believe that it is better not to make the meaning of the law depend on words authoritatively enacted. The experience of civil law systems seems to bear out my contention. Either these parts of the law have been enunciated in extremely broad terms, as in France, without thereby preventing wholesale departures from both the letter or the spirit of the code, or, where they have been stated, as in Germany, in the most systematic manner possible, they have been saved from excessive rigidity by the operation of general clauses which in fact break through and almost destroy the system.²

On the other hand I see no reason why the unwritten parts of the law need be more obscure than the written.

² It is often said that once any part of the law has reached maturity it ought to be codified. I doubt whether some parts of the law, such as the law of torts and the general parts of the law of contract and criminal law will ever become ripe for codification. German law was perfectly mature when it was codified, but has since got out of shape.

In so far as they have more loose ends than written law—and this, as we have seen, is one of their great virtues—they are rather more difficult to express, but this only means that the textbooks in which they are set out in unauthoritative form should explain as far as possible where those loose ends are and the possibilities of using them to good purpose. Our best textbooks are already moving in this direction.

Is the distinction between common law and equity now of any value? I think that large parts of the law could be restated without using it at all. Certainly the terms 'legal estate' and 'equitable interest' are merely useful shorthand. I suspect that not even so much could be said in favour of retaining the distinction where other equitable rights are concerned. Equitable remedies present a more difficult problem. In so far as they are in practice, though not in theory, granted as of right, the distinction seems unnecessary; but in so far as they are still discretionary, there is everything to be gained from keeping the term 'equitable', for it emphasises the fact that the court still has regard to the conscience of the defendant, and indeed of the plaintiff also. It seems that there is now some chance of developing afresh this discretionary element.

English law has been made by a profession closely associated with an aristocratic governing class; English lawyers have never belonged to an intelligentsia. Somehow or other something of an aristocratic character has been communicated to the law itself. It is often brilliantly adventurous; it is often shabby and a little decrepit; it is usually canny, after the manner of those who are used to governing men; it is hardly ever

concerned to be fashionable. In all these ways it is very like the Roman law of the classical period. Not all more recent legal systems have shared these characteristics.⁸

English law is not on the whole too rational : it is certainly not rationalistic. The danger of rationalism in the legal sphere is that one man's reason may appear as good as another's, and the law may seem entitled to claim obedience only in so far as it conforms to the sense of right of the person whom it commands. But English law has always been much more like a thing than an idea ; it has a quality of hard fact like that possessed by a rock against which one knocks one's head in vain. The very concepts which the law uses, such as the estates and interests which are known to the law of property, while they are more abstract than those known to foreign laws, are at the same time almost like material objects. A contract is not merely the source of an obligation between two persons : it is itself a thing which if unperformed is broken. The various torts are still like things, each with its own structure defined by the allegations that the plaintiff must prove and the defences that the defendant can set up against him. No other law in modern times has had quite this character. English law is therefore not only rational but strong.

⁸ French law is very like it in many ways. Napoleon had a strong hatred of ideologues, and let it influence his views of law.

