CHAPTER 11

Obligation and duty

This and the next three chapters are devoted to certain concepts. Conceptual analysis has declined in popularity, so something needs to be said about its inclusion here.[1] The lawyer is a craftsman and the analysis of concepts may be likened to a dissection of the tools of his trade in order that knowledge of their structure and functioning will enhance his skill in their use. 'To be a good craftsman of the law' said Professor Rheinstein 'students must not only learn the law, but also become proficient in the use of its tools. These tools are concepts, logic, and language'[2]. This kind of examination cannot be conducted in courses on substantive law. For example, various branches of substantive law show how one acquires rights, duties, ownership, possession and so on. They are not concerned with the question, What is a 'right', or 'duty'?, which involves a different type of inquiry. Conceptions like possession vary from branch to branch and a unifying study of them has to fall within the province of a separate course, whether this is called 'jurisprudence' or not.

Many rules are expressed in terms of concepts, and concepts, are means of unifying clusters of fact-situations and rules and so provide the machinery for assigning benefits and burdens. They are institutions in themselves, distinct from rules, and as such should not be overlooked[3]. In other words, they are tools of judicial reasoning and the art of doing justice according to law depends in part on the apparatus of the law being so structured as to preserve certainty and also allow room for the play of value-judgments. The efficiency with which the job is done depends on the efficiency of the tools; and the requirements of the job shape and re-shape the tools. The structure of concepts has been moulded by the functions they perform, which, as set out earlier, may broadly be called the tasks of justice. If the functioning of rules is considered at all, then it cannot be divorced from the instruments with the aid of which they function. It has been emphasised repeatedly that law is a social institution and that its study should not be divorced from its social *milieu*. Many useful insights into the moral and social problems of law can be obtained by seeing how concepts are used in different contexts to give effect to such value considerations.

Conceptual analysis is sometimes denigrated as not being 'jurisprudential'.

1 For a different treatment of conceptual study, see Summers 'Legal Philosophy Today—an Introduction' in *Essays in Legal Philosophy* (ed Summers) p 1.

2 'Education for Legal Craftsmanship' (1944-45) 30 Iowa Law Review 408.

3 Simpson 'The Analysis of Legal Concepts' (1964) 80 LQR 535, says that to understand what is peculiar about legal concepts it is necessary to investigate the way in which legal terms diverge from and also are related to their extra-legal meanings with explanation as to how, when, why and with what consequences this occurs. For the importance of concepts as institutions, see MacCormick 'Law as Institutional Fact' (1974) 90 LQR 102, who says that a concept requires (a) a set of constitutive rules specifying the type of facts; (b) consequential rules specifying the legal consequences; and (c) terminative rules specifying how it ends.

The immediate response to such a charge should be that it is based on the assumption that 'jurisprudence' has some 'proper' meaning which excludes such analysis. Further, if the way this word is used is considered, it will be found frequently to have included the study of concepts[4]. The charge is reminiscent of the occasional rejection from university courses of certain topics on the ground that they are 'vocational' in a pejorative sense and not 'educational'. Whether a subject is 'vocational', 'educational' or 'jurisprudential' depends on *how* it is treated. The moral, ethical and social dimensions of law are now regarded as falling within the sphere of jurisprudence. Concepts are inlets through which these influences are brought to bear, and if conceptual analysis is conducted in relation to these, as indeed it should be, then there is nothing amiss in treating this, too, as 'jurisprudential'. Part of the objection stems from a belief that 'jurisprudence' should be concerned with generalisations, which remain fairly constant. Such a belief results from thinking exclusively in the time-frame of the here and now in which, it is true, as will appear, that the meanings of concepts vary from branch to branch. From what has been said above it should be evident that concepts need to be studied with reference to the task of doing justice, which requires thinking in a continuing time-frame. This can and does provide a unifying framework within which local variations can be brought together. Finally, analysis of the stuff of the law will provide a background to the study of at least some theories about the nature of law. It should sharpen one's critical awareness of what such theories are about by deepening one's insight. The wider and deeper the analysis of concepts, the greater the chance of appreciating the purport of those theories.

THE IDEA OF 'OUGHT'

The principal function of laws is to prescribe how people ought or ought not to behave. 'Ought' has many significations, not all of which are relevant to lawyers.

(a) It may connote shortcomings, eg 'you ought to know better'.
(b) It may connote probability, eg 'you ought to win your match'.
(c) It may connote recommended conduct, eg 'you ought to see that film'.
(d) It may connote conduct which is due (obligation or duty, eg 'you ought to pay your debt'[5].
(e) It may connote propriety (correct or accepted usage), eg 'you ought to say 'food', not 'grub''.
(f) It may connote the effective means to an end, eg 'if you want to talk to X by telephone, you ought to ring him up'.

The last three have legal significance: (d) concerns obligation and duty, (e) concerns definitions and the special use of certain terms, and (f) concerns the effective exercise of powers. As (e) and (f) have been dealt with earlier[6], only obligation and duty will be considered here.

4 Eg, *Oxford Essays in Jurisprudence* (ed Guest) especially chs 1, 2, 4, 5 and 6; Goodhart *Essays in Jurisprudence and The Common Law* chs 1, 3–7.

5 This is borne out by the etymology: *dëü* (past participle of *devoir*), *dueté* (Anglo-French). Cf *debitum* and 'debt'. See *Oxford English Dictionary*; *Thesaurus Linguae Latinae* s vv; Co Litt 291a.

6 See pp 44–45 ante.

OBLIGATION

The analysis by Professor Hart provides the basis for approaching this concept[7]. His treatment of it is bound up with the analysis of 'rule' since, according to him, an obligation exists by virtue of a rule. 'Rule' has been examined earlier, and what was said in connection with it needs to be borne in mind[8]. Every obligation is a normative judgment, and normative judgments imply social rules. These require that the patterns of behaviour enjoined by them are generally 'repeated when occasion arises by most of the group', and 'some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole', ie some at least must internalise the behaviour patterns[9]. Internalisation derives from the fact that these 'are thought important because they are believed to be necessary to the maintenance of social life or some highly prized section of it'; also, the required behaviour 'may, while benefiting others, conflict with what the person who owes the duty may wish to do'[10].

Internalisation is manifested in criticism, felt to be justified or legitimate, of deviance and in demands for compliance; and 'great social pressure' is brought to bear[11]. It is also manifested in the expressions 'right', 'must', 'should', 'wrong', 'ought', and 'obligation'. An obligation is thus a statement from the internal point of view and exists 'when the general demand for conformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great'[12]. The adverse reaction against deviance may or may not ensue; so it is neither a condition for the existence of an obligation, nor does obligation imply a prediction that it is likely.

Obligations can be moral as well as legal[13]. Both kinds are supported by pressure for conformity, which is exerted irrespective of individual consent. Both concern behaviour in everyday situations, and deviance from either kind of obligation justifies criticism. Conformity, on the other hand, is not a matter for praise, since the desired patterns of behaviour are thought to be necessary for society and conformity is a condition *sine qua non* of its existence. The differences between moral and legal obligations are listed as follows:

(a) every moral rule is treated as being important, but this is not so with every legal rule;
(b) moral rules are not changed by deliberate, single acts, while legal rules can be so changed;
(c) breach of moral rules requires voluntary and blameworthy conduct, but many legal rules can be broken without fault;
(d) moral pressure is applied mainly through appeal to the morality of the conduct, not by coercion as with legal rules.

One criticism of Professor Hart's thesis is probably based on a misunderstanding. This is that the existence of social rules being a fact, the 'ought' of obligation cannot logically be derived from an 'is' of fact. Professor Hart

7 Hart *The Concept of Law* pp 79-88.
8 See pp 47 et seq. ante.
9 *Hart* pp 54-55.
10 *Hart* p 85.
11 *Hart* p 84.
12 *Hart* pp 84 et seq.
13 *Hart* pp 168-176.

does not say this: he only says that obligation implies social rules, not that it is logically derived. Leaving this aside, it does appear that there is some unclearness as to what is signified by 'social group'. Most members of a large criminal organisation, eg the Mafia, may regard certain patterns of behaviour as standards among themselves and exert pressure against deviance. In what sense is this a 'social group' and are its behaviour patterns 'social rules'? They are certainly not legal rules; which leads to the next point. Obligation cannot be wholly divorced from moral soundness, despite Professor Hart's firmly positivist stance. It is true that people may acknowledge a legal obligation to do something which they think is morally bad. This conflict stems from the obligatoriness attaching to whatever possesses law-quality, which derives from the original acceptance of the criteria of validity. As pointed out, moral considerations are among the reasons for such acceptance[14].

DUTY

Duty is a species of obligation, and it will be helpful to examine first its function, then its structure and lastly its functioning in society.

FUNCTION OF DUTY

The factors that call duties into being may be summed up very generally: they are prescriptions of conduct towards the achievement of some end, moral, social or other[15]. The ends may also determine the form of the prescription.

A more important question is why a duty continues to exist, by which is meant: continues to be 'law'. The first and obvious requirement is the continuance of the purpose for which it was introduced. It has also to be consonant with, or at least not diverge too much from, prevailing moral ideas. The connection between legal and moral ideas is close[16], but not congruent. On the one hand, moral ideas bring about the creation, modification or abolition of laws[17], and influence their application. On the other hand, there is also truth in the view that certain moral ideas have been moulded through the immemorial administration of the law[18]. It may also happen that after a duty has been created, its moral source changes or even disappears, in which case the duty separates itself from the prevailing morality and the pressure behind it is then solely respect for 'law'. The morality of yesterday may thus find itself perpetuated as an anachronism in legal form[19]. Or it may be that considerations other than morality gave rise to a duty, in which case again the duty is independent of morality. To a greater or lesser extent such tensions between duties and moral ideas can be tolerated, but there comes a point at which the conflict becomes acute and the duty has to be either altered or extinguished. This is why, as Allen remarked, duties should

14 See pp 49-59 ante.
15 See infra, and ch 10 ante.
16 Eg Lord Coleridge CJ in *R v Instan* [1893] 1 QB 450 at 453, and in *R v Dudley and Stephens* (1884) 14 QBD 273 at 287. As to how far they ought to do so, see pp 111, 116 ante.
17 Eg capital punishment, adult homosexuality, matrimonial guilt as the basis of divorce.
18 See further pp 51, 52 ante.
19 Eg some forms of strict liability.

not reach too far beyond accepted moral ideas if they are to command respect[20]. Laws should have a future, which will not be the case unless people have faith in them.

Another factor in the continuance of a duty is its ability to fulfil its function. Two of its tasks, which will now be examined, are: to prescribe a pattern of behaviour and to serve as a norm with reference to which judges decide the legality of actual behaviour. The general conditions for regulating behaviour were stated by Professor Fuller[1]. A duty has to be (i) general (though limited exceptions are allowable); (ii) promulgated; (iii) prospective (though limited exceptions are allowable); (iv) intelligible; (v) consistent in itself; (vi) capable of fulfilment (though exceptions are to be found); (vii) constant through time; and (viii) congruent with official action. These eight points constitute what he called the 'inner morality' of law, and are distinguishable from its 'external morality', which concerns ideals. It should be obvious that these are relevant only in the continuing time-frame and in that context are part of the concept of duty since the task of regulating behaviour could not be performed otherwise. Thus, apart from occasional exceptions, a duty should be general and not designed for an individual, else there would be no cohesion, but only myriads of separate duties severally addressed to each member of the community. Again, no one can be expected to regulate his conduct according to the prescription unless this is made known to him, ie published and intelligible; it must also refer to the future, be unself-contradictory and within the bounds of human possibility. Without a measure of constancy through time there would be no continuity and hence no stable legal order.

The last condition, congruence with official action, carries an implication not developed by Professor Fuller. It has been stated that, apart from regulating behaviour, a duty has also to serve as a norm of judicial decision, and it is here that the requirement of congruence comes in. What it means is that there has to be a satisfactory degree of conformity between the prescription and the action of the judge (or other official); 'satisfactory', that is, from the point of view of both litigants and officials. The extent to which this is achieved depends as much on the *structure* of the duty as on the ability, integrity etc of the judge. Since prescription is usually directed to the future, the control has to be in expansive terms; and since justice in its widest sense has to be done in the resolution of disputes, the structure of duty must allow for the interplay of value considerations. This, as will now be shown, is not fixed.

STRUCTURE OF DUTY

The picture revealed by analysis is not clear-cut because the part played by values in the judicial process makes it necessary that instruments of reasoning should allow a measure of flexibility. Courts use different conceptions of duty so as to do justice in different situations.

Behaviour is regulated chiefly through duties; to conceive of them except in relation to conduct is impossible.

1. Since duties do not describe, but only prescribe behaviour, it follows

20 Allen *Legal Duties* pp 196–200. See also Gray *The Nature and Sources of the Law* pp 11–15; Kelsen *General Theory of Law and State* p 58.

1 Fuller *The Morality of Law* ch 2.

that they express notional patterns of conduct to which people ought to conform. Thus they 'exist' only as ideas, and they remain expressions of 'oughts' even though they may be expressed imperatively as 'must' or 'shall'. This imperative phraseology has given rise to the view that duties have been commanded[2]. Many writers have been at pains to refute the command theory, but only one objection need be mentioned here. Professor Olivecrona maintains that the connection between the imperative form and command is purely psychological[3]. Everyone has a store of experience of actual commands dating from infancy, which have always been expressed in the imperative form. Experience thus accustoms one to associate the command *form* with actual commands. The result is that when faced with this form, as in the case of duties, there is an erroneous tendency to infer that they must have been commanded. Professor Olivecrona concludes that duties are not commanded, but only *expressed* in command form, and for that reason refers to them as 'independent imperatives'[4]. Not only are they independent of a personal relation between commander and commanded, but they also operate independently through the power of suggestion and not by the direct communication of wishes.

The idea of command, therefore, should be discarded. The most that need be said is that duties are notional patterns of conduct that are *phrased* in an imperative form.

2. An 'ought' is legal if it is embodied in one or other of the criteria of validity. Not all legal rules create duties, but even when they do not, they always address an additional duty to officials to treat them as 'law'. Rules conferring powers may confer mandatory or discretionary powers. In the case of the former there is the further duty in officials to exercise them.

3. A duty prescribes a person's behaviour primarily for some purpose other than his own interest, ie it is other-regarding. The duty to perform a contract relates to the other party to the bargain, the duty not to steal X's hat exists not only for X's benefit, but also in the interests of social stability, while the duty not to be cruel to one's own animals is likewise imposed in the interests of the community. Austin, it is true, recognised a category of duties, which he called 'self-regarding duties', and which are imposed, according to him, in the interest of the person obliged by them[5]. Allen, however, showed that all these concern the criminal law and that the behaviour involved has a bearing on the community, or on some section of it[6]. Perhaps, the most that can be argued is that some duties exist not only for the benefit of other persons, but also in one way or another for the benefit of the person obliged, for example, the duty on the driver of a vehicle to observe road signs.

4. The conduct envisaged in duties need not necessarily refer to the future, although this is in fact the case with the majority of them. A duty can be created with reference to past conduct, in which case it represents a notional pattern of conduct as to how people ought to have behaved. If the behaviour of any person is found to have been contrary to what it ought to have been, he is regarded as having committed a breach of that duty. Such

2 Austin *Jurisprudence* I, pp 89-91. See ch 16 post.

3 Olivecrona *Law as Fact* (1939) pp 42-49, and in 'Law as Fact', in *Interpretations of Modern Legal Philosophies*, pp 543-546. See too Von Mises *Positivism* chs 25-26.

4 Cf Kelsen: 'de-psychologized command' *General Theory of Law and State* p 35.

5 *Austin* I, p 401.

6 *Allen* pp 183-193.

ex post facto creation of duties, of which Acts of Attainder are examples, is unusual and is on the whole disfavoured[7].

5. Conduct can be conceived as an omission, an action by itself, an action in relation to circumstances, or an action in relation to both circumstances and results. Thus, there may be:

DUTIES WHICH CONTEMPLATE BEHAVIOUR ALONE. The behaviour may be conceived of simply as acts or omissions. Such duties may be imposed by contract for instance.

DUTIES WHICH CONTEMPLATE BEHAVIOUR IN SPECIFIED CIRCUMSTANCES. An example would be an engagement to sing at a concert. Likewise, there is no duty which restrains a person from getting drunk, but there is a duty not to be drunk when driving or attempting to drive a motor vehicle on a road or other public place[8]. So, too, there is a duty not to carry 'offensive weapons' in public places[9].

DUTIES WHICH CONTEMPLATE BEHAVIOUR BOTH IN RELATION TO SPECIFIED CIRCUMSTANCES AND CONSEQUENCES. In this category are found the largest number of variations. Criminal law and tort furnish the best illustrations. Sometimes the result only is emphasised, at other times it is the result brought about in a certain manner or in certain circumstances. Also, when considering the result it is necessary at times to distinguish between the types of persons who have been affected. Duties compounded in these various ways cannot be classified neatly under the headings of kind of conduct, kind of result, or kind of person affected; yet for purposes of exposition it will be convenient to emphasise each of these aspects individually.

Considering, first, the kinds of behaviour contemplated by different kinds of duties:

(a) A distinction has to be drawn between acts and omissions. In crime and tort this is vital. The duties in these branches contemplate specific results, and are generally negative, ie not to produce certain results. The disapproval here is of acts which produce them. Exceptionally there is disapproval of results produced by failure, in which case the duties are positive, ie to do something[10].

(b) Within the category of acts, some duties contemplate certain types of conduct, but not others. Thus, there is no duty in tort not to cause loss by trade competition[11], or by abstracting subterranean water flowing in undefined channels, even though it is done maliciously[12].

(c) A large number of duties enjoin people not to conduct themselves in

7 It has been argued that the Nuremburg War Crimes Trials were not *ex post facto* creation of offences, but that duties not to commit the acts in question had always existed at international law though lacking the machinery of punishment, and that what the Nuremburg Charter did was to provide the latter: Paulson 'Classical Legal Positivism at Nuremburg' 1975 4 Phil & Pub Affairs 132.

8 Road Traffic Act 1972, s 5.

9 See the Public Order Act 1936, s 4, Prevention of Crime Act 1953, s 1.

10 See Clerk & Lindsell on *Torts* §§ 1-68, 69; 10-19; G L Williams *Criminal Law, General Part*, pp 3-8. For the duty of a police officer to preserve the peace and protect persons, see *R v Dytham* [1979] QB 722, [1979] 3 All ER 641, CA.

11 *Mogul SS Co v McGregor Gow & Co* (1889) 23 QBD 598.

12 *Bradford Corpn v Pickles* [1895] AC 587.

a blameworthy manner. Different duties contemplate different degrees of blameworthiness. Scaled according to their degree of strictness, at one end are those duties which require no blameworthiness at all, ie strict duties. In all such cases the duties simply forbid the production of certain results. Blame is irrelevant. Next in strictness are the duties which require people not to act carelessly, but these are also conditioned by the kind of result that ensues. In the law of tort where the question is less relevant now than it used to be, it is still the law that there is a duty not to interfere intentionally in a contract between two persons, but not carelessly[13]; malicious prosecution, as its name implies, cannot be committed carelessly. Of course, wherever there is a duty not to inflict a particular type of injury negligently, there is *a fortiori* a duty prohibiting the reckless, intentional, or malicious infliction of it[14], even though in the latter cases such duty may, for historical reasons, be classed under a different label. Thus, the intentional infliction of physical injury on the person is classified as battery or trespass, while the careless infliction of such an injury falls under negligence[15]. Again, causing pecuniary loss by wilful or reckless misstatements is actionable as deceit[16], and only in 1963 was it made actionable under negligence[17]. Some duties prohibit only the reckless or wilful infliction of certain types of damage. In such cases, there is no duty not to be negligent. Other duties enjoin people not to act maliciously, for example, in injurious falsehood, malicious prosecution and malicious issue of civil process[18].

Turning to duties in relation to the result of conduct, there is, once more, a great deal of variation in particular duties. In tort the result contemplated by the various duties is, broadly speaking, damage. It used to be possible to distinguish more sharply than now between physical damage (personal and proprietary) and non-physical damage. Duties imposed in respect of the latter used to be narrower in scope than the former. Since the 1970s duties not to inflict non-physical damage have developed apace, but it is still true that some kinds of non-physical damage are not recognised at all[19], while in other cases the duty is not to produce the non-physical damage wilfully or recklessly, but no duty in negligence[20].

Finally, duties may contemplate some classes of persons and not others. No duties in tort or crime are owed to the Queen's enemies, and (in the past) outlaws; the victim of an act of perjury[1], or a contempt of court is not

13 *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; Prosser 'Palsgraf Re-visited' (1953-54) 52 Michigan Law Review 10: 'a contract interest is not entitled to protection against mere negligence'.

14 Plowman J in *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424 at 1440. Exception: *W B Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850.

15 *Letang v Cooper* [1965] 1 QB 232 at 239-240, [1964] 2 All ER 929 at 932, per Lord Denning MR.

16 *Derry v Peek* (1889) 14 App Cas 337.

17 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575. For the development, see Clerk & Lindsell on *Torts* §§ 10-12, 13.

18 Clerk & Lindsell on *Torts* §§ 1-76 and further references.

19 Eg invasion of privacy.

20 Eg interference with contract. In *Corbett v Burge, Warren and Ridgley Ltd* (1932) 48 TLR 626, it was stated that conduct had to be malicious in relation to the type of harm involved, negligence being insufficient.

1 *Hargreaves v Bretherton* [1959] 1 QB 45, [1958] 3 All ER 122.

recognised in the law of tort as entitled to damages[2]. The Fatal Accidents Acts 1846–1976, mark the progressive widening of the class of dependants entitled to sue for the tortious killing of the breadwinner. A statutory duty may contemplate only a particular class of persons and not others[3]. As with the recognition of plaintiffs, so too with defendants. Some, eg the Queen or very young infants, are not recognised as bearing duties in tort or crime, while trade unions refuse to accept contractual duties.

In its most abstract form the idea of duty may be stated simply as a prescriptive pattern of conduct recognised as legal by courts. 'Recognition' is technical, for this may be of conduct alone, or conduct qualified in any of the ways considered. The existence of a duty implies that the courts accept as a model a certain form of behaviour with reference, it may be, to certain types of persons and results; and this is the criterion by which the actual behaviour of an individual is judged. In any given case, therefore, the existence of a duty depends on whether the particular kind of result, the manner of its production and the kind of persons involved are recognised by law. To the vital question: how is one to know whether these are recognised? the answer is: *by knowing the law*. Only in this way can one know whether a duty exists in a given case or not and what its scope is, and it is for this reason that the question of duty is always one of law for the judge[4]. The decision to recognise or not to recognise any of the above factors, in short, to create or refuse to create a duty, cannot be anything other than a policy decision. 'There is always' said MacDonald J 'a large element of judicial policy and social expediency involved in the determination of the duty-problem, however it may be obscured by the use of traditional formulae'[5]. The duty represents the official idea as to how people ought to behave, and adaptations of this idea to suit the needs of changing society reflect the prevailing scheme of distributive justice in society and its curbs on liberty.

Approval and disapproval

The phrasing of a duty signifies the kind of approval or disapproval that is given. Where a duty is embodied in a judicial precedent, the approval or disapproval is traceable to the policy decision of the judge or judges who laid it down; where it is embodied in a statute, the policy that ultimately finds expression in the statute-book is the result of an inextricable interplay of considerations, as explained in Chapter 8. Where it is embodied in custom, the approval of the community is generated out of established practice and, as explained in Chapter 9, there is at least the absence of disapproval on the part of some judge. So, by approval and disapproval in the present context is signified the official acceptance of the 'ought' and 'ought not' patterns of conduct as 'laws'. Even though the 'ought' or 'ought not' of a particular duty may have originated in the opinion of some individual, once it becomes 'legal' through finding expression in one or other of the law-making media, the opinion of the individual fades into the background and may vanish

2 *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513.

3 *Knapp v Railway Executive* [1949] 2 All ER 508; *Hartley v Mayoh & Co* [1954] 1 QB 383, [1954] 1 All ER 375.

4 Lord Kinnear in *Butler or Black v Fife Coal Co* [1912] AC 149 at 159; du Parcq LJ in *Deyong v Shenburn* [1946] KB 227 at 233, [1946] 1 All ER 226 at 229.

5 *Nova Mink Ltd v Trans-Canada Airlines* [1951] 2 DLR 241 at 254–256. For further references, see Clerk & Lindsell on *Torts* §10–28.

altogether, for the 'ought' has then attracted to itself a value of its own, that of fidelity to law. The approval and disapproval become depersonalised and are adhered to in spite of one's personal sympathy to the contrary. To say that a pattern of conduct is required or prohibited by a duty implies respectively that it is approved or disapproved in the above sense. However, conduct may be approved or disapproved in ways other than through duty. Appreciation of altruistic behaviour, for instance, may be shown in several ways without obliging it as a duty, just as disapproval of wagering may be signified without prohibiting it in the form of a duty.

Sometimes the attitude of the law expressed in duties is one of approval and at others of disapproval. The performance of a contract is approved and there is a duty to perform; on the other hand, stealing is disapproved and there is a duty not to steal. Conduct which amounts to a *breach* of a duty is always disapproved, but the way in which duties are phrased may vary. A duty is positively framed when approval is given to the conduct required by it, eg to perform a contract; it is negatively framed to register disapproval of the conduct contemplated in it, eg not to steal.

The attitude of the law, whether of approval or disapproval, is based on the purpose to be achieved, which in turn may be governed by social values, morality, justice, or may be a relic of a bygone age. Thus, the strict duty not to trespass on land derives from the early days when the law contemplated only the result of conduct and, for reasons which have long since disappeared, remained largely indifferent to the blameworthiness of a defendant's conduct. On the other hand, various strict duties have been introduced in modern times, chiefly by statute, for wholly different reasons. Duties are strict when they may be broken without fault on the part of the person who breaks them. It is therefore untrue to say *lex non cogit ad impossibilia*, that the law does not expect people to accomplish the impossible, for in cases of strict duties people are held responsible even when they could not have done otherwise. Strict duties apart, there are other variations in the attitude of the law, for example, those that depend upon the manner in which the act is done, eg intentionally, carelessly and so on.

Enforceability

As a tool of reasoning 'duty' has alternative meanings, both of which are judicially employed: (a) prescriptive pattern of conduct which is enforceable; (b) prescriptive pattern of conduct even if unenforceable. This ambiguity is utilised in giving effect to the varied play of value-considerations. If (b) can be substantiated, enforceability cannot be essential to the concept of duty.

'Enforceability' itself may mean one of two things: compelling observance of the pattern of conduct enjoined by the duty, or the indirect method of inflicting a penalty, or 'sanction', in the event of a failure to observe it. Considering, first, compelling actual observance of duties, it is necessary to distinguish further between what are known as 'primary' and 'secondary' duties. The latter only come into existence on the breach of the former and have, as it were, an independent existence[6].

The carrying out of primary duties is termed 'specific enforcement'. Where

6 Thus, the statutory rule, which extinguishes a primary duty on the death of the defendant, does not affect the secondary duty to pay damages for the breach of it ordered by a court: *Rysak v Rysak and Bugajski* [1965] P 179, [1965] 2 All ER 1026

the primary duty is negative, ie not to do something, there is no convenient method of ensuring its continued observance. 'Duty' said Allen 'cannot be enforced by anything but individual conscience'[7]. X is under a duty not to assault Y. There is no way, short of locking X or Y up permanently, by which it can be ensured that X will not assault Y. It is impossible to lock up every member of the community so as to prevent assaults being committed and, indeed, if this were done society would cease to exist. All one can do is hedge the prohibition with deterrent sanctions in the hope that fear of them may succeed in securing obedience if all else fails.

Even where the primary duty is positive, ie to do something, it is generally not possible to ensure that it is carried out. Thus, if the primary duty under a contract is to sing at a concert, it is not possible to make the person sing. Only in exceptional situations are primary positive duties specifically enforced. Thus, if the primary duty is to pay a debt, the party obliged can be sold up in execution and made to pay it; in very special cases of contract specific performance may be ordered; a person may be compelled to repay money received by mistake; he may also be compelled to restore land and chattels wrongfully detained, and *habeas corpus* is available to obtain the release of persons wrongfully detained.

Secondary duties, on the other hand, can be, and are carried out, for no system will be so futile as to impose them unless they can be carried out. Most secondary duties, which are one form of sanctions, consist of the payment of money. It is therefore the case that, apart from the exceptional primary duties mentioned, only secondary duties are enforced in the sense of their observance being ensured. Since this is so, either those primary duties, which are 'unenforceable' in this sense, should not be called duties[8], or else the conclusion must be that this sort of enforcement is no test of duty; and this has in fact been judicially asserted[9].

The alternative meaning of 'enforcement', namely, the attachment of some sanction, whether in the form of a secondary duty or otherwise, leads to the question how far the presence of a sanction should be taken as a test of duty.

Sanction

A number of authorities contend that a duty can be distingished as 'legal' whenever a sanction attaches to its breach. The corollary of this view is that the presence of a sanction is the test of legal duty. It is true that sanctions attend most duties, but the ideas of duty and of sanction should be kept separate and, as will be shown, sanction is no test of a legal duty. There are several objections to the view that it is a test. In the first place, sanctions only contemplate breach of duty, and the need to pay attention to conformity

7 *Allen* p 197.

8 So Holmes, who rejected the whole idea of primary duties, except in certain cases which he regarded as unimportant: 'The Path of the Law' in *Collected Papers* 167 at 173-174. There are many objections to this view. (1) Courts do take primary duties into account when applying the well-known rule that the performance of, or promise to perform, an existing primary duty is not sufficient consideration in contract: *Pinnel's Case* (1602) 5 Co Rep 117a; *Stilk v Myrick* (1809) 2 Camp 317; *Collins v Godefroy* (1831) 1 B & Ad 950. (2) The primary duty is as much a pattern of conduct that ought to be followed as the secondary pattern of conduct. Why reject the one and accept the other? (3) The implications of the exceptions admitted by Holmes, some of which have now been altered by statute, are more far-reaching than he seems to have imagined.

9 *Kaye v Sutherland* (1887) 20 QBD 147 at 151; *Tassell v Hallen* [1892] 1 QB 321.

to duties is just as important as non-conformity. Laws are required at least as much, if not more, for the law-abiding, who wish to know how they ought to regulate their behaviour. For them the importance of a duty lies, not in the sanction, but in the behaviour-pattern that is prescribed. Even in Utopia there will still be a need for guiding behaviour-patterns, though sanctions will never be required. Therefore, to argue, as Kelsen did, that 'law arrives at its essential function' only when a wrong is committed[10], is not the whole way of looking at the matter. Thus, the sanction test gives at best an incomplete and misleading picture.

The word 'sanction' has three different meanings. According to Pollock, it is 'the appointed consequences of disobedience'[11]; but what does 'consequence' mean? The statement 'sanction is a test of legal duty', may mean

1. That a duty exists whenever something called sanction actually happens, or will probably happen, or can be made to happen, in consequence of some action[12]. As to this, (a) the sanction may fail to operate, as where the culprit escapes detection, dies or becomes bankrupt, but the duty remains none the less. (b) The mere fact that something is actually made to happen as the result of doing a certain thing does not imply the presence of a duty forbidding the doing of that thing. Contrast the following examples. If X appropriates Y's property, he is made to pay Y its value. It might be argued that a sanction has operated and that, therefore, this points to a duty in X not to appropriate (convert) Y's property. Suppose now that X, a local authority, has statutory power to expropriate Y's property subject to the payment of compensation. Here, too, if X takes the property, X has to pay Y its value; but there is no duty in X not to do so, for the act of expropriation lacks the element of wrongfulness which it had in the first example[13]. The point is that the wrongfulness of the original taking, in other words, a duty forbidding it, cannot be deduced from the mere fact that X is made to pay Y a sum of money. Indeed, in the latter example, it is because the taking was not a breach of duty that the consequential payment is not called a 'sanction'; or, putting the matter in another way, it is the presence of a duty that makes the term 'sanction' appropriate for the given consequence. Sanction is therefore not a test of duty; on the contrary, it is the other way about. (c) To speak of sanction as what happens, or will probably happen, or can be made to happen, is inadequate. Austin defined sanction as 'the eventual or conditional evil'[14]; and to him, sanction and duty were correlative terms, the sanction being that which ought to be done to a person who breaks a duty. The operation of a sanction depends on the observance of duties by those charged with its execution. Thus, the sanction of imprisonment for theft depends upon a police officer performing his duty of arresting the offender, upon various other persons performing their duties in bringing him to trial, upon the judge performing his duty of passing sentence if the case is proved, and upon the prison authorities performing their duties in imprisoning him. Each of these duties depends in turn upon others and so on in regression[15]. Since, therefore, the operation of the sanction depends on the

10 Kelsen 'The Pure Theory of Law' (1934) 50 LQR 474 at 487.

11 Pollock *A First Book of Jurisprudence* p 23.

12 This meaning seems to underlie the argument of Kadish and Kadish *Discretion to Disobey* as to which see pp 315-317 post.

13 *Crown Lands Comrs v Page* [1960] 2 QB 274 at 286, [1960] 2 All ER 726 at 732.

14 *Austin* I p 444; see also p 89.

15 Timasheff *An Introduction to the Sociology of Law* p 264; Haesaert *Théorie Générale du Droit* p 97.

observance of duties, it is unsatisfactory to make the operation, or likely operation, of duties the test of duty.

2. To surmount the last-mentioned difficulty it is said that sanction as a test of legal duty is simply the prescriptive formula: 'If A, then sanction B ought to follow', regardless of its actual operation. Kelsen emphasised the distinction between propositions of law and their efficacy[16], and said that a sanction applies only in the event of a certain pattern of conduct not being observed. The sanction is therefore what the law prescribes: 'If A, then B ought to follow'. He treated the prescription of sanctions as 'primary norms', and the patterns of conduct that have to be observed to avoid sanctions as 'secondary' (inverting the terminology in this chapter). Since the proposition, 'if you steal, you ought to be punished', implies the proposition, 'you ought not to steal', it is only the first that is necessary. He did admit all the same that it is sometimes useful to refer separately to the second, but not essential[17]. The difficulties of using sanction in this sense as a test of duty are as follows. (a) As the example of statutory expropriation given above shows, the mere prescription in the form that if X takes Y's property ('If A'), then X ought to pay Y its value ('then B ought to follow'), does not of itself imply a duty in X not to take the property. It leads to a *reductio ad absurdum*: if one reaches the age of 65 ('If A'), then one ought to receive an old age pension ('then B ought to follow'). Is entitlement to pension a 'sanction', and is there a duty not to reach 65? Whether the 'then B' part is to be called a sanction or not depends, as already stated, on whether the 'if X' part imports a duty or not. (b) The thesis of this chapter is that duty is an 'ought' prescribing behaviour and that sanction, though usually associated with duty, is independent. In Utopia primary duties prescribing behaviour are all that would be required, as Austin himself admitted[18]. Theoretically, therefore, duties could exist other than in the 'If A, then B ought to follow' form. (c) As will be demonstrated in detail below, there are numerous occasions when sanctionless duties are recognised by the courts[19].

3. Another possible meaning of sanction as a test of legal duty is that a duty exists when there is an automatic worsening of one's legal condition or liability to something being done, regardless of whether it is in fact done or not; and on much the same line the term 'privation', rather than sanction, has been offered[20]. To both these suggestions the statutory expropriation example provides an objection. Also, some of the sanctionless duty situations to be mentioned will show that duties can exist without there being any worsening of one's legal condition.

Leaving aside the imprecision of the term 'sanction', another objection to the use of sanction as a test of legal duty is that tribunals do not deduce the presence of a duty from a sanction. On the contrary, they apply the sanction because they first recognise that a duty has been broken. The sanction is applied, not just because a person has done something, but because he has done it when he *ought not* to have done so. The point becomes obvious when one considers a case in which a duty has been recognised for the first time. For instance, the Court of Appeal did not recognise a duty of care towards rescuers because they awarded damages; they awarded damages because

16 Kelsen *General Theory of Law and State* pp 29-30.
17 *Kelsen* pp 58-62.
18 Austin p 763: Holland *The Elements of Jurisprudence* p 148.
19 See pp 239-246 post.
20 J Hall *Foundations of Jurisprudence* pp 104 et seq.

they decided to recognise the duty[1]. It is only by way of retrospective rationalisation that one is able to say: because a sanction has been imposed, the presence of a duty must now be inferred. A dynamic and prospective view is just as admissible, in which case one has to decide whether or not to recognise a duty before the question of sanction can arise.

To make sanction the test of legal duty is to confuse two different ideas, that of prescribing behaviour and that of ensuring obedience. How people ought to behave is one thing; what ought to be done if they fail to behave is another. The fact that sanctions are often required to induce people to conform to duties should not obscure the separateness of the two ideas. Besides this, there are many reasons why people obey duties of which fear of sanctions is only one[2]. Even if it were true that fear of sanction provides the chief reason why the individual regulates his conduct in accordance with a duty, sanction cannot explain why the behaviour pattern required to avoid it is accepted by the legislature and the courts as a standard for the community. It is their acceptance of the 'ought' that accounts for this.

Professor Hart formulates a different objection by distinguishing between 'having an obligation' (duty) to do something and 'being obliged' to do it. If a gunman claps a pistol at X's head and demands his purse, X may 'be obliged' to comply, but he 'has no obligation' to do so[3]. Here the threatened evil, or even its execution, does not give rise to, or indicate the presence of, any duty. To use sanction as a test of duty, he says, is only the gunman situation writ large.

Finally, judges and lawyers do think in terms of duty even when there is no sanction[4]. It cannot be emphasised too often that judges do not follow a path of undeviating logic; they act according to policy, and the conceptions which they employ have to be flexible for use in this way. Duty, one of the commonest of legal conceptions, is no exception. Judges frequently think and talk in terms of duty even though there is no sanction, but when it suits their purpose they are equally ready to annex sanction as necessary to it. Any concept should allow for such variations; to freeze it in terms of sanction is to distort what actually goes on in the courts.

The case law on 'sanctionless duties' is overwhelming and can only be

1 *Haynes v Harwood* [1935] 1 KB 146. So too the structure of the formula of a Roman action at civil law, which directed the judge, 'if it appears that the defendant ought (*oportere*) to do so and so, then condemn him', shows that the idea of duty preceded that of sanction. *Actiones in factum* do not contradict this. The formulae of these ran: 'if such and such facts are proved, then condemn'. They were not civil law actions but praetorian, not *in jus conceptae* but *in factum conceptae*. Although *oportere*, which is the technical term for a duty at civil law, does not figure in them, the idea of 'ought' was nevertheless implied. For it was only when the praetor decided to recognise a new duty-situation that he published in his edict the formula that he would give.

2 See pp 51-52 ante.

3 Hart *The Concept of Law* pp 19, 80 et seq, and see p 48 ante. Speaking of a usurper who became President of Pakistan, Yaqub Ali J said 'He obligated the people to obey his behests, but in law they incurred no obligation to obey him': *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 229.

4 In an Australian case, *Tooth & Co Ltd v Tillyer* [1956] ALR 891, the idea of a sanctionless duty was rejected as 'a metaphysical unreality'. So too Boreham J in *Mutasa v A-G* [1980] QB 114, [1979] 3 All ER 257. J Hall says that laws conferring powers are sanctionless laws, but goes on to argue that in so far as powers are so closely tied to duties that they cannot be understood apart, the theory of sanctionless laws is said to be discredited: *Foundations of Jurisprudence* p 122. This does not follow, since he assumes that duties are always sanctioned. For his substitution of 'privation' for sanction as the coercive element behind laws, see Hall pp 104 et seq; and p 238 ante.

referred to in outline[5]. Some of the examples to be mentioned have since been altered, but they are relevant as illustrations of judicial thinking.

1. Section 4 of the Statute of Frauds 1677 (the greater part of which has now been repealed by the Law Reform (Enforcement of Contracts) Act 1954), and s 40(1) of the Law of Property Act 1925 (replacing s 17 of the Statute of Frauds), say respectively that in the absence of a note or memorandum in writing signed by the party to be charged 'no action shall be brought' and 'no action may be brought'. Judicial policy towards the Statute of Frauds, as is well known, sought to minimise its operation with the result that its provisions were interpreted to mean that the lack of a memorandum did not affect the existence of a duty, but only its actionability.

> 'I think it is now finally settled' said Lord Blackburn 'that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract'[6].

The fact that the duty remains notwithstanding the absence of an action is evidenced in many ways. The Rules of the Supreme Court require the want of writing to be pleaded, otherwise the party is answerable[7]. In other words, the duty is there and it is for the defendant to avail himself of the procedural advantage. Again, if an action is brought in Great Britain on a contract entered into abroad, it has been held that it is not the validity of the transaction but its actionability in the English courts that is affected by the requirement of writing[8]. The absence of writing does not of itself render a transaction void, since it could become void for other reasons, eg want of consideration. The writing may come into existence at any time between the agreement and the action. Finally, if one party alone has signed the memorandum, the action may be brought against him, but not by him[9]. By contrast whenever a transaction is void, a statute will say so.

2. Where acts of part performance are relied on in place of a note or memorandum in writing to make the transaction actionable, the courts do not treat these as creating the duty, but only as supplying the necessary evidence[10].

3. The fact that property rights pass under non-actionable transactions shows that they do create legal relationships. Devlin J once said,

> 'If the Act said that it was void, then of course the character of Murphy's possession could not be altered by it. But the Act says merely that it is to be

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5 In an article, entitled 'The Unenforceable Duty' (1959) 33 Tulane Law Review 473, the author endeavoured to convey some idea of the volume of authority on the subject in Roman and English law.

6 *Maddison v Alderson* (1883) 8 App Cas 467 at 488. This is all the more significant because this case disposed of the old view that there was no duty: *Carrington v Roots* (1837) 2 M & W 248. For an equally important statement, see *United Dominions Corpn (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 347, [1968] 2 All ER 904 at 906-907 (quoted at pp 242-243 post). For acceptance that the contract remains valid in all other respects: *Wauchope v Maida* (1971) 22 DLR (3d) 142.

7 RSC Ord 18 r 8 on which see (1985) *Annual Practice* p 267; *Craxfords (Ramsgate) Ltd v Williams and Steer Manufacturing Co Ltd* [1954] 3 All ER 17 at 18.

8 *Leroux v Brown* (1852) 12 CB 801 at 824. Conversely, a contract unenforceable abroad may be sued on in Britain: *Harris v Quine* (1869) LR 4 QB 653. See also *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216.

9 *Laythoarp v Bryant* (1836) 2 Bing NC 735; *Britain v Rossiter* (1879) 11 QBD 123 at 132.

10 *Rawlinson v Ames* [1925] Ch 96; *Broughton v Snook* [1938] Ch 505, [1938] 1 All ER 411.

> unenforceable. This must mean that it is effective to alter the rights of the parties but that the altered rights cannot be enforced'[11].

4. Statutes of Limitation only bar the action and do not extinguish the duty, which continues to be sanctionless.

> 'I think' said Cotton LJ 'that "due" included everything that was owing, whether barred by the statute or not. Statute-barred debts are due, though payment of them cannot be enforced by action'[12].

Nield J discussing the effect of the Statute of Limitations said:

> 'The Act of 1939 does not provide that after such period the plaintiff's remedy shall be extinguished or even wholly cease to be enforceable, and indeed the remedy is not extinguished, nor does it wholly cease to be enforceable; for if a defendant elects not to plead the Statute of Limitations, the remedy may be pursued after the period of limitation. Further than that, the benefit which a defendant derives from the Statute of Limitations is not I think properly described as a substantive benefit but really is merely as a right to plead a defence if he chooses to, so that the plaintiff is barred from prosecuting his claim'[13].

Diplock J has said that 'a cause of action does not cease to exist because a limitation period has expired'[14]; and so also Donaldson LJ 'it is trite law that the English Limitation Acts bar the remedy and not the right; and, furthermore, that they do not even have this effect unless and until pleaded'[15].

5. Acknowledgment or part payment of a statute-barred debt makes it actionable again. If it is argued that the statute, by removing the sanction, thereby extinguished the duty, then acknowledgment or part payment can only result in the creation of a wholly new duty. This is not so. The fact that no new consideration is required is consistent with the idea that acknowledgment operates only as a waiver of the procedural bar rather than with the creation of a new duty; and judges have said that it only revives the old duty. So Lord Sumner:

> 'Surely the real view is, that the promise, which is inferred from the acknowledgment and 'continues' or 'renews' or 'establishes' the original promise laid in the declaration, is one which corresponds with and is not a variance from or in contradiction of that promise ... If so, there is no question of any fresh cause of action'[16].

If, then, it is the original duty which is rendered actionable again, lapse of time can only have made it unenforceable. It is worth noting, however, that judicial policy has introduced some inconsistency in practice. Judges have not viewed the Statutes of Limitation with favour, especially when they are

11 *Eastern Distributors Ltd v Goldring* (*Murphy, third party*) [1957] 2 QB 600 at 614, [1957] 2 All ER 525 at 534 (overruled without affecting this point by *Worcester Works Finance Co Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708).

12 *Curwen v Milburn* (1889) 42 Ch D 424 at 434.

13 *Rodriguez v Parker* [1967] 1 QB 116 at 136, [1966] 2 All ER 349 at 363. For equally important statements, see Lord Esher in *Coburn v Colledge* [1897] 1 QB 702 at 705 (quoted in *O'Connor v Issacs* [1956] 2 QB 288 at 341, [1956] 2 All ER 417 at 428); and Lord Denning MR in *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at 718, [1967] 2 All ER 682 at 686.

14 *Airey v Airey* [1958] 2 All ER 59 at 62 (affd on other grounds [1958] 2 QB 300, [1958] 2 All ER 571; nullified by the Proceedings Against Estates Act 1970, s 1).

15 *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 at 404, [1982] 3 All ER 961 at 965, CA.

16 *Spencer v Hemmerde* [1922] 2 AC 507 at 524; *Busch v Stevens* [1963] 1 QB 1, [1962] 1 All ER 412.

used to evade obligations[17]. As between the original promisor and promisee they are ready to hold the promisor strictly to his original bargain and for this purpose regard acknowledgement merely as the waiver of a procedural bar so as to make the original promise actionable once more. With the promisee's executor, on the other hand, there may not be the same reason for insisting on the original promise being carried out to the letter, and there has been a tendency in these cases to say that acknowledgment creates a new promise so that its terms may be qualified[18]. So it would appear that where it would be consonant with policy to say that the duty is the old one or a new one, the idea of the sanctionless duty will be pressed into service or not as the case may be.

6. It is because a sanctionless duty is still conceived of as a duty that payment under it cannot be recovered, whereas payment under a void transaction can be. The reason is that even though the duty is sanctionless the party who pays fulfils the requirement that he ought still to pay. The fact that he cannot be made to do so does not alter the continuing legal 'ought'. Where the transaction is void, there is no 'ought' at all[19].

7. A duty, the performance of which is postponed, is in the meantime a sanctionless duty. Speaking of an agreement to give time to a debtor Denning LJ once said,

> 'the effect of it was that the debt remained due, but not enforceable. Between November 17 and 30, it was *debitum in praesenti, solvendum in futuro*'[20].

Judgment creates a duty to satisfy it, even though it is not enforceable by action until a future date; but the period of limitation starts to run from judgment[1].

8. There has to be an existing duty before a payment or part payment can be appropriated to it: A sanctionless duty is for this purpose recognised as a duty. Thus, in *Seymour v Pickett*[2], one part of the creditor's claim was actionable, the other was not. The debtor, who was aware of this, paid only sufficient money to cover the actionable part without specifically saying so. The creditor thereupon appropriated the payment to the non-actionable part and sued in respect of the actionable part. He was held entitled to do so.

9. Security can only be given in support of an existing duty, and a sanctionless duty will suffice for this purpose[3].

10. An unenforceable contract, ie one in which the duty is sanctionless, is valid in the sense that it may be used to discharge a prior contract, provided there is an intention to rescind it even though the new contract is itself unenforceable. If the intention is only to vary the prior contract, then the unenforceable character of the new one leaves the old unamended.

> 'At the root of the problem' said Lord Devlin 'there lies the concept of unenforceability, first introduced into English law by the Statute of Frauds and

17 *Re Baker, Nichols v Baker* (1890) 44 Ch D 262 at 270; *Stamford Spalding and Boston Banking Co v Smith* [1892] 1 QB 765 at 770.

18 See Williston *Contracts* ch 7, and authorities collected in Dias 'The Urien forceable Duty' (1959) 33 Tulane Law Review at 485-86 n 49.

19 *Bize v Dickason* (1786) 1 Term Rep 285. Cf *Chillingworth v Esche* [1924] 1 Ch 97 at 112.

20 *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346 at 353, [1950] 2 All ER 821 at 824.

1 *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 QB 463, [1971] 2 All ER 1513.

2 [1905] 1 KB 715. See also 5th Interim Report of the Law Revision Committee, 32.

3 *Spears v Hartly* (1800) 3 Esp 81; *Low v Fry* (1935) 152 LT 585.

> since made use of in a number of other settings, including the Moneylenders Act 1927. If the statute made the amending contract void and of no effect, there would be no problem at all. An attempt at changing the original contract would have failed altogether and so left it quite untouched. But unenforceability creates only a procedural bar. The substance of the contract is good; yet, although the contract is alive and real, the court will not give effect to it unless its existence can be proved in the way prescribed by the statute ... On this view the old contract cannot be enforced because it has been rescinded and the new contract cannot be enforced because it is not properly evidenced'[4].

Similarly, an unenforceable contract may be used by way of defence. Where, for instance, a compromise is unenforceable by one party for lack of writing, that party may nevertheless raise the agreement as a defence to an action brought against him[5].

11. Where work has been done under an unenforceable contract, the question has arisen whether reimbursement can be claimed on the basis of an implied contract. It has been held that the unenforceable contract is an existing contract, and that where an express contract already exists no other contract can be implied[6].

12. The position of diplomats is a good example of how the idea of the sanctionless duty is used to give effect to the conflicting demands of policy. International courtesy requires, on the one hand, that diplomats should be protected, but the claims of private persons, on the other hand, also deserve satisfaction. The solution is to recognise sanctionless duties in diplomats so that, although no action can be brought against them without waiver of the immunity, others, such as insurance companies and sureties, can be made responsible collaterally[7].

> 'Diplomatic agents' said Lord Hewart CJ 'are not in virtue of their privilege as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction'[8].

Furthermore, *Musurus Bey v Gadban*[9] and *Empson v Smith*[10] are authorities for saying that the diplomat will himself be answerable on the expiry of a reasonable time after the termination of his mission if he remains within the jurisdiction. This is not a new duty which suddenly emerges; it is his original duty which becomes actionable.

13. The position in tort of husband and wife before 1962 was another

4 *United Dominions Corpn (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 347, [1968] 2 All ER 904 at 906-907. See also *Morris v Baron* [1918] AC 1.

5 *Auckland Bus Co v New Lynn Borough* [1965] NZLR 542.

6 *Britain v Rossiter* (1879) 11 QBD 123 at 127; approved in *James v T H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099.

7 Insurance: *Dickinson v Del Solar* [1930] 1 KB 376; surety: *Magdalena Steam Navigation Co v Martin* (1859) 2 E & E 94 at 115; excise: *A-G v Thornton* (1824) 13 Price 805; *Schneider v Dawson* [1960] 2 QB 106, [1959] 3 All ER 583. On immunity generally, see Diplomatic Privileges Act 1964.

8 *Dickinson v Del Solar* [1930] 1 KB 376 at 380. See also Diplock LJ in *Zoernsch v Waldock* [1964] 2 All ER 256 at 265-266, [1964] 1 WLR 675 at 691-692.

9 [1894] 2 QB 352. See the Swiss case: *V v D* (1927) 54 JDJ 1175; Briggs *The Law of Nations* pp 786, 801.

10 [1966] 1 QB 426, [1965] 2 All ER 881. A petition under the Matrimonial Causes Act 1973 against a husband, who enjoyed immunity at the time, was valid even though the suit could not be heard; but by the time the matter came to court the husband lost his immunity, so there was no longer a procedural bar: *Shaw v Shaw* [1979] Fam 62, [1979] 3 All ER 1.

instance of sanctionless duty being utilised to serve policy. A trifling exception aside, one spouse used not to be able to sue the other, but the other's employer was vicariously responsible[11]. The House of Lords has declared that vicarious means vicarious, and that no one can be answerable vicariously unless his servant has himself committed a tort[12]. If, then, an employer was answerable vicariously for one of the spouses, there must have been an unenforceable tort committed between them[13]. The judgment of Denning LJ in *Broom v Morgan*[14] is of especial interest in this connection. He first grounded the employer's answerability on a special view that this is not a vicarious, but a primary responsibility; but he went on to proffer the sanctionless tort between spouses as an alternative ground for the decision should it be said that the employer's answerability has to be vicarious.

> 'If I am wrong on this point, however, and the liability of the master is, properly speaking, a vicarious liability only (so that he is only liable if his servant is also liable), then I still think that the employer here is liable ... That section disables the wife from suing her husband for a tort in much the same way as the Statute of Frauds prevents a party from suing on a contract which is not in writing, but it does not alter the fact that the husband has been guilty of tort. His immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action: and, as he is liable, so also is his employer, but with the difference that the employer's liability is enforceable by action'.

This shows how, in order to reach a particular decision, the sanctionless duty, or some other line of argument, will be utilised if suitable.

14. A joint obligation consists of one duty which rests on more than one person. Anything which ends the duty of one, such as a release, ends the duty of all. A mere agrement not to sue one party does not free the others, because such an agreement does not extinguish the duty, but only makes it unenforceable against him[15].

15. Even in criminal law, where sanctions abound if anywhere, before the Suicide Act 1961 effected a change, there was a sanctionless duty not to commit suicide. It is absurd to say that, because in the nature of things there could be no sanction, therefore there was a liberty to commit suicide. For, the policy of the law was to forbid, not to permit, suicide. Suicide used to be a felony of violence and it is a contradiction in terms to speak of a liberty in law to commit a felony. Attempt at suicide was a punishable misdemeanour; to admit that there was a sanction and hence a duty not to attempt suicide, but no duty not to complete the attempt is to overstep the limits of sense. Finally, the survivor of a suicide pact used to be guilty of murder as

11 *Smith v Moss* [1940] 1 KB 424, [1940] 1 All ER 469; *Broom v Morgan* [1953] 1 QB 597, [1953] 1 All ER 849.

12 *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627, [1956] 1 All ER 403; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999.

13 'Unless the servant is liable the master is not liable for his acts; subject only to this, that the master cannot take advantage of an immunity from suit conferred on the servant': per Lord Pearce in *ICI Ltd v Shatwell* [1965] AC 656 at 686, [1964] 2 All ER 999 at 1012.

14 [1953] 1 QB 597 at 609-610, [1953] 1 All ER 849 at 854-855.

15 *Duck v Mayeu* [1892] 1 QB 511 at 513; *Apley Estates Co Ltd v De Bernales* [1947] Ch 217, [1947] 1 All ER 213; *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474; *Gardiner v Moore (No 2)* [1969] 1 QB 55, [1966] 1 All ER 365.

a principal in the second degree, which can only imply that suicide constituted the principal offence[16].

All this should establish that a legal duty is the expression of an 'ought', reinforced no doubt by sanctions in the majority of cases, and that a duty is conceived as such even though the sanction is withdrawn or may not exist. In the face of this evidence it is to be wondered why sanction is so persistently thought of as essential to the concept of duty. An obvious reason is that most duties do have sanctions. It is possible also that attention tends to be focused on general duties which each person owes to everyone else, such as those in criminal law and tort, which are duties not to do certain things. With these it is the sanction arising out of their breach that attracts attention. Where the duty is positive, one of active performance, one thinks primarily of what ought to be done and secondarily of sanction. Usually such duties have to be specifically created and they are owed to particular persons, which is why they do not spring so readily to the mind as general duties. Another reason may be that the fear of sanction is a factor in securing obedience; but it is wrong to assume that this is exclusive, or even of paramount importance[17]. Again, it is necessary to distinguish legal from moral duties and a good deal of comfort appears to be derived by fastening on sanction as the distinctive feature. As pointed out, the distinction lies in the use of the label 'law'. Every country has accepted certain criteria which govern this; in Britain these are precedent, statute and custom. If an 'ought' is embodied in any of these, it is 'legal'; if not, it is not 'legal', whatever else it may be. This test is simpler to apply than the ambiguous sanction test. Besides, as mentioned earlier in this chapter, sanction itself consists of duties.

The fallacy underlying the sanction test of duty is the result of an illegitimate transposition of a conclusion drawn when thinking in a continuum of time into the time-frame of the present. The functioning of duties in a continuum inevitably brings in the machinery of enforcement as an observable feature of their working. Duty, however, is also a tool of legal reasoning applied *ad hoc* in this and that case, and the nature of it in the context of here and now is not to be elucidated with reference to its operation as part of the entire system[18]. In brief, sanctions are among the observable facts of a 'legal system' and constitute part of the 'is' of society as a going concern. It is a mistake to deduce from this that they are, therefore, part of the concept of 'duty' as an 'ought'. A 'legal system' is not merely the sum-total of laws[19]. It is thus logically consistent to say that the phenomenon of sanction is a feature of 'legal system', but not necessarily of every 'law'. It is true that a complete picture will be obtained not only by considering duties as prescriptions of conduct and tools of judicial reasoning, but also the actual working of these prescriptions in society. The point, however, is that in order to obtain as true a picture as possible of each aspect it is best to deal with them separately. To present a unified picture of two dissimilar contexts,

16 The need for at least a principal offence, though not necessarily a principal offender, who may have a defence, is seen in *R v Bourne* (1952) 36 Cr App Rep 125. See generally *Beresford v Royal Insurance Co Ltd* [1938] AC 586, [1938] 2 All ER 602; *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807; [1957] 1 WLR 1121; *R v Doody* (1854) 6 Cox CC 463; *R v Croft* [1944] 1 KB 295, [1944] 2 All ER 483.

17 See pp 51–52 ante.

18 Cf Fuller, who rejects the sanction criterion for another reason: *The Morality of Law* pp 108–110.

19 See p 60 ante.

based on a feature appropriate to one only, inevitably results in a distortion of case law. For duty is a weapon of judicial thought and should be elucidated with reference to the way in which it is used to give effect to policy and other such considerations in individual cases. To tie it rigidly to sanction is to fail to allow for that complex interplay of values so necessary to the application of laws, and also to fall into the 'jurisprudence of conceptions' habit justly derided by Ihering. The sanction-oriented concept of duty is appropriate to a sociologist who, like a natural scientist, is seeking to derive *descriptive* laws of social existence. It is not appropriate to a lawyer, even one concerned with the social working of laws, for to him laws are also prescriptive and he has to take account of all the processes, which include law-making, law-applying, reasoning and the operation of laws[20].

Conflicting duties

Before discussing the conflict of duties, some explanation is required as to what is meant by 'conflict'. Two situations are distinguishable: the first is where the two duties are in opposition to each other, one saying in effect, 'You ought to do X', and the other, 'You ought not to do X'; the second is where the duties are not of opposite content, but the fulfilment of one involves a breach of the other.

Duties of opposite content may be found in different jurisdictions or systems of law, eg in the conflict between municipal and international law, as the war criminals found to their cost, or between the civilian and military duties of a soldier. The nearest approach to a conflict within the same system is the *Case of the Sheriff of Middlesex*[1], where the sheriff, who fulfilled his duty by levying execution on the property of Hansard in pursuance of a judgment of the court, found himself committed for contempt by the House of Commons for having done so. Cases are naturally hard to discover, for no system of law will tolerate such situations for long. A more fruitful line of inquiry is whether a person by contract may subject himself to conflicting duties. If A enters into a contract with B, knowing of a prior inconsistent duty in B, the second contract will probably be void; but where it has been entered into without such knowledge in A, the answer is not clear[2]. In so far as people are left to make their own bargains, there is no reason why a person, who has been so foolish as to place himself under conflicting duties, should not be held bound by both.

Although the duties themselves may not be in conflict, their performance may not be reconcilable. An example is the now, as it would seem, discredited case of *R v Larsonneur*[3], in which the defendant was deported under police escort and placed in custody at Holyhead, and was then held guilty of being found in the United Kingdom without having a permit to land. Had she refused to be brought there so as not to commit a breach of the

20 See pp 422-423 post.

1 (1840) 11 Ad & El 273. The conflict was resolved shortly afterwards by the Parliamentary Papers Act 1840. In *Johnson v Phillips* [1975] 3 All ER 682, one duty was held to override a contrary duty.

2 See *Beachey v Brown* (1860) EB & E 796; *British Homophone Co Ltd v Kunz* (1935) 152 LT 589; Salmond & Winfield on *Contracts* pp 145-146; Salmond & Williams on *Contracts* pp 366-367; Pollock on *Contracts* p 355; Lauterpacht 'Contracts to Break a Contract' (1936) 52 LQR 494; Rattigan *The Science of Jurisprudence* pp 33-37.

3 (1933) 97 JP 206. Cf *Lim Chin Aik v R* [1963] AC 160, [1963] 1 All ER 223.

duty for which she was found guilty, she would have committed a breach of her other duty not to resist the police in the discharge of their duties. Whichever duty she complied with, she was bound to commit a breach of the other. Another situation is illustrated by *Daly v Liverpool Corpn*[4], where it was acknowledged that the fulfilment of the duty by an omnibus driver to drive with due care and attention was not reconcilable with the discharge of his duty to adhere to a reasonable time-schedule. A person may place himself by contract under two duties which cannot both be fulfilled. A possible illustration is *Eyre v Johnson*[5], in which the defendant by virtue of a pre-war tenancy contract was under a duty to keep the premises in repair and to restore them eventually in a state of repair. At the end of the tenancy he applied for a licence under the Defence (General) Regulations 1939, reg 56A, to effect the necessary repairs, but was refused permission. To have carried out the repairs none the less would have amounted to a breach of the regulations, and not to have done so would have been a breach of the contract. The court held him answerable in contract, but it should be noted that the breach of the contractual duty here was not inevitable, since, as the court found, had he maintained the premises in repair over the years, as he should have done, no licence would have been needed.

Where there is conflict in the sense under consideration between a legal and moral duty, the former prevails[6].

BREACH OF DUTY

Duty is a prescriptive pattern of conduct, which 'exists' in the sense that ideas exist. The breach of duty, however, can only occur as a result of conduct in a given situation, which is why it is always a *question of fact*.

What amounts to a breach of any given duty must follow from the formulation of that duty. If the duty is simply to behave or not to behave in a certain way, then the breach of it is not behaving or behaving in that way. If the duty is to produce or not to produce a given result, the breach of it is the failure to produce or the production of that result. So, too, if the duty is not to produce a given result in a particular manner, the breach of it is constituted by the production of that result in the manner specified[7].

Also, depending on the formulation of the duty, ascription of responsibility for conduct may turn on whether this is an act or an omission, a distinction which has additional significance as to the moment of time when a breach of duty occurs. Thus, in relation to limitation of actions time starts to run from breach. If the conduct in question is an act, then breach of duty occurs at that moment; if it is an omission, breach begins with the failure to act and continues thereafter[8].

In some cases breach of duty requires that the conduct has to be blameworthy (malicious, intentional, reckless or negligent), in others it occurs even

4 [1939] 2 All ER 142.

5 [1946] KB 481, [1946] 1 All ER 719. See also *Sturcke v Edwards* (1971) 23 P & CR 185.

6 *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep 304, CA.

7 For an application of the above analysis to the confusion attending the 'duty of care' concept in negligence, reference might be made to Dias 'The Duty Problem in Negligence' (1955) CLJ 198, and 'The Breach Problem and the Duty of Care' (1956) 30 Tulane Law Review 377.

8 *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384, [1978] 3 All ER 571.

without blameworthiness (strict responsibility). Further questions concern the result of conduct, namely, causation and remoteness of consequence. Each of these possesses a range of application giving courts latitude to arrive at just decisions[9].

FUNCTIONING OF DUTY

Professor Fuller is undoubtedly right in saying that one cannot even *hope* to regulate behaviour unless his eight desiderata are satisfied. There is more to it, however, than hope. Duties *do* by and large succeed in regulating the conduct of people. This leads to the question why duties are in fact obeyed, which is sometimes associated with the 'binding force' of duties. What this seems to mean is that the jurisdiction of certain institutions, such as the legislature and courts, extends to all spheres of behaviour and such jurisdiction is supreme. Their decisions cannot be ignored by officials or citizens, even when they are thought to be wrong. Officials are said to have duties in respect of the law, that is, to apply it honestly whether they like it or not; citizens have duties under the law many of which they are powerless to change. This is what gives rise to the idea of the 'bindingness'. So put, it conjures up a mystical entity, but which is only the product of language form. Instead of asking, Why are duties binding? it is more profitable to ask, What machinery is there for dealing with disobedience? and, Why do people in fact obey?

Machinery for dealing with disobedience

This provides the sanctions that support the majority of duties. It has been pointed out that sanction is a feature of the working of duties when these are considered in a continuum. Sanctions are of many kinds; they may operate on the individual himself (eg imprisonment) or on his property (eg damages); they may provide compensation, retribution, deterrence or reformation.

Why do people obey?

There are many reasons why people comply with duties. Bryce long ago tabulated them in the following order: indolence, deference, sympathy, fear and reason[10]. This list does not take sufficient account of psychological, social and moral pressures. All this is another way of approaching the manner in which rules are internalised and continue to be internalised, and for this reference should be made to an earlier part of this book[11].

9 See eg G L Williams *Criminal Law: The General Part* (2nd edn) ch 1, especially §§8-13, and chs 2-3; Clerk & Lindsell on Torts §§1-111 et seq, 11-35 et seq.

10 Bryce *Studies in History and Jurisprudence* II, pp 6 et seq.

11 See p 48 et seq. ante. Some mention might be made of Olivecrona's application of his psychological basis of internalisation to the notion of duty: *Law as Fact* (1971) pp 126 et seq. He distinguishes between the '*imperantum*', which is the part that creates 'the impression that the behaviour in question shall be observed', and the '*ideatum*', which is the part that refers to the conduct. The *imperantum* is the whole background creating the attitude of submission, namely, the organisation, procedures etc. He also followed JL Austin's insight that certain statements are 'performative' in that they produce effects in the world, eg 'I pronounce you man and wife' (see p 7 ante). Such statements are not to be understood as being true or false. Similarly, says Professor Olivecrona, legal statements 'are not statements about realities within the system; they form part of the regularised use of language which makes the system work' (pp 261-262).

READING LIST

C K Allen *Legal Duties* pp 156–220.
J Austin *Lectures on Jurisprudence* (5th edn, R Campbell) Lecture 1.
J Bryce *Studies in History and Jurisprudence* II ch 9.
L L Fuller *The Morality of Law* chs 1 and 2.
A. L Goodhart *English Law and The Moral Law* (Hamlyn Lecture Series).
H L A Hart *The Concept of Law* pp 33–41, 55–56, 79–88.
H Kelsen *General Theory of Law and State* (trans A Wedberg, 20th Century Legal Philosophy Series I).
J U Lewis 'John Austin's Concept of "Having a Legal Obligation": a Defence and Reassessment in the face of some Recent Analytical Jurisprudence' (1975) 14 Western Ontario Law Review 51.
K Olivecrona 'Law as Fact' in *Interpretations of Modern Legal Philosophies* (ed P Sayre) ch 25.
J C Smith *Legal Obligation.*

CHAPTER 12

Persons

The legal use of the word 'person' has attracted an assortment of theories which is probably second to none in volume. Before turning to them, it is necessary to have an idea of the way in which various problems that have arisen in this connection are dealt with, and what part the term 'person' plays in relation to them. This word has undergone many shifts in meaning, so two questions have to be asked: how has it been used? and, how does it function?[1].

With regard to its uses, it might be noted that originally it meant a mask[2], then the character indicated by a mask, the character in a play, someone who represents a character, a representative in general, representative of the Church, a parson[3]. In Roman law another shift in meaning seems to have occurred from a character in a play to any human being. Law takes account of human beings so far as their jural relations are involved and this in Roman law, with its emphasis on remedies, meant the power to sue as well as the recognition of interests in property. The development of such capacities in bodies, such as the *municipium* and the *collegium*, may have helped to abstract the idea. Despite this it would be wrong to suppose that the word *persona* was used in any technical sense in Roman law: there was only a tendency in that direction in late law.[4] Some such idea seems to have been present in the mind of Tertullian, who brought his legal ideas to bear on the interpretation of the 'person' of Christ, which gave the word another shift in meaning as connoting the 'properties' of divinity and humanity[5]. English law has taken over the popular reference of the word to human beings with all its emotive overtones, but the legal significance centres on the jural relations that are focused on an individual. This represents a technical shift in the meaning of 'person'. The law has gone still further and applied it to corporations, which is yet another technical shift and does not rest on any similarity, pretended or real, between human beings and groups. One may acknowledge that a group is a unit without feeling impelled to call it a person; which indeed is the case with unincorporated associations. Had the law stopped at human beings in its use of the word 'person' a good deal of needless perplexity would have been avoided. As a unit of jural relations, however, the term has lent itself to applications other than to human beings and hence serves different functions. This chapter will consider the ways in which it serves various purposes of justice as set out earlier.

1 See Hart 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37.
2 *προσωπον* = face or visage.
3 Greenough and Kittredge *Words and their Ways in English Speech* p 268, quoted by Ogden and Richards *The Meaning of Meaning* p 129.
4 Duff *Personality in Roman Private Law* ch 1.
5 Bethune-Baker *An Introduction to the Early History of Christian Doctrine* ch 10.

ALLOCATION OF BENEFITS AND BURDENS

The concept 'person' focuses large numbers of jural relations, but it allocates them differently in different cases.

Human beings

Individuals are the social units and pre-existed both laws and society. Since laws are made by them and for them, and since jural relations are relations between individuals, it is no wonder that the jural relations of each individual came to be one of the first and most important unities for legal purposes[6]. The legal concept of a human being as a person is simply a multitude of claims, duties, liberties etc treated as a unit; as such there is no distinction in law between 'natural' and 'legal' persons[7].

Corporations sole

From an early time it was found necessary to continue the official capacity of an individual beyond his lifetime, or tenure of office. The common lawyers accordingly created a second 'person' who, though passing under the same name as the flesh and blood individual, enjoys legal existence in perpetuity. This is the corporation sole, which is a personification of official capacity. Unity of jural relations is thus assured a continuity which it would not otherwise have. 'The living official comes and goes', said Salmond in a passage which has become classic, 'but this offspring of the law remains the same for ever'[8]. The idea originated, according to Maitland, with a piece of land, known as the parson's glebe, which was vested in a parson in his official capacity. Difficulties arose over the conveyance of the seisin to a parson for the benefit of the Church. The corporation sole was invented so that the seisin could be vested in it[9]. Maitland went on to show that lawyers nevertheless did not avail themselves of the services of this child of their imagination for certain old rules stood in the way[10].

The main purpose of the corporation sole is to ensure continuity of an office. Moreover, the occupant can acquire property for the benefit of his successors, he may contract to bind or benefit them, and he can sue for injuries to the property while it was in the hands of his predecessor. Today there are many corporations sole, eg a parson, a bishop, Public Trustee, and a great many others[11]. The most spectacular is the Crown about which something more needs to be said.

6 Slavery in England died out before Norman times. The attribution of rights or responsibility to animals has likewise long been obsolete. The responsibility of animals is common in primitive systems: Exodus xxi 28; XII Tables 8.8: *D* 9.1.1 *pr.* In English law the responsibility of wrongdoing things, *deodands*, was abolished by statute in 1846, though the institution had long been obsolete. The Privy Council had occasion to deal with the position of an idol in Hindu law, *Pramatha Nath Mullick v Pradyumna Kumar Mullick* (1925) LR 52 Ind App 245.

7 Cf Kelsen *General Theory of Law and State* pp 93 et seq; *Pure Theory of Law* (trans M Knight) p 173.

8 Salmond *Jurisprudence* p 311.

9 Maitland 'The Corporation Sole' in *Collected Papers* III, p 200.

10 Maitland pp 230–243.

11 A Buddhist temple in Ceylon (now Sri Lanka) has been held not to be a corporation sole: *M B Thero v Wijewardene* [1960] AC 842. See also *Land Comr v Pillai* [1960] AC 854; *Salih v Atchi* [1961] AC 778.

THE CROWN AS A CORPORATION SOLE[12]. Personification of the Crown has obviated the need to personify the state in English law as in other systems. The Crown Proceedings Act 1947, s 40 (1), sharply underlines the distinction between the sovereign as an individual and the corporation sole. Maitland said that the notion of the parson's glebe was applied to the Crown, adding a Gilbertian touch that in this way the Crown was duly 'parsonified'[13]. The chief manifestation of this is seen in the maxim 'the King never dies', while the proclamation on the death of the reigning monarch, 'the King is dead, long live the King' refers both to the individual who has died and to the corporation which survives[14]. There have been rules, however, which were inconsistent with this idea of the continuity of the Crown. In early days the King's peace used to die with the King[15]. Pending actions in the Royal courts used to lapse on the King's death and had to be restarted in the next reign until statute altered the rule[16]. Petitions of right also lapsed, but could never be renewed[17]; and this rule lasted until the Crown Proceedings Act 1947 abolished petitions of right[18]. Further, Crown appointments were automatically terminated[19] and Parliament was automatically dissolved[20].

An archaic attribute of the Crown is that it is *parens patriae*, which confers upon it prerogative jurisdiction over infants, idiots and lunatics. This is now exercised by means of Ward of Court procedure[1]. It is also well known that 'the monarch can do no wrong'. The origin of this is that a feudal lord was not suable in his own court, and the monarch, as the highest feudal lord in the land, was not suable in any court. The question is whether the monarch is capable of legal wrongdoing but enjoys a procedural immunity, or whether there is no initial breach of duty. The opinion is ventured with reserve that, in early times at any rate, the monarch could do wrong, but was not suable[2].

12 *A-G v Köhler* (1861) 9 HL Cas 654 at 671. Cf *Madras Electric Supply Corpn Ltd v Boarland* [1955] AC 667, [1955] 1 All ER 753.

13 Maitland 'The Crown as a Corporation Sole' in *Collected Papers* III, p 245.

14 *Calvin's Case* (1608), 7 Co Rep 1a; Blackstone *Commentaries* I, p 249. For an anthropological explanation, see Hocart *Kings and Councillors* pp 132 et seq.

15 Stubbs *Select Charters* p 98.

16 1 Edw 6 c 7, *Discontinuance of Process & by the Death of the Queen* 7 Co Rep 29b. (Mr D E C Yale courtesously furnished this reference.)

17 *Canterbury (Viscount) v A-G* (1842) 1 Ph 306; *A-G v Köhler* (1861) 9 HL Cas 654.

18 G L Williams *Crown Proceedings* p 8, thinks the abolition of the Petitions of Rights Act 1860 (Crown Proceedings Act 1947, s 39 (1) and Sch 2) still leaves the possibility of bringing petitions of right against the sovereign personally under the provisions of s 40 (1) and the pre-1860 rules. See Hood Phillips *Constitutional Law* p 689. For case law, see *Franklin v AG* [1974] QB 185, [1974] 1 All ER 879; *Franklin v R (No 2)* [1974] QB 205, [1974] 3 All ER 861.

19 Altered by statute: Tenure of Judges Act 1761; Demise of the Crown Act 1901.

20 Altered by statute: Succession to the Crown Act 1707; Meeting of Parliament Act 1797; Representation of the People Act 1867.

1 *Re M (an infant)* [1961] Ch 328, [1961] 1 All ER 788; *Re G (infants)* [1963] 3 All ER 370, [1963] 1 WLR 1169.

2 Pollock & Maitland *HEL* I, pp 515-517; Kenny's *Outlines of Criminal Law* (18th edn) p 69. Cf Stephen *A History of the Criminal Law of England* II p 3. Although the Crown is now liable to process, the personal immunity of the monarch has been retained: Crown Proceedings Act 1947, s 40(1). So a theoretical point could still arise as to whether a private individual might be held answerable for aiding and abetting a mischief perpetrated by the monarch. Following the suggestion given above, the answer would be in the affirmative. (1) The feudal origin suggests only a procedural immunity. (2) There seems to be no reason why the king cannot infringe his own peace. If so, his act is wrongful whatever immunity there might be from process. (3) A subordinate cannot plead Royal orders as a defence. This is because, on the Parliamentarian interpretation, the maxim 'the king can do no wrong', meant that it

Another peculiarity of the Crown is that in relation to the Commonwealth it is regarded for some purposes, not as one person, but as a number of different personalities, each representing one part of the Commonwealth[3]. So, in the 1939–45 war the Crown in each Dominion declared war on Germany at different times, while the Crown in Eire (at that time still a Dominion) remained neutral throughout; also, the abdication of King Edward VIII and the accession of King George VI was confirmed at different times by the Dominions.

Corporations aggregate

The development of trade has enlarged the grouping of jural relations in such a way as to embrace collections of individuals organised into what are known as corporations aggregate. There is no doubt that these are 'persons' in English law. The expression 'person' shall, 'unless the contrary intention appears', include 'a body of persons corporate or unincorporate': so runs the Interpretation Act 1978, s 5 and Sch 1[4]. They can be created (a) by royal charter, (b) by special statute, eg the old railway companies, and (c) by registration under the Companies Act 1985, s 1, which is now the most usual method of creation[5].

In dealing with this topic it might be helpful to note, first, that there is an instinctive tendency to unify groups. This is a surface reaction, for a corporation, like a crowd, is ultimately reducible to a large number of individuals; but both are thought of apart from collections of individuals and a mental effort is always required to perform the analytical dissection. For reasons to be considered, the law, too, sometimes reacts in this way. Secondly, it is important to keep distinct the unity of a group and how the word 'person' is used. There is no necessary connection between them and the belief that there is has engendered needless confusion. In order to explain the

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was *ultra vires* for the monarch to authorise wrongdoing. (4) The original basis of diplomatic immunity was that foreign sovereigns and their envoys enjoyed the same position at English law as that of the English sovereign. Since such envoys are responsible and only immune from process, it can be inferred that such also is the position of the English sovereign. (Mr H C Whalley-Tooker and Mr E Garth Moore very kindly offered helpful suggestions on this question.)

3 So Griffith CJ in *Municipal Council of Sydney v The Commonwealth* (1904) 1 C LR 208 at 231, and after the Statute of Westminster 1931, the Dominions are regarded as sovereign states.

4 See ibid, Sch 2, Part I, para 4(b), for the application of penal enactments to corporations. See also *Re Pilkington Bros Ltd, Workmen's Pension Fund* [1953] 2 All ER 816. *National and Grindlays Bank Ltd v Kentiles Ltd and the Official Receiver* [1966] 1 WLR 348; *A-G v Antigua Times Ltd* [1976] AC 16, [1975] 3 All ER 81. The position prior to the Act is not clear. Harman LJ in *Penn-Texas Corpn v Murat Anstalt* [1964] 1 QB 40 at 70, [1963] 1 All ER 258 at 270–271, thought that 'person' in the Foreign Tribunals Evidence Act 1856, s 1, did not cover corporations; and Walton J in *Re Dodwell & Co Ltd's Trust Deed* [1979] Ch 301, [1978] 3 All ER 738, held that a corporation was not a person within the meaning of the Accumulations Act 1800, even though such an interpretation went against the mischief contemplated by the the Act.

5 Salmond gives another method of creation, viz immemorial custom, but he gives no example: *Jurisprudence* p 320. Perhaps, the University of Cambridge may be cited, for it is described in the Preface to the University Statutes as a 'common law corporation'. These corporations may depend upon a 'lost grant', *Re Free Fisherman of Faversham (Co or Fraternity of)* (1887) 36 ChD 329. It is possible also that the common law regarded corporations as unlawful, which would favour the 'lost grant' justification; and see the Companies Act 1985, s 716, prohibiting partnerships above twenty.

application of the word 'person' to groups attempts have been made to invest them with the attributes of human beings, whereas the use of the word is purposive, not descriptive. There is also an unfortunate tendency to react to the emotional connotation of 'person' regardless of whether it is used with reference to human beings or corporations. Thirdly, appreciation of unity is dependent on the viewpoint and context. Thus, a team of footballers would be regarded as a unit by subscribers to the pools, whereas in the eyes of the caterer, who has to provide the celebration after a match, they would be a collection of individuals. So too in law, but here the viewpoint and context are governed by purpose.

The term 'person' in connection with corporations performs different functions from those in connection with human beings. One objective is to facilitate the conferrment of powers on collective undertakings. When large numbers of individuals are involved, it is difficult, if not impossible, to deal with them individually. So the power is conferred on the group as a unit. Corresponding to this is the ascription of collective liability to action at law for what has been done, for which purpose, too, emphasis shifts to the unit. This is only one aspect of the general convenience of unifying the common interests of a large number of people and of working out as one unit a host of similar individual jural relations. Another important advantage is undoubtedly the ability to carry on business with limited liability, that is to say, no member need shoulder the debts of the company to an extent greater than the amount outstanding, if any, on the value of his shares. By contrast, in partnerships for example each partner is fully liable for the debts of the firm[6]. Incorporation is particularly advantageous to the one-man trader, who by forming a company is able to control and profit from the undertaking, and at the same time keep the debts of the company distinct from his own. To achieve this end, courts treat a corporation as having an existence apart from its members. The classic illustration is the celebrated case of *Salomon v Salomon & Co*[7]. Salomon formed a company, consisting of himself, his wife and five children, to which he sold his business at an exorbitant price. Payment took the form of 20,000 fully-paid £1 shares and £10,000 in debentures, ie Salomon purported to lend to the company £10,000, which was the balance owing to him on the purchase price, and he secured this loan by means of debentures. When the company went bankrupt shortly afterwards it owed debts amounting to £17,000, of which £10,000 were owed to Salomon on the purchase price and £7,000 to other unsecured creditors. Its assets only totalled £6,000. The trial judge and the Court of Appeal held that the creditors had the prior claim to the assets since the company was a mere sham. Salomon *was* the company. The House of Lords unanimously reversed this, holding that the company was in law a person distinct from Salomon and that, therefore, Salomon was preferentially entitled to the assets as the secured creditor[8]. An American case illustrating the same point is *People's Pleasure Park Co v Rohleder*[9], where the question arose

6 Subject to a slight exception created by the Limited Partnerships Act 1907, ss 4(2) and 6(1).

7 [1897] AC 22. See also *Lee v Lee's Air Farming Ltd* [1961] AC 12, [1960] 3 All ER 420; *Davies v Elsby Bros Ltd* [1960] 3 All ER 672, [1961] 1 WLR 170; *Tunstall v Steigmann* [1962] 2 QB 593, [1962] 2 All ER 417; *R v Arthur* (1967) 111 Sol Jo 435.

8 Cf *Houldsworth v City of Glasgow Bank* (1880) 5 App. Cas. 317. Parliament immediately stepped in to prevent such abuses in future.

9 61 South Eastern Rep 794 (1909). See *Underwood (AL) Ltd v Bank of Liverpool* [1924] 1 KB 775; *Ebbw Vale UDC v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366, [1951] 1 All ER 806; *Pegler v Craven* [1952] 2 QB 69, [1952] 1 All ER 685.

whether a restrictive covenant that title to land should never pass to a coloured person operated to prevent a transfer to a corporation of which all the members were negroes. It was held that the corporation was distinct from its members and that the transfer was valid.

A question that is also asked is whether a corporation can survive the last of its members. Professor Gower mentions a case in which all the members of a company were killed by a bomb while at a general meeting, but the company was deemed to survive[10].

There is also perpetuity of succession, the ability to sue and be sued in the corporate name by outsiders and by members, the ability to acquire and dispose of property as a unit, and the advantage that members may derive the profits while being relieved of the tedium of management. This is the case with large-scale undertakings, especially those in which the public are invited to invest money. The great technicality of modern commercial enterprise requires management by experts, a task which the majority of shareholders are incapable of discharging. This has brought about a cleavage, on the one hand, between membership and management, and, on the other, between ownership, which is in the company, and power, which is exercised by managers. This development is sometimes referred to as the 'managerial revolution'. There is often no effective control over management, for the corporation, being a figure of straw, is incapable of exercising it, nor can the members, who usually lack technical knowledge and, in any case, are too large and diffuse a body to be co-ordinated effectively. It is thus true, as has been said, that shareholders have tended to become little more than recipients of dividends[11].

It follows from the distinction between the corporation and its members that the property of the corporation is not the joint property of the members. What they own are their shares[12]. As Evershed LJ (as he then was) put it,

> 'Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the shareholders'[13].

CONTROL OF POWER

The separation of power from ownership of the corporate property and ownership of 'notional property', namely shares, has been taken a step further with parent and subsidiary companies. Company A may own the controlling shares in Company B. The result is that, although Company B remains owner in law of its property, the power of control has passed to Company A, which holds the majority of shares. Power also attaches in different degrees to the ownership of even the shares themselves, for a share in A clearly carries more power than one in B. Control of power in all these kinds of situations has to be applied to its actual source and not to the façade

10 *Modern Company Law* p 76 n 45. See also Savigny *System des heutigen römischen Rechts* II, 89; Windscheid *Lehrbuch des Pandektenrechts* I, 61.

11 Berle and Means *The Modern Corporation and Private Property* pp 3, 7-8; Jones 'Forms of Ownership' (1947-48) 22 Tulane Law Review 82-93.

12 As to what is a 'share', see Farwell J in *Borland's Trustees v Steel Bros & Co Ltd* [1901] 1 Ch 279 at 288; *Colonial Bank v Whinney* (1885) 30 ChD 261 at 286, (1886) 11 App Cas 426 at 439; *IRC v Crossman* [1937] AC 26 at 66, [1936] 1 All ER 762 at 777.

13 *Short v Treasury Comrs* [1948] KB 116 at 122, [1947] 2 All ER 298 at 301 (affd [1948] 2 All ER 509). See also Lord Buckmaster in *Macaura v Northern Assurance Co* [1925] AC 619 at 626.

of the legal person. Accordingly, statute stepped in and required, *inter alia*, consolidation of the balance sheet and profit and loss account so as to bring to light assets otherwise hidden[14]. Similarly, Sch 13 of the Transport Act 1947 attached statutory responsibilities to controller companies; and the Health and Safety at Work etc Act 1974, s 37, makes managers and directors personally responsible rather than the company.

The best known method of controlling power is nationalisation of large concerns in the hope that state ownership would prevent anti-social abuses of power. Yet, even this step has not provided the hoped-for safeguard. The reason lies partly in the 'managerial revolution', alluded to earlier[15]. Owing to the technicalities of modern industrial and commercial enterprises the actual power lies in the experts, who manage the business, and not in the company, which is only the formal owner in law. Unless parallel measures are taken to ensure control over managers, nationalisation is simply locking the stable door after the horse has bolted. The dual or multi-party system of government in Western democracies makes it imperative that the managerial boards of nationalised concerns should remain independent of the government of the day if they are to enjoy continuity and function efficiently; and such independence limits control[16]. Another drawback to nationalisation is that it adds political power to economic power, which could leave the individual more oppressed than ever; and a centrally planned economy, which nationalisation is designed to secure, not only brings in its wake a vast bureaucracy and a mass of regulations, but it is also debateable whether it may not in fact hamper rational planning[17].

CONTROL OF LIBERTY

Liberty is freedom of action, and actions can only be performed by human beings, not by abstractions like companies. When it becomes necessary to control freedom of action, the courts 'pierce' or 'lift the veil' of corporate personality in order to take account of the conduct of individuals, whose actions are in question. Courts, therefore, do not always adhere to the separateness of corporate existence, which excludes any consistent theory and emphasises the need to look at what courts do in particular situations.

'Lifting the mask' is an imprecise phrase covering different kinds of inquiries. It is not used in connection with individuals. Yet even with a human being it has to be remembered that 'person' is a purely legal conception and that one is looking at his conduct all the time and imputing it to his legal *persona*. What is special about 'lifting the mask' of corporate personality is that only the conduct of certain individuals is looked at with a view to imputing it to the corporation. A further point is that treating the act of a company as being in reality the act of some individuals is different again when treating the act of Company X as being in reality the act of Company Y, for here the act of some individual has first to be imputed to Company X (to make it the act of X), and then imputed to Y. All three situations are fundamentally alike, but it is pointless to consider what should be the correct

14 See *Littlewoods Mail Order Stores Ltd v IRC* [1969] 3 All ER 855, [1969] 1 WLR 1241, CA, where Lord Denning MR was prepared to ignore the separate *persona* of the subsidiary.

15 See p 255 ante.

16 See eg HC Debates of 3rd March 1948 (448 HC Deb 391-455 (5th series) 1948).

17 Cf the editorial comment in *The Soviet Legal System* (eds Hazard, Shapiro and Maggs) p 180.

use of the phrase 'lifting the veil' and then to argue that one of its applications is 'proper' and others 'improper'. It is better simply to describe some of the ways in which courts deal with certain situations.

In the first place, whenever courts find it necessary to take account of behaviour, they have to look at the flesh and blood actors behind the corporate façade. In *Gilford Motor Co v Horne*[18] H entered into a covenant not to compete with the plaintiffs. Later, having left the plaintiffs, he formed a company of his own family and this company then sought the custom of the plaintiffs' customers. H argued that his company could not be bound by the covenant, since it had not entered into one; nor could he be personally answerable, since it was not he but the company which committed the breach. The contention was rejected and the plaintiffs were granted an injunction. In certain other cases the acts of members are imputed to the company, even when they act outside its constitution, provided they still keep within the objects of the company. In *Parker and Cooper Ltd v Reading*[19], an informal ratification by the members was held to bind the company. When considering the misperformance or non-performance of duties only the conduct of individuals can be considered. Thus, a rule designed to promote the performance of duties, eg keeping holy the Sabbath day, is inapplicable to a corporation. 'A limited company is incapable of public worship or repairing to a church, or of exercising itself in the duties of piety and true religion, either publicly or privately, on any day of the week'[20].

Questions of imputation are important in tort and crime. In tort it is usual to distinguish between *intra vires* and *ultra vires* torts. Strictly speaking, the commission of torts is never within the powers of a corporation; what is referred to by *intra vires* torts is torts committed in the course of doing something which is within the powers of the corporation. As to these there is no difficulty: a corporation is answerable on the ordinary principles of vicarious responsibility; which has nothing to do with 'lifting the mask'. However, the law has gone further: the actions of members of the 'supreme directorate' may sometimes be regarded as the 'personal' acts of the corporation. This doctrine is invoked wherever responsibility attaches to a personal or wilful breach of duty, as may be the case, for example, when the duty is statutorily imposed[1]. The utterance of Viscount Haldane LC in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd*[2], has become the *locus classicus:*

> 'In such a case as the present one the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself'.

The doctrine is not limited to cases of fault, for it has also been applied in

18 [1933] Ch 935.

19 [1926] Ch 975, distinguishing *Re George Newman Ltd* [1895] 1 Ch 674, on the ground that in that case the acts were *ultra vires* the company itself. See *EBM Co Ltd v Dominion Bank* [1937] 3 All ER 555.

20 Per Mocatta J in *Rolloswin Investments Ltd v Chromolit Portugal Cutelarias e Produtos Metálicos SARL* [1970] 2 All ER 673 at 675, [1970] 1 WLR 912 at 915.

1 Eg the Pipe-lines Act 1962, s 54, imposes responsibility on a corporation where the act is done with the consent or connivance of a senior executive.

2 [1915] AC 705 at 713 714. See on this case *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 533. For breach by wilful act, see *Wheeler v New Merton Board Mills Ltd* [1933] 2 KB 669. See also *HMS Truculent, The Admiralty v The Divina (Owners)* [1952] P 1, [1951] 2 All ER 968.

ascertaining the intention of a landlord company in landlord and tenant law[3].

As to *ultra vires* torts there is a theoretical difficulty. For one thing, chartered corporations do not come within the *ultra vires* rule[4]. With statutory corporations the rule may be that no authority will be implied from the corporation to perform the acts in the course of which such torts were committed[5], or it may be that responsibility is to be determined on the ordinary rule concerning the course of a servant's employment. If there is express authority, Winfield argued that the corporation should be answerable as a joint tortfeasor[6]. A contrary view was put forward by Professor Goodhart[7]. Even where there is no express authority, many writers submit that the corporation should be answerable for the acts of its governing body. The only decided case, not a very satisfactory one, is *Campbell v Paddington Corpn*[8], which is in support of responsibility.

In criminal law the old procedural difficulties were removed by statute[9]. The theoretical difficulties have been overcome, partly by statute and partly by bold decisions, so that now a corporation can be made answerable even for crimes involving *mens rea* on the basis that the acts of the 'supreme directorate' are the personal acts of the corporation[10].

In the interests of national safety courts have also sought to ascertain whether a company is to be treated as an 'enemy company' in time of war. During the 1914–18 war in *Daimler Co Ltd v Continental Tyre and Rubber Co (Gt Britain) Ltd*[11], a company, which was incorporated in England, was nevertheless held by the majority of the House of Lords to possess enemy character because all its directors and shareholders except one were Germans. This is not a departure from the rule that a company is distinct from its members, but only shows that its friendly or enemy character is to be ascertained by looking behind the mask. It was held in another case that a company, which

3 *HL Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 173, [1956] 3 All ER 624 at 630. Shipping law: *The Lady Gwendolen* [1965] P 294, [1965] 2 All ER 283. For the residence of a company see *Unit Construction Co Ltd v Bullock* [1960] AC 351, [1959] 3 All ER 831. Where a company is the victim, the knowledge of its directors is not notionally transmitted to it: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA.

4 *Sutton's Hospital Case* (1612) 10 Co. Rep. 23a.

5 Arguing from *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534.

6 Winfield on *Tort* (7th edn) pp 82–83; see now 12th edn, pp 692–693.

7 Goodhart 'Corporate Liability in Tort and the Doctrine of Ultra Vires' in *Essays in Jurisprudence and the Common Law* ch 5.

8 [1911] 1 KB 869.

9 Criminal Justice Act 1925, s 33(3); Magistrates' Courts Act 1980, Sch 3; Companies Act 1985, ss 210, 732.

10 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119; *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691; *Moore v Bresler (I) Ltd* [1944] 2 All ER 515. Where defendant is the sole responsible person in a company, there can be no conspiracy between him and the company: *R v McDonnell* [1966] 1 QB 233, [1966] 1 All ER 193. There is no imputation of acts of persons who are not in responsible positions: *J Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233, [1965] 1 All ER 725; *Magna Plant v Mitchell* (1966) 110 Sol Jo 349. In *Essendon Engineering Co Ltd v Maile* [1982] RTR 260, it was said that for a company to be guilty of a crime involving *mens rea*, the company must have given the individual full discretion to act independently of instructions from the company and have the necessary knowledge.

11 [1916] 2 AC 307. So, too, a company in a neutral country which becomes effectively controlled by the enemy owing to occupation: *V/O Sovfracht v Gebr van Udens Scheepvaart en Agentuur Maatschappij* [1943] AC 203, [1943] 1 All ER 76.

acquires enemy character in this way, still remains an English company, at all events if it had been registered in England[12].

Public policy may make it necessary to look at the realities behind the corporate façade. Covenants in restraint of trade are viewed more strictly when imposed on employees than on others[13]. In the leading case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*[14], it was held that for this purpose covenants by the managing director of a company were to be treated as covenants by a seller and not an employee. In another type of case, *Dimes v Grand Junction Canal Co*[15], the Lord Chancellor himself had an interest as a shareholder in the litigant company. The judges advised the House of Lords that the Lord Chancellor's interest disqualified him from sitting as a judge in the case.

Courts are always vigilant to prevent fraud or evasion[16]. Thus, they will not permit the evasion of statutory obligations. In *Re FG (Films) Ltd*[17], a film was made nominally by a British company, which had been formed for this purpose with £100 capital of which £90 were held by the director of an American company. The film was financed and produced by the American company, and it was held that the British company was not the maker of it within the meaning of the Cinematographic Films Act 1948, ss 25(1)(a) and 44(1), but that it was purely the nominee of the American company[18]. This case and others like it are examples of the mask of corporate unity being lifted and account being taken of what lies behind in order to prevent fraud. The converse situation is also true: if a person finds it to his advantage to disregard corporate unity, he may discover to his discomfiture that the courts refuse to do so[19].

Devlin J once said 'the legislature can forge a sledge-hammer capable of cracking open the corporate shell'[20], and the legislature has done so in a variety of statutes, principally to prevent the evasion of tax and other forms of revenue[1]. The Companies Act 1985, s 24, casts responsibility personally on members of a company which carries on business for longer than six months after the membership has fallen below a stated minimum, provided that they know it has fallen. Sections 348–350 similarly cast responsibility on the individuals concerned for a failure to publish the name of the company

12 *Kuenigl v Donnersmarck* [1955] 1 QB 515, [1955] 1 All ER 46.

13 *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, at 270; p 211 ante.

14 [1894] AC 535. See also *Connors Bros Ltd v Connors* [1940] 4 All ER 179.

15 (1852) 3 HLC 759. For a different sort of situation, see *Littlewoods Mail Order Stores Ltd v IRC* [1969] 3 All ER 855, [1969] 1 WLR 1241.

16 See *Pioneer Laundry and Dry Cleaners Ltd v Minister of National Revenue* [1940] AC 127 at 137, [1939] 4 All ER 254 at 259.

17 [1953] 1 All ER 615.

18 See also *S Berendsen Ltd v IRC* [1958] Ch 1, [1957] 2 All ER 612; *Unit Construction Co Ltd v Bullock (Inspector of Taxes)* [1960] AC 351, [1959] 3 All ER 831; *Barclays Bank Ltd v IRC* [1961] AC 509, [1960] 2 All ER 817; *IRC v Harton Coal Co Ltd* [1960] Ch 563, [1960] 3 All ER 48; *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832; *Wallersteiner v Moir* [1974] 3 All ER 217 at 237–238, [1974] 1 WLR 991 at 1013; *US v Lehigh Valley RR Co* 220 US 257 (1911) (American); *McDuff Co Ltd v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 (SA).

19 *Macaura v Northern Assurance Co* [1925] AC 619; *Pioneer Laundry and Dry Cleaners Ltd v Minister of National Revenue* [1940] AC 127 at 137, [1939] 4 All ER 254 at 259.

20 *Bank Voor Handel en Scheepvaart v Slatford* [1953] 1 QB 248 at 278, [1951] 2 All ER 779 at 799.

1 Various Finance Acts eg: 1936, s 18; 1937, s 14(5); 1940, ss 44, 46, 55; 1950, ss 26, 46; *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at 95–96.

in the appropriate manner. In s 458 it is laid down that if on winding up it appears that the business of a company has been conducted for fraudulent purposes, all persons who were knowingly parties to such transactions are to be personally responsible.

Even apart from express legislative provision, courts will take account of the realities of a situation in order to give effect to legislative purpose[2].

MISCELLANEOUS PURPOSES

There are various other cases in which the courts have proceeded on what can only be described compendiously as justice and convenience. Even with the *persona* of a human being there is flexibility in the attitude of the law. Thus, courts are free to decide when the jural relations vest. Normally, this occurs at birth, although pre-natal existence is recognised for many purposes. Thus, a child can succeed in tort after it is born on account of damage caused by a pre-natal injury to its mother[3]. Damages may also be recovered under the Fatal Accidents Act 1976, for the benefit of a posthumous child[4]. Ownership may be vested in a child *en ventre sa mère*, and such a child constitutes a 'life' for the purpose of the rule against perpetuities[5]. So, too, such a child can be a 'child of the family' within s 16(1) of the Matrimonial Proceedings (Magistrates' Court) Act 1960[6]. In criminal law the infliction of a pre-natal injury on a child, which is 'capable of being born alive', and which prevents it from being so born could amount to the offence of child destruction[7], while a similar injury which brings about the death of the child after it has been born alive could amount to homicide[8]. It has also been held that to incite someone to murder a child when it is born, but which at the time of inciting is unborn, amounts to soliciting to murder a 'person'[9]. The present relaxation of the law against abortion has not affected the legal concept of person, although it has, of course, raised grave moral and social issues[10]. These vital debates may conceivably bring about a change in the moment at which a person is deemed to 'exist' in law; but this is another matter. Another instance of the recognition of life not yet in being was contained in the old rule that a pregnant murderess was not to be executed until after her child had been born, and the Sentence of Death (Expectant Mothers) Act 1931, substituted life imprisonment for the death penalty in such a case.

The precise moment when a child is deemed to be 'born' cannot be embodied in a neat formula. The point is important in criminal law, where the present state of the law is the result of individual decisions. Thus, the child must have emerged completely and alive from the mother's body, but it is not necessary for the umbilical cord to have been severed, nor is

2 *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, [1961] 3 All ER 495.
3 Congenital Disabilities (Civil Liability) Act 1976.
4 Even prior to the Act: see *The George and Richard* (1871) LR 3 A & E 466.
5 *Elliot v Lord Joicey* [1935] AC 209; *Re Stern, Bartlett v Stern* [1962] Ch 732, [1961] 3 All ER 1129. See also Variation of Trusts Act 1958, s 1(1).
6 *Caller v Caller* [1968] P 39, [1966] 2 All ER 754.
7 Infant Life (Preservation) Act 1929, s 1.
8 *R v Senior* (1832) 1 Mood CC 346.
9 *R v Shephard* [1919] 2 KB 125.
10 G L Williams *The Sanctity of Life and the Criminal Law* ch 5.

breathing the sole test of being 'alive'[11]. Once a child has been born it is a 'person' and becomes the focus of a host of jural relations.

Since their attribution and continued attribution are a contrivance of law, it is possible to withdraw them during life. Thus, at one time a human being who had been declared an 'outlaw' ceased to be a 'person' in the eyes of the law, and killing him was not homicide. A few other points are also worthy of mention. There is a misleading expression that 'husband and wife are one in law'. Taken literally this would imply that there could never be murder of one spouse by the other, but only a form of suicide. It is a clumsy way of expressing the operation of certain special rules that apply to husbands and wives, and by no means the assertion of single personality[12]. For certain other purposes, however, several individuals may be treated as one person. Thus, the Income Tax Act 1952, s 256(3), says that in order to determine the control of a company, 'persons who are relatives of one another, persons who are nominees of any other person together with that other person, persons in partnership and persons interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person shall respectively be treated as a single person'[13].

Again, it is possible to categorise and sub-divide an individual's jural relations. When such groupings are related to certain types of individuals (distinguished, eg by role, social, or racial characteristics), they constitute 'status', which may be limited or extensive, eg status of parent, husband etc. When groupings are related to certain types of jural relations, they constitute 'capacity'. Different groupings of these latter may be vested in the same individual, in which case he is said to possess different capacities. He may, for instance, convey property to himself or contract with himself acting in different capacities[14], but none of this connotes dual personality[15].

A human being ceases to be a person, in law as in fact, at death. The moment of death used to present few, if any, problems, but modern survival techniques and the transplanting of living organs has opened up possibilities with profound moral, social and legal implications. Techniques are still in an experimental stage and medical experts have much to perfect and discover. This being the case, lawyers must inevitably await clarification of the data before they can re-shape the concept of death and others associated with it.

Although legal interest in a human being as a person ceases at his death, it continues in some other respects. The most important of these is the law of testamentary succession, by which the wishes of the deceased as to the disposal of his property are given effect. The criminal law ensures a decent burial for his body[16], and the law of criminal libel protects his reputation, but only when an attack upon it affects living persons[17]. Certain actions at

11 *R v Poulton* (1832) 5 C & P 329; *R v Reeves* (1839) 9 C & P 25; *R v Enoch* (1833) 5 C & P 539. For discussion, see *Williams* ch 1.

12 Maule J in *Wenman v Ash* (1853) 13 CB 836 at 844; and see now Law Reform (Husband and Wife) Act 1962.

13 *Morrison Holdings Ltd v IRC* [1966] 1 All ER 789, [1966] 1 WLR 553. See now the Income and Corporation Taxes Act 1970, s. 533 (2), (4).

14 *Rowley, Holmes & Co v Barber* [1977] 1 All ER 801, [1977] 1 WLR 371 (contract).

15 Cf Re *Neil McLeod & Sons, Petitioners* 1967 SLT 46, Ct of Sess: articles of association required a quorum of three members to be personally present. Two shareholders attended. Held that the requirement was satisfied, since one attended both as an individual and as a trustee. It is submitted that this is incorrect, because trusteeship does not constitute a different *persona*.

16 *R v Stewart* (1840) 12 Ad & El 773 at 777-778.

17 *R v Ensor* (1887) 3 TLR 366.

law which he would have had during his life, or which would have lain against him, are continued for or against his estate[18].

The *persona* of a company may likewise be disregarded in the interests of justice and convenience. Thus at times a company may be treated merely as the agent of its members, particularly when the members themselves are companies. In *The Roberta*[19] company X acted admittedly as the agent of company Y, which was in turn wholly owned by company Z, and Z was held liable. A different situation arose in *The Abbey, Malvern Wells Ltd v Ministry of Local Government and Planning*[20], where a trust on which the shares in a company were held affected the company. In *Jones v Lipman*[1] the transfer of property by the defendant to a company, which he controlled, in order to avoid specific performance was held to be a sham, and specific performance was ordered. In *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*[2] the corporate *personae* of three separate concerns were pierced so as to take account of the essential unity of all their claims and of the enterprise as a whole. Finally, in *Lonrho Ltd v Shell Petroleum Co Ltd*[3] it was held that documents in the possession of the directors of subsidiary companies do not indicate that the parent companies have power over them for the purpose of discovery of documents. Whether parent companies have such power or not depends on the facts of each case.

In carving these exceptions out of the doctrine of the separateness of the corporate entity the legislature and the courts seem to have proceeded on value considerations. That they have not been acting on a consistent principle is only too obvious. The point gains force from the fact that the law has found ways of dealing with group activities without resorting to the concept of 'corporate person'.

UNINCORPORATED ASSOCIATIONS

It is not necessary to deal with these in any detail. A few remarks might be made about trade unions, friendly societies and partnerships[4].

Registered trade unions have the power to bring actions[5], while other unincorporated associations cannot do so but their members must proceed

18 Law Reform (Miscellaneous Provisions) Act 1934, as amended by the Proceedings Against Estates Act 1970, and Law Reform (Miscellaneous Provisions) Act 1971, s 2.

19 (1937) 58 Ll L Rep 159 at 159, 169; *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465.

20 [1951] Ch 728, [1951] 2 All ER 154. See also *Re Bugle Press Ltd, Re Houses and Estates Ltd* [1961] Ch 270, [1960] 3 All ER 791.

1 [1962] 1 All ER 442, [1962] 1 WLR 832.

2 [1976] 3 All ER 462, [1976] 1 WLR 852.

3 [1980] 1 WLR 627. See also *Orri v Moundreas* [1981] Com LR 168; *Canada Enterprises Corpn Ltd v Macnab Distilleries Ltd* [1981] Com LR 167, CA.

4 These are not exhaustive, eg Universities Central Council on Admissions, on which see *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140 at 148, 152, [1964] 2 All ER 39 at 42, 44, where Lord Denning MR spoke of the Council as 'a separate entity', while Salmon LJ spoke of it as 'a separate entity' although not 'a separate legal entity'. The Victorian Supreme Court held that the Victorian Soccer Federation was an unincorporated association, which could be sued in its collective name: *Bailey v Victorian Soccer Federation* [1976] VR 13. The Central Office of the Conservative Party is not an unincorporated association: *Conservative and Unionist Central Office v Burrell* [1982] 2 All ER 1, [1982] 1 WLR 522.

5 *National Union of General and Municipal Workers v Gillian* [1946] KB 81, [1945] 2 All ER 593; *Willis v Brooks* [1947] 1 All ER 191; *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208.

by what are known as representative actions[6]. Further, it was held in *Taff Vale Rly Co v Amalgamated Society of Railway Servants*[7] that a trade union could be sued in tort. The effect of this decision has been modified by successive statutes reflecting the political persuasion of the government in power[8]. It is not clear whether a trade union can commit a tort, but no action can be brought[9], or whether no tort at all is committed. In *Longdon-Griffiths v Smith*[10] it was held that a friendly society can be sued in tort in its registered name. In *Bonsor v Musicians' Union*[11] the House of Lords held that a member can sue a trade union as a legal entity for breach of contract. Thirdly, the Trade Union Act 1871, s 8, laid down that the property of trade unions was to be held by trustees, and it was to protect this property, collected with such trouble, that the Trade Disputes Act 1906, was passed. Making trade unions suable, as in *Bonsor*'s case, created a difficulty as to how judgments against them were to be enforced, since the property was in the hands of trustees[12]. Another difficulty was illustrated by the case of *Free Church of Scotland (General Assembly) v Lord Overtoun*[13], in which the House of Lords refused to sanction the use of the funds for purposes other than those to which they were devoted according to the terms of the trust, despite the fact that the religious views of the majority had changed in the meantime. 'The dead hand of the law fell with a resounding slap on the living body' said Maitland, and in the end the legislature had to step in and allow the desired change. Trade unions and other unincorporated associations also have powers in regard to the treatment of their members and the trend with regard to unions has been to reduce the supervision by courts[14]. As to the criminal, or quasi-criminal responsibility of unincorporated associations, it is to be noted that the Road Traffic Act 1960, s 118(3)(a) spoke of 'any association of persons (whether incorporated or not)'. Earlier in *Wurzel v Houghton Main Home Delivery Service Ltd, Wurzel v Atkinson*[15], where two societies, one of which was incorporated and the other unincorporated, had delivered coal to their members, it was held that the former, being an entity apart from its members, had infringed the terms of its vehicle licence, but not the latter. On the other hand, in *Trebanog Working Men's Club and Institute Ltd v Macdonald*[16], the mask was

6 RSC Ord 15, r 12: eg *Woodford v Smith* [1970] 1 All ER 1091, [1970] 1 WLR 806; unregistered trade union: *Hodgson v National and Local Government Officers Association* [1972] 1 All ER 15, [1972] 1 WLR 130.

7 [1901] AC 426; see the remarks of Lord Brampton at 442 to the effect that a trade union is a legal person. Cf *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367.

8 Trade Disputes Act 1906, s 4. Subsequent and current legislation should be sought in books on industrial law.

9 The words of Farwell LJ in *Conway v Wade* [1908] 2 KB 844 at 856 'the legislature cannot make evil good, but it can make it not actionable', suggest that there is a tort but that it is unenforceable. Cf *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspaper Ltd* [1980] QB 585, [1980] 1 All ER 1097, where it was held that the Trade Union and Labour Relations Act 1974, deprived trade unions of their quasi-corporate status so that a union cannot be defamed.

10 [1951] 1 KB 295, [1950] 2 All ER 662.

11 [1956] AC 104, [1955] 3 All ER 518.

12 Lord Somervell in *Bonsor*'s case [1956] AC 104 at 157, [1955] 3 All ER 518 at 543, suggested that the trustees should be made parties to the action. See *Keys v Boulter* [1971] 1 QB 300, [1971] 1 All ER 289.

13 [1904] AC 515.

14 The degree of control has varied under different governments.

15 [1937] 1 KB 380. See also the Insurance Companies Act 1982, s. 92 (1).

16 [1940] 1 KB 576, [1940] 1 All ER 454. It is to be noted that the same judge decided both cases. See *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] AC 15, [1972] 3 All ER 101.

lifted from an incorporated society and the sale of liquor to its members was held not to be a sale between two distinct persons.

Partnerships are invariably contrasted with corporations and are not called 'persons'. Nevertheless, a firm can sue and be sued in its own name[17], and partnership property is distinct from the property of its members. Thus, it is the firm that is placed under the duty to indemnify its members in respect of payments made or responsibilities incurred in the course of partnership business[18]. However, a partnership is not a legal entity in the sense that a partner may make a contract of employment with the firm[19].

ADAPTATION TO CHANGE

The greatest social change has been the introduction of nationalisation, which was effected through the concept of the public corporation.

Public corporations

These have been in existence for some time, but they came into prominence with nationalisation[20]. The principal features are, firstly, that they have no shareholders, ie no human sub-stratum. The Minister appoints the managing boards. Secondly, they have no subscribed share capital. In some cases where an existing company was nationalised, its share capital was nationalised too[1]. Generally where industries have been nationalised, the assets have also been transferred to the public corporations. Thirdly, the extent of the claims, liberties, powers and immunities enjoyed by them is regulated by the statutes which create them[2].

When these corporations were created it was sought to make them independent of the government of the day and political influence generally in order to assure them of continuity, and at the same time to provide 'democratic' methods of control, namely, through the courts and through ministerial responsibility in Parliament. This is a matter of the closest concern to constitutional lawyers[3].

Is the legal concept of 'person' efficient?

'Efficiency' is always relative to the task to be accomplished and the end in view. So one answer is that the flexibilities inherent in treating 'person' as a unity of jural relations does enable courts to do 'justice' in its broadest sense. On the other hand, the way in which the idea has been extended to corporations is no longer suited to modern commerce. Here it is not flexible enough, for the influence of the *Salomon* doctrine[4] has a stultifying effect. So experienced a judge as Lord Wilberforce drew attention to this[5]. For instance, as

17 RSC Ord 81 CCR Ord 5, r 9.
18 Partnership Act 1890, s 24(2).
19 *Re Thorne and New Brunswick Workmen's Compensation Board* (1962) 33 DLR (2d) 167 (Canadian).
20 Friedmann 'The New Public Corporations and the Law' (1947) 10 MLR 236–237.
1 Eg Bank of England Act 1946; Cable and Wireless Act 1946.
2 A judicial description of the public corporation comes from Denning LJ in *Tamlin v Hannaford* [1950] 1 KB 18 at 23, [1949] 2 All ER 327 at 328.
3 For Parliamentary control, see House of Commons Debates, March 3 1948; Report of the *Select Committee on Nationalised Industries* (HC 235 of 1952/1953/1955).
4 [1897] AC 22; p 254 ante.
5 'Law and Economics' Presidential Address to the Holdsworth Club 1966, especially at pp 6–13.

he pointed out, the separate *persona* of a corporation fails to cope with the problems of parent and subsidiary companies. Again, there are other urgent questions which the *Salomon* doctrine does not even begin to answer, eg what is 'capital' and 'income' when deciding whether a gain is taxable? How should directors balance the interests of society, shareholders and workers? Should a company go in for long term or short term profits? How far, if at all, should profits be apportioned between welfare purposes and shareholders? What of a company carrying on diverse activities some of which prosper while others fail? Even the great boon of limited liability could be achieved by means of a rule limiting the responsibility of members to shares without tying this to a doctrine of separate *persona*. A more useful basis of approaching some at least of these problems is to take the corporate *enterprise* as the unit, rather than the corporation[6].

On the other hand, the value of personifying group activities is further reduced by the fact that courts have evolved ways of dealing with such activities without resorting to the device of *persona*. The power and liability of unincorporated associations to sue and be sued, sometimes in their own names and sometimes by representative actions, has been mentioned. The relationship between their members can be regulated by holding that the payment of subscription constitutes a contract between them. The property of such organisations can be dealt with by utilising trust ownership, or a form of co-ownership. The latter would be rather special, since the owners are a changing body and enjoyment of the property is limited by membership[7].

From all this the uneven treatment of corporations and groups may be appreciated. The courts have refused to commit themselves to any single theory about the nature of legal persons[8], so the views of some writers on the subject will now be considered.

THEORIES OF THE NATURE OF 'LEGAL PERSONS'

Professor Wolff has observed that on the Continent legal writers may be grouped into two categories: those who have written on the nature of legal persons and those who have not yet done so[9]. In dealing with some of these theories it is as well to bear in mind that the attitude of the law has not been consistent and also that there is a distinction between appreciating the unity of a group and the way the word 'person' is used.

'PURPOSE' THEORY

This theory, that of Brinz primarily, and developed in England by Barker[10], is based on the assumption that 'person' is applicable only to human beings; they alone can be the subjects of jural relations. The so-called 'juristic'

6 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 3 All ER 462, [1976] 1 WLR 852; and see p 266 post.

7 As to when a club ceases to exist, see *Re GKN Bolts and Nuts Ltd Sports and Social Club, Leek v Donkersley* [1982] 2 All ER 855, [1982] 1 WLR 774.

8 For the use of 'quasi-corporation', see *IRC v Bew Estates Ltd* [1956] 2 All ER 210 at 213; *Knight and Searle v Dove* [1964] 2 QB 631, [1964] 2 All ER 307.

9 Wolff 'On the Nature of Legal Persons' (1938) 54 LQR 494.

10 Brinz *Lehrbuch der Pandekten* I, pp 196-238; III, pp 453-586; Barker in his translation of Gierke *Natural Law and the Theory of Society* lxxiii-lxxxvii.

persons are not persons at all. Since they are treated as distinct from their human sub-stratum, if any, and since jural relations can only vest in human beings, they should be regarded simply as 'subjectless properties' designed for certain purposes. It should be noted that this theory assumes that other people may owe duties towards these 'subjectless properties' without there being correlative claims, which is not impossible, although critics have attacked the theory on this ground. As applied to ownership, the idea of ownerless ownership is unusual, but that is not necessarily an objection. The theory was designed mainly to explain the foundation, the *Stiftung* of German law, and it would also explain the vacant inheritance, the *hereditas jacens*, of Roman law. It is not applicable to English law. Judges have repeatedly asserted that corporations, for instance, are 'persons', and it is this use of the word that needs explaining. If they say that these are 'persons', then to challenge this usage would amount simply to using the word differently from judges.

To Duguit 'purpose' assumed a different meaning. To him the endeavour of law in its widest sense is the achievement of social solidarity. The question is always whether a given group is pursuing a purpose which conforms with social solidarity. If it does, then all activities falling within that purpose deserve protection. He rejected the idea of collective will as unproven; but there can be, he said, a collective purpose[11].

THEORY OF THE 'ENTERPRISE ENTITY'

Related, though somewhat removed from the above, is the theory of the 'enterprise entity'. The corporate entity, it is said, is based on the reality of the underlying enterprise[12]. Approval by law of the corporate form establishes a *prima facie* case that the assets, activities and responsibilities of the corporation are part of the enterprise. Where there is no formal approval by law, the existence, extent of responsibility and so forth of the unit are determined by the underlying enterprise.

This way of looking at it does explain the attitude of the law towards unincorporated associations and also leaves room for the miscellaneous situations in which corporate unity is ignored. The theory is an utilitarian one.

'SYMBOLIST' OR 'BRACKET' THEORY

According to Ihering[13] the members of a corporation and the beneficiaries of a foundation are the only 'persons'. 'Juristic person' is but a symbol to help in effectuating the purpose of the group, it amounts to putting a bracket round the members in order to treat them as a unit. This theory, too, assumes that the use of the word 'person' is confined to human beings. It does not explain foundations for the benefit of mankind generally or for animals[14]. Also—and this is not so much an objection as a comment—this theory does not purport to do more than to say what the facts are that underlie

11 See Duguit *The Progress of Continental Law in the 19th Century* pp 87–100.

12 Berle 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343; Lord Wilberforce in *British Railways Board v Herrington* [1972] AC 877 at 911, 922, [1972] 1 All ER 749 at 769, 779; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 3 All ER 462, [1976] 1 WLR 852.

13 Ihering *Geist des römischen Rechts* III, 356.

14 *Wolff* p 497.

propositions such as, 'X & Co owe Y £5'. It takes no account of the policy of the courts in the varying ways in which they use the phrase, 'X and Co'; whether they will, for instance, lift the mask, ie remove the bracket, or not.

Closely related to this theory is that of Hohfeld, which may be considered next.

HOHFELD'S THEORY

Hohfeld[15] drew a distinction between human beings and 'juristic persons'. The latter, he said, are the creation of arbitrary rules of procedure. Only human beings have claims, duties, powers and liabilities; transactions are conducted by them and it is they who ultimately become entitled and responsible. There are, however, arbitrary rules which limit the extent of their responsibility in various ways, eg to the amount of the shares. The 'corporate person' is merely a procedural form, which is used to work out in a convenient way for immediate purposes a mass of jural relations of a large number of individuals, and to postpone the detailed working out of these relations among the individuals *inter se* for a later and more appropriate occasion.

This theory is purely analytical and, like the preceding one, analyses a corporation out of existence. Although it is reminiscent of a person who fails to see a wood and sees only a collection of trees, it would be unfair to suggest that Hohfeld was advocating that corporations should be viewed in this way. He was only seeking to reduce the corporate concept to ultimate realities. What he said was that the use of group terminology is the means of taking account of mass individual relationships. It is to be noted, however, that he left unexplained the inconsistencies of the law; his theory was not concerned with that aspect of it. Finally, to say that corporate personality is a procedural form may seem to be rather a misleading use of the word 'procedural'. What seems to be meant is that the unity of a corporation is a convenient way of deciding cases in court.

KELSEN'S THEORY

Kelsen[16] began by rejecting, for purposes of law, any contrast between human beings as 'natural persons' and 'juristic persons'. The law is concerned with human beings only in so far as their conduct is the subject of rules, duties and claims. The concept of 'person' is always a matter of law; the biological character of human beings is outside its province. Kelsen also rejected the definition of person as an 'entity' which 'has' claims and duties. The totality of claims and duties *is* the person in law; there is no entity distinct from them. Turning to corporations, he pointed out that it is the conduct of human beings that is the subject matter of claims and duties. A corporation is distinct from one of its members when his conduct is governed not only by claims and duties, but also by a special set of rules which regulates his actions in relation to the other members of the corporation. It is this set of rules that constitutes the corporation. For example, whether the contract of an individual affects only him or the company of which he is a member will depend on whether or not the contract falls within the special set of rules regulating his actions in relation to his fellow members.

15 Hohfeld *Fundamental Legal Conceptions* chs 6 and 7.
16 Kelsen *General Theory of Law and State* pp 93-109; *Pure Theory of Law* pp 168-192.

This theory is also purely analytical and accurate as far as it goes. It omits the policy factors that bring about variations in the attitude of the courts, and it does not explain why the special set of rules, of which Kelsen spoke, is invoked in the case of corporations, but not, eg partnerships. In fairness to Kelsen it must be pointed out that he expressly disclaimed any desire to bring in the policy aspects of the law. All he was concerned to do was to present a formal picture of the structure of the law, and to that extent he did what he set out to do.

'FICTION' THEORY

Its principal supporters are Savigny and Salmond[17]. Juristic persons are only treated *as if* they are persons, ie human beings. It is thought that Sinibald Fieschi, who became Pope Innocent IV in 1243, was the first to employ the idea of *persona ficta; 'cum collegium in causa universitatis fingatur una persona'*[18]. It is clear that the theory presupposes that only human beings are 'properly' called 'persons'. 'Every single man and only the single man is capable of rights', declared Savigny[19]; and again, 'The original concept of personality must coincide with the idea of man'[20]. The theory appears to have originated during the Holy Roman Empire and at the height of Papal authority. Pope Innocent's statement may have been offered as the reason why ecclesiastical bodies could not be excommunicated or be capitally punished. All that the fiction theory asserts is that some groups and institutions are regarded as if they are persons and does not find it necessary to answer why. This gives it flexibility to enable it to accommodate the cases in English law where the mask is lifted and those where it is not, cases where groups are treated as persons for some purposes but not for others, and those where some groups are treated as persons but not others. The popularity of this theory among English writers is explained partly by this very flexibility, partly by its avoidance of metaphysical notions of 'mind' and 'will', and partly by its non-political character.

'CONCESSION' THEORY

This is allied to the fiction theory and, in fact, supporters of the one tend also to support the other. Its main feature is that it regards the dignity of being a 'juristic person' as having to be conceded by the state, ie the law. The identification of 'law' with 'state' is necessary for this theory, but not for the fiction theory. It is a product of the era of the power of the national state, which superseded the Holy Roman Empire and in which the supremacy of the state was emphasised. It follows, therefore, that the concession theory has been used for political purposes to strengthen the state and to suppress autonomous bodies within it. No such body has any claim to recognition as a 'person'. It is a matter of discretion for the state. This is consistent with the deprivation of legal personality from outlaws; but on the other hand it is possible to argue that the common law corporations of English law discredit it somewhat though, even with these, there is a possibility of arguing that they are persons by virtue of a lost royal grant.

17 Salmond *Jurisprudence* 7th edn, s 114.
18 Gierke *Das deutsche Genossenschaftsrecht* III, 279 n 102.
19 Savigny *System des heutigen römischen Rechts* II, 2-3.
20 *Savigny* II, 60.

'REALIST' AND 'ORGANISM' THEORY

The 'realist' theory, of which Gierke is the principal exponent and Maitland a sympathiser[1], asserts that 'juristic persons' enjoy a real existence as a group. A group tends to become a unit and to function as such. The theory is of German origin. Until the time of Bismarck Germany consisted of a large number of separate states. Unification was their ideal, and the movement towards it assumed almost the character of a crusade. The very idea of unity and of collective working has never ceased to be something of a marvel, which may be one reason for the aura of mysticism and emotion which is seldom far from this theory.

The theory opposes the concession theory. Human beings are persons without any concession from the state and, so the argument runs, so far as groups are 'real', they too are automatically persons.

The 'organism' theory, with which the 'realist' theory is closely associated, asserts that groups are persons because they are 'organisms' and correspond biologically to human beings. This is based on a special use of the term 'organism', and the implications of such biological comparison can lead to absurdity[2]. It is said that they have a 'real life'. Professor Wolff points out that if this were true, a contract between two companies whereby one is to go into voluntary liquidation would be void as an agreement to commit suicide[3]. It is also said that they have a 'group will' which is independent of the wills of its component members. Professor Wolff has pointed out that the 'group will' is only the result of mutually influenced wills[4], which indeed every fictionist would admit. To say, on the other hand, that it is a single will is as much a fiction as ever the fictionists asserted. As Gray, quoting Windscheid, said 'To get rid of the fiction of an attributed will, by saying that a corporation has a real general will, is to drive out one fiction by another.'[5]

It has also been stated that group entities are 'real' in a different sense from human beings. The 'reality' is psychical, namely the unity of spirit, purpose, interests and organisation. Even so, it fails to explain the inconsistencies of the law with regard to corporations.

Connected with the realist theory is the 'Institutional' theory which marks a shift in emphasis from an individualist to a collectivist outlook. The individual is integrated into the institution and becomes part of it. The 'pluralist' form of this theory allowed the independent existence of many institutions within the supreme institution of the state. The 'fascist' form of it, however, gave it a twist so as to make the state the only institution, which integrated all others and allowed none to survive in an autonomous condition.

CONCLUSIONS

In the first place, no one explanation takes account of all aspects of the problem, and criticism becomes easy. Two questions should be kept clear:

1 Maitland Introduction to Gierke's *Political Theories of the Middle Ages*.

2 Discussed by Wolff pp 498-499. See, however, Denning LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172, [1956] 3 All ER 624 at 630. A 'realist' interpretation can be given to certain aspects of English law, eg when a corporation is said to act, 'personally' through its supreme directorate. See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807 at 861, [1961] 1 All ER 495 at 516.

3 *Wolff* p 501.

4 *Wolff* p 501.

5 *Gray* pp 54-55.

What does any theory set out to explain? and, What does one want a theory to explain? Those that have been considered are philosophical, political or analytical: they are not so much concerned with finding solutions to practical problems as with trying to explain the meaning of the word 'person'. Courts, on the other hand, faced with the solving of practical problems, have proceeded according to policy, not logic. The objectives of the law are not uniform. One of its main purposes in the case of human beings is to regulate behaviour; so there is, on the one hand, constant concern with the performance or non-performance of duties by individuals. With corporations the main purpose is to organise concerted activities and to ascribe collective responsibility therefor; so there is, on the other hand, emphasis on collective powers and liabilities.

Secondly, as has been pointed out by more than one writer, English lawyers have not committed themselves to any theory. There is undoubtedly a good deal of theoretical speculation, but it is not easy to say how much of it affects actual decisions. Authority can sometimes be found in the same case to support different theories[6].

Thirdly, two linguistic fallacies appear to lie at the root of much of the theorising. One is that similarity of language form has masked shifts in meaning and dissimilarities in function. People *speak* of corporations in the same language that they use for human beings, but the word 'person' does not 'mean' the same in the two cases, either in point of what is referred to or function. The other fallacy is the persistent belief that words stand for things. Because the differences in function are obscured by the uniform language, this has led to some curious feats of argumentation to try and find some referent for the word 'person' when used in relation to corporations which is similar to the referent when the word is used in relation to human beings[7]. A glance at the development of the word *persona*, set out at the beginning of this chapter, shows progressive shifts in the ideas represented by it.

There is no 'essence' underlying the various uses of 'person'. The need to take account of the unity of a group and also to preserve flexibility are essential, but neither is tied to the word. The application of it to human beings is something which the law shares with ordinary linguistic usage, although its connotation is slightly different, namely a unit of jural relations. Its application to things other than human beings is purely a matter of legal convenience. Neither the linguistic nor legal usages of 'person' are logical. If corporations aggregate are 'persons', then partnerships and trade unions should be too. The error lies in supposing that there should always be logic. Unless this has been understood, the varied uses of the word will only make it a confusing and emotional irritant.

6 So Pollock *A First Book of Jurisprudence* pp 110–111; 'Has the Common Law Received the Fiction Theory of Corporations?' in *Essays in the Law* p 151; Duff *Personality in Roman Private Law* p 215.

7 *Hart* pp 49–59. Cf Auerbach 'On Professor Hart's Definition and Theory in Jurisprudence' (1956) 9 Journal of Legal Education 39.

READING LIST

A A Berle 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343.
A A Berle and G C Means *The Modern Corporation and Private Property.*
J Burnham *The Managerial Revolution.*
P W Duff *Personality in Roman Private Law* chs 1 and 9.
O Gierke *Political Theories of the Middle Ages* (trans F W Maitland) chs 3, 4 and 8; and F W Maitland's 'Introduction' pp xviii–xliii.
O Gierke *Natural Law and the Theory of Society 1500–1800* (trans E Barker); and E Barker's 'Introduction' pp lvii–lxxxvii.
A L Goodhart *Essays in Jurisprudence and the Common Law* ch 5.
F Hallis *Corporate Personality.*
W N Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed W W Cook) chs 6–7.
H Kelsen *General Theory of Law and State* (trans A Wedberg) pp 93–109.
D Lloyd *The Law Relating to Unincorporated Associations* especially the 'Introduction' and 'Conclusion'.
F W Maitland *Collected Papers* (ed H A L Fisher) pp 210, 244, 271, 321.
G W Paton *A Text-Book of Jurisprudence* (4th edn G W Paton and D P Derham) ch 16.
F Pollock and F W Maitland *The History of English Law before the Time of Edward I* pp 511–526.
W A Robson 'The Public Corporation in Britain Today' in *Problems of Nationalised Industry* (ed W A Robson) ch 1.
J W Salmond on *Jurisprudence* (12th edn P J Fitzgerald) ch 10; (see also the 7th edn).
F F Stone 'Ultra Vires and Original Sin' (1939–40) 14 Tulane Law Review 190.
G L Williams *The Sanctity of Life and the Criminal Law* chs 1, 5–6, 8.
P H Winfield 'The Unborn Child' (1942) 8 Cambridge Law Journal 76.
M Wolff 'On the Nature of Legal Persons' (1938) 54 Law Quarterly Review 494.
I M Wormser *The Disregard of the Corporate Fiction and Allied Corporate Problems* chs 1–2.

CHAPTER 13

Possession

Physical control of a thing by a person is a fact external to and independent of laws. When laws came into existence, this fact, known as 'possession'[1], was taken into account in the sense that certain advantages attached to the possessor. In Roman law the chief of these were (a) that possession was *prima facie* evidence of ownership. (b) Possession was the basis of certain remedies, especially the possessory interdicts. Even a wrongful possessor was protected, not only against the world at large, but also against the true owner who dispossessed him without due process of law. (c) Possession was an important condition in the acquisition of ownership in various ways. (d) In the law of pledge possession of the thing pledged constituted the creditor's security without any presumption of ownership. These apply substantially in English law as well where there is also the advantage that the possessor may exceptionally confer a good title on another though he has none himself. In both systems there are other advantages besides these.

If the idea of possession had remained wedded to physical control, the position would have been relatively simple. Difficulties arose when it became necessary, because of the widening of legal activity, to attribute to persons who were not actually in control some or all of the advantages that were enjoyed by persons actually in control. Tradition and technicality combined to complicate the matter. Traditionally possession was the basis in law of these advantages. They attached to a man because he had physical control, which was synonymous with 'possession', but when it became necessary to give the same benefits to a man who was not in control, 'possession' came to be ascribed to him without the need for control. Reasoning then took the form that whenever a man has these advantages, this must be because he has possession[2].

The consequence was to bring about a contrast between actual holding and possession as well as a shift in the meaning of the term 'possession'[3]. Physical control came to be distinguished from possession under the nomenclature of 'custody' or 'detention'. In Roman law it was designated sometimes by the phrase '*in possessione esse*' (as distinct from '*possidere*')[4] or by coupling the word '*possessio*' with such words as '*corporaliter*', '*naturalis*' and '*naturaliter*'. It is suggested that the terms 'custody' for English law and '*detentio*' for Roman law would be the least confusing terminology to adopt.

Three situations had thus become possible. A man could have physical

1 For the basis of *possessio* as the Romans saw it, see *D* 41.2.1 *pr*, 41.2.3.5, 43.26.19 *pr*.

2 Neatly summarised by Maitland: Pollock & Maitland *HEL* II, p 31. The same sort of reasoning is found in Roman law: *D* 8.1.20.

3 *Parmee v Mitchell* [1950] 2 KB 199 at 203, [1950] 1 All ER 872 at 874; *Newcastle City Council v Royal Newcastle Hospital* [1959] AC 248 at 255, [1959] 1 All ER 734 at 736; *Towers & Co Ltd v Gray* [1961] 2 QB 351 at 364, [1961] 2 All ER 68 at 73; *R v Purdy* [1975] QB 288 at 298, [1974] 3 All ER 465 at 473; *Sullivan v Earl of Caithness* [1976] QB 966, [1976] 1 All ER 844.

4 In *D* 41.2.10.1 Ulpian explains the distinction.

control without possession and its advantages; he could have possession and its advantages without physical control; or he could have both. Possession, therefore, became a technicality of law. The separation of possession from physical control gave it a flexibility, which the administrators of the law have not been slow to utilise in fulfilling the demands of policy and convenience.

An understanding of the way in which lawyers employ the term 'possession' has been obscured by too much theorising and, worse still, by the distortion of actual decisions so as to fit them into preconceived ideas[5]. Much of this speculation originated in attempts to elucidate possession in Roman law and has been carried over into English law. In order to clarify the approach to the latter, it is worthwhile considering what exactly the Roman jurists did say.

POSSESSION IN ROMAN LAW

A cardinal tenet of the Roman law of property was the protection of *dominium*, or ownership at civil law. The purpose of prescription, *usucapio*, was to avoid leaving ownership in doubt for too long: G 2.44, *Inst* 2.6 *pr*. To complete prescription continuous possession was essential. The object of the institution of pledge, on the other hand, was to secure the creditor by protecting his possession by means of the possessory interdicts. The policies of the law in these two branches could come into conflict as when an usucaptor pledged the thing. The jurists saw no difficulty. Javolenus said that for the purpose of completing prescription, the usucaping debtor possessed the thing, while for (most) other purposes the creditor possessed it: *D* 41.3.16, 41.2.1.15. Similarly, when the usucaptor died, his heir was deemed to continue possession of the thing so as to complete prescription without interruption. For other purposes, however, the heir's possession of it was a new possession beginning at the moment when he actually took it: *D* 4.6.30 *pr*, 41.2.23 *pr*, 41.2.30.5. Again, the basis of the interdicts was possession. In order to make them available to owners, it was necessary sometimes to extend possession artificially. Certain things, such as summer and winter pastures and some wild creatures, which have the *animus revertendi*, were deemed to remain in possession even when they were beyond reach: *D* 41.2.3.15–16, 41.2.3.11, 43.16.1.25.

Possession for the purpose of prescription and the interdicts was not the same as possession for other purposes. Thus, possession of a thing was one of the bases for acquiring through it. Where a thing was given in pledge by an usucaptor, both the pledgor and the pledgee, as just indicated, were deemed to be in possession of it for different purposes; but neither of them was in possession for the purpose of acquiring through it: *D* 41.1.37 *pr*, 41.2.1.15, 41.3.16. Possession of a thing in deposit remained with the depositor and the depositee got only *detentio*. The depositor could thus continue prescribing it. *Sequestratio* was but a form of deposit with someone pending the settlement of a dispute, and the *sequester*-depositee also got only *detentio*. Where, however, the object of the particular *sequestratio* was to halt the prescription of one of

5 The view of possession set out in this chapter was originally suggested by Professor G L Williams and by Dr J W C Turner.

the depositing parties to the dispute, the *sequester* was given possession so as to prevent that party from acquiring title and forestalling the decision: *D* 16.3.17.1, 41.2.39. This shows that within the contract of deposit itself the incidence of possession varied according to the purpose in hand.

Another way in which the flexibility of possession was utilised was as follows. The person with an immediate 'right' to obtain physical control had an interest worthy of protection by the interdicts; but a person must actually have possession in order to bring them. There was no difficulty; for the purpose of bringing an interdict the person with a 'right' to possess was deemed to be in possession: *D* 41.2.17 *pr.* A curious extension of possession was to interests, such as servitudes and usufruct. The rule was that holders did not possess the things over which they enjoyed their interests: G 2.93; but their exercise needed protection, especially of the interdicts. The magistrates would appear to have given such protection without regard to theoretical difficulties: *Vatican Fragments* 90, *D* 46.13.3.13, 17. Later the jurists in attempts at rationalisation argued that the interdicts were given because these persons must in some way have possession. They did not possess the things themselves, so the uncouth solution was to say that they 'possessed the right', not the thing, '*possessio juris*', *D* 8.4.2; or that they were treated 'as if they possessed', or had a 'sort of possession' of the thing itself, '*quasi possessio*', G 4.139.

Policy was not the only factor that induced the inconsistencies of possession. Convenience played a part. *Traditio brevi manu*, where X held Y's thing and Y purported to transfer it to X, and *constitutum possessorium*, where X transferred a thing to Y but continued to hold it with Y's permission, were both cases where possession was shifted artificially so as to avoid the thing having to be handed back and forth. *Traditio longa manu*, where large and cumbersome objects were transferred by pointing them out to the transferee, was also a means whereby possession shifted in law without the inconvenience of actual delivery.

The dictates of convenience are best illustrated by the acquisition, continuance and loss of possession. Possession was acquired and lost when certain facts existed or ceased to exist, but what these were varied. As a broad generalisation, the facts needed to acquire possession were physical control, '*corpus possessionis*', and an awareness of the situation, '*animus*': *Pauli Sententiae* 5.2.1, *D* 41.2.3.1. The mental element had to be supplied personally by the acquirer, but the physical element could be supplied either by him or by an instrument, whether inanimate or another person acting in an instrumental capacity: *Pauli Sententiae* 5.2.1. In certain cases the *animus* element was dispensed with, eg the acquisition of possession by a *paterfamilias* through the allowance made to slaves and children, *D* 41.2.44.1; and by a principal through an agent acting with prior authority, *Pauli Sententiae* 5.2.2, *C* 7.32.1. Both these relaxations of the normal rule were expressly based on convenience. Fewer facts were needed to continue a possession once acquired than were necessary to acquire it, but they varied from case to case. In some, possession continued despite loss of *animus*, whether temporarily or permanently, and the rule was expressly grounded in convenience: *D* 41.3.44.6. There are other cases, however, in which loss of *animus* alone did not involve loss of possession: *D* 41.2.3.6. In some cases a person did not lose possession by losing *corpus* alone, and this rule is also expressly based on convenience: *D* 41.2.1.14, 41.2.40.1; but there are others in which it was so lost: *D* 41.2.3.13. A runaway slave continued to be possessed, certainly for the

purpose of acquiring ownership of him through continued possession, and this rule, too, was based on convenience: *D* 41.2.1.14; *D* 47.2.17.3. Again, it is said on occasions that both *animus* and *corpus* have to be lost before possession can be lost: *D* 41.2.8, 50.17.153; but at other times that possession was retained even though both were lost: *D* 41.2.27. It is thus obvious that these cases cannot reflect any single principle. Most of them were decisions given in actual situations and were designed to meet the practical requirements of the particular cases.

The way should now be clear towards a general conception of the Roman view of possession. Possession was not one idea, but many. The element common to all these applications seems to be that it was a device of convenience, utilised chiefly to effectuate the policy of the law in different branches. It is in the light of the foregoing that the classic theories on the subject need to be reviewed.

SAVIGNY'S THEORY

The theory which has had enduring influence is that of Savigny, whose pioneer work, *Das Recht des Besitzes*, appeared in 1803[6]. Its appeal lay not only in the fact that it was the first in the field on this topic, but also in that it marked a new departure in scholarship, returning as it did to the Roman originals the silt of gloss and commentary. It also foreshadowed the historical approach with which Savigny's name is for ever associated. The work is the more impressive when it is realised that it was the product of a man as yet in his early twenties. Yet for all that, its substance bears little relation to Roman law and is no more than a brilliant *tour de force*.

Basing his theory mainly on the texts of Paul, Savigny said that possession consisted of two ingredients, *corpus possessionis*, effective control, and *animus domini*, the intention to hold as owner. Since possession involved both these elements the permanent loss of one or the other brought possession to an end. He could not escape, however, from the cases in which possession continued although one was lost, and he sought to explain them by conceding that the temporary loss of one did not matter, provided it was reproducible at will[7]. The proviso was essential to his thesis that possession 'was' both *corpus* and *animus*.

As an explanation of Roman law this theory is demonstrably wrong. In the first place, Savigny overlooked the shift in meaning of the word 'possession', to which attention has been drawn, and he seems to have fallen into the fallacy that words must correspond with some factual counterpart. Hence his desire to find such a content for possession. He also based his statement of this content on the utterances of one jurist, Paul. Academic speculation was never the strong point of the Romans, and Paul was no exception. In any case, it was erroneous to assume that *corpus* and *animus*, which were only *conditions* sometimes required for the acquisition and loss of possession, constituted possession itself. Even Paul's texts, on which Savigny relied so much (*D* 41.2.3.1. *Pauli Sententiae* 5.2.1.), only say, '*apiscimur possessionem corpore et animo*', and again, '*possessionem adquirimus et animo et corpore*': we *acquire* possession by means of *corpus* and *animus*, not that possession

6 Savigny *Possession* (Translated by Perry (1848)).
7 *Savigny* pp 253, 266.

is both these things. Savigny's idea of *animus domini*, the intention to hold as owner, fails to explain the cases of the pledgee, emphyteuta, *sequester* and *precario tenens*, who had possession but did not intend to hold as owners. He first condemned them as 'anomalous', hinted at 'historical reasons', and then suggested that they were cases of 'derivative possession', ie possession 'derived from the owner'. If so, why did not *detentors*, such as the borrower, depositee and the tenant, also get possession derived from the owner? It has been said that the only reason for treating these cases as anomalous was their failure to conform to his theory, and that if this theory failed to take account of them, so much the worse for the theory[8]. Puchta, defending Savigny, took the heroic line that these cases should really have been cases of *detentio*, in effect, that if Roman law failed to conform with Savigny's theory, so much the worse for Roman law[9]. Other disciples of Savigny, perceiving the weakness of the *animus domini* idea, altered it to '*animus possidendi*', the intention to exclude other persons. This got rid of the derivative possession fiction, but remained open to two objections: (a) it still did not explain why the borrower and the tenant had only *detentio*, even though they intended to exclude others just as much as possessors, and (b) it is without support in the texts. Finally, the application of Savigny's rigid theory to the continuation and loss of possession starkly reveals its weakness. Possession did sometimes continue despite the loss of *animus* or *corpus* or even both. The most that his theory could allow was that possession was lost when one or the other was lost. When, therefore, his beloved Paul said in two texts that both *animus* and *corpus* have to be lost before possession was lost, he was forced to say that where Paul said '*utrumque*', each of them, he really meant '*alterutrum*', one or the other[10]. Such an escape from the difficulty is comment enough on his theory. Savigny's qualification that mere temporary loss of one ingredient did not matter, provided there was the ability to reproduce it at will, is also inconsistent with the texts. It does not explain, for instance, the continued possession of a fugitive slave, despite the owner's inability to reproduce the *corpus* element at will, nor the continued possession by a madman.

As said at the beginning, Savigny's theory bears little relation to Roman law.

IHERING'S THEORY

It is agreed that Ihering succeeded in demolishing Savigny's theory. He himself approached possession as a sociological jurist[11]. He posed the question why Roman law protected possession by means of the interdicts. They were devised, he said, to benefit owners by protecting their holding of property and so placing them in the advantageous position of defendants in any action as to title. Persons who hold property would be owners in the majority of cases and possession was attributed to them in order to make the interdicts available. Accordingly, he concluded that whenever a person looked like an owner in relation to a thing, he had possession of it, unless possession was denied him by special rules based on practical convenience. The *animus* element was simply an intelligent awareness of the situation. It will be seen at a glance that this is more consonant with the facts of Roman law than

8 Bond 'Possession in the Roman Law' (1890) 6 LQR 259 at 269.
9 Quoted by *Bond* at 270.
10 *D* 41.2.8 and 50.17.153; *Savigny* pp 247, 253.
11 Ihering *Grund des Besitzesschutzes* (1868) *Der Besitzwille* (1889).

Savigny's theory. It is flexible: it explains the case of the fugitive slave, who to outward appearances resembles one going on an errand for his master, and above all Ihering did grasp the great point about policy and convenience.

The comment to be offered on this theory is that it appears to be unduly coloured by the angle of his approach, namely, the interdicts. The special reasons of policy that lay behind the interdicts required that the person in control should be protected. To that extent possession for interdictal purposes had a factual basis, but outside that sphere, the factual basis ceases to help. In the case of the usucaptor who pledged a thing, the pledge-creditor, who looked like an owner since he actually had the thing, was in possession for the purpose of the interdicts; but the usucaptor too had possession, though he no longer resembled an owner. He was a person who, though no longer resembling an owner, was allowed to have possession for one special purpose. If this is regarded as an 'exception', based on policy or convenience, to a general rule that whoever looked like an owner in relation to a thing had possession of it, that overlooks the fact that the main rule itself is just as much a rule of policy and convenience as the departures from it. Ihering's main rule can, therefore, be dispensed with and possession described in terms of policy and convenience alone. His formula is an appropriate explanation of interdictal possession. As a more general description, it seems needlessly narrow, but none the less it is superior to Savigny's view.

POSSESSION IN ENGLISH LAW

Notwithstanding the frailty of Savigny's theory as an explanation of Roman law, a modified version of it has exercised considerable influence on English writers. Ihering's hint has passed unheeded by all save a few. The same shift in the meaning of possession has occurred in English as in Roman law: the term is not confined to physical control. As Roskill LJ has said, 'Having something in one's possession does not mean of necessity that one must actually have it on one's person'[12]. This is to some extent reflected in the phrases sometimes encountered, such as 'possession in fact' and 'possession in law'. The former suggests the presence of some factual basis for 'possession in fact', and it may be some such supposition that has paved the way for the acceptance of the ready-made *corpus* and *animus* formula of Savigny, not only by writers but even in some of the cases[13]. The objection to *corpus* and *animus* as comprising possession is that their content has varied so much that they cannot provide a reliable criterion. *Corpus* and *animus* mean different things for different purposes so much so that even possession in fact has come to be no more than a variable concept of the law.

> 'Possession', said Erle CJ 'is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied—varying very much in its sense, as it is introduced either into civil or into criminal proceedings'[14].

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12 *R v Purdy* [1975] QB 288 at 298, [1974] 3 All ER 465 at 473; and further references on p 272 n 3 ante.

13 *The Tubantia* [1924] P 78 at 89; *Brown v Brash and Ambrose* [1948] 2 KB 247 at 254, [1948] 1 All ER 922 at 925.

14 *R v Smith* (1855) 6 Cox CC 554 at 556.

Lord Parker CJ has expressed the same view:

> 'For my part I approach this case on the basis that the meaning of 'possession' depends on the context in which it is used'[15].

Both statements are apt summaries of the thesis of this chapter. The evidence in support may now be considered, subject to the caution that some of the examples to be given refer to rules and doctrines no longer in force: they are merely historical illustrations.

The question may first be considered how far the holding of a key gives possession of the thing or the place to which it gives access. In *Ancona v Rogers*[16] X was allowed to put her goods in certain rooms in Y's house. X sent them by an agent, who locked them in the rooms allotted for that purpose in Y's house by Y, and took away the key. It was held that X was in possession of the rooms. The court indicated that the delivery of the key accompanied by other facts, such as the appropriation of the rooms by Y to X's use and the acquiescence by Y in the whole proceeding, were sufficient to vest possession in X. The delivery of a key may also be sufficient by itself to pass possession of the contents of a room or a box, at all events if it provides the effective means of control of the goods[17]. On the other hand, for the purpose of satisfying the doctrine of part performance of an unenforceable contract to transfer or dispose of an interest in land, entry into possession is a sufficient act of part performance; but having the key to the premises will not of itself constitute possession of them. The policy of the law is different in part performance. For these contracts are not actionable unless evidenced by a note or memorandum in writing signed by the party to be charged or his agent. The absence of such evidence can be got round by acts of part performance of the agreement, but since these are a substitute for written proof of the contract, they must be unambiguously referable to the contract[18]. Entry into possession of the premises could amount to part performance, for which purpose possession means actual, physical entry[19]. Having only the key will not suffice, for this is open to many interpretations, eg to view the premises.

The old Rent Acts provided instructive examples. It is necessary to distinguish between possession in a landlord of rent-controlled premises and possession in a tenant. Under the Rent and Mortgage Interest Restrictions Act 1923, if the landlord regained possession of the premises, they became decontrolled. Section 2 (3)[20] specified that 'For the purposes of this section, the expression 'possession' shall be construed as meaning 'actual possession', and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with consent'. The policy behind this provision was probably what Scrutton LJ thought it was:

15 *Towers & Co Ltd v Gray* [1961] 2 QB 351 at 361, [1961] 2 All ER 68 at 71, approved by Lord Pearce in *Warner v Metropolitan Police Comr* [1969] 2 AC 256 at 304, [1968] 2 All ER 356 at 387; by Fisher J in *Hambleton v Callinan* [1968] 2 QB 427 at 432, [1968] 2 All ER 943 at 945; by Ashworth J in *Woodage v Moss* [1974] 1 All ER 584 at 588, [1974] 1 WLR 411 at 415; and Lord Widgery CJ in *Sullivan v Earl of Caithness* [1976] QB 966 at 969-970; [1976] 1 All ER 844 at 846-847.

16 (1876) 1 Ex D 285.

17 *Jones v Selby* (1710) Prec Ch 300; *Re Mustapha, Mustapha v Wedlake* (1891) 8 TLR 160; *Wrightson v McArthur and Hutchinsons* [1921] 2 KB 807; *Re Lillingston, Pembery v Pembery* [1952] 2 All ER 184; *Re Wasserberg, Union of London and Smiths Ltd v Wasserberg* [1915] 1 Ch 195.

18 *Wakeham v Mackenzie* [1968] 2 All ER 783, [1968] 1 WLR 1175.

19 *Morphett v Jones* (1818) 1 Swan 172 at 181-182; *Brough v Nettleton* [1921] 2 Ch 25.

20 See now the Rent Act 1977.

> 'I think Parliament in using the phrase 'actual possession' intended to reject the legal right to possess and to require actual control or apparent dominion in fact'[1].

Nevertheless, the courts took the line that if the landlord merely got the key, even momentarily, he got 'actual possession' within the meaning of this section. It was held in *Jewish Maternity Home Trustees v Garfinkle*[2] that having the key for some time amounted to 'actual possession' of the premises. In *Thomas v Metropolitan Housing Corpn Ltd*[3] it was held that dropping the key into the letter box of the office of the landlord's agent, which was closed for the week, was sufficient to give the landlord 'actual possession'. In *Holt v Dawson*[4] the outgoing tenant gave up the key to the landlord's agent, who handed it to the new tenant, and the landlord was held to have come into 'actual possession'. In *Goodier v Cooke*[5] the outgoing tenant and the new tenant met the landlord's agent by appointment five days before the former left the premises. She handed the key to the agent, who immediately handed it over to the new tenant. It was held that the landlord had come into 'actual possession'. It must not be supposed that control of the key is the sole criterion of a landlord's possession, for as Scott LJ was careful to say in *Holt v Dawson*:

> 'Each of these cases as to actual possession by the landlord must be decided on its own particular circumstances, and the fact that in one case a court or judge has taken a certain view is of little guidance in other cases'[6].

Thus, it was held in *Boynton-Wood v Trueman*[7] that the handing over of the key to the landlord to carry out repairs was not surrender of possession; and in *Michel v Volpe*[8] the possession of a key to a room in a house was held not to give exclusive occupation amounting to a subtenancy.

Possession of controlled premises by tenants was viewed differently from possession by landlords because the policy of the law differed in the two situations. With regard to landlords, the old Rent Acts used originally to be viewed with disfavour as restricting the freedom of property owners to deal with their property as they wished. Judicial policy, which at the time was more vigilant in safeguarding interests in private property than in furthering social experiments, appeared to have sought to minimise the legislative restriction on the freedom of landlords. In possession was found a handy device for pursuing this policy, and a nominal view was adopted of what amounted to regaining possession so that landlords might be freed from the statute on the easiest conditions. With tenants, on the other hand, the judges pursued another line. They sought to protect tenants and to ease the housing shortage, but also to prevent them from taking unfair advantage from their protection. It was summed up by Sir Raymond Evershed MR (as he then was):

> 'The reason for such a provision, I think, is not far to seek. No one has better laid down the principles of the Rent Restrictions Act than Scrutton LJ and he

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1 *Hall v Rogers* (1925) 133 LT 44 at 45.
2 (1926) 42 TLR 589.
3 [1936] 1 All ER 210.
4 [1940] 1 KB 46, [1939] 3 All ER 635.
5 [1940] 2 All ER 533.
6 [1940] 1 KB 46 at 53, [1939] 3 All ER 635 at 639.
7 (1961) 177 Estates Gazette 191. Cf *Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 3 All ER 633 (possession of a car was retained by retaining the ignition key); and *obiter* in *Walker v Rountree* [1963] NI 23.
8 (1967) 202 Estate Gazette 213.

> has pointed out that their object was to protect persons who were tenants from eviction, and not to provide some mean whereby tenants could make financial gain out of dealings with rent-controlled property'[9].

To further this aim the courts construed the tenant's possession more strictly than that of the landlord; they even adopted a *corpus* and *animus* view of it. What constituted *corpus* and *animus* in any given case depended on whether the court thought that the tenant was trying to take an unfair advantage or not. In *Brown v Brash and Ambrose*[10], the tenant went to gaol for two years, leaving his mistress in occupation, and after a time she also left. His claim that he remained in possession during that time was rejected by the court. When the tenant was not being unfair, the courts were prepared to protect him and to say that he continued in possession by viewing his *corpus* and *animus* more liberally. In *Tennant v Whytock*[11], where the tenant went to live in Germany with her husband, who was serving with the British Army of Occupation, it was held that she remained in possession. In *Tickner v Hearn*[12] the tenant left the premises to visit her daughter and was taken from there to a mental home. The daughter maintained the premises so that the tenant could eventually return. It was held that the tenant had not lost her possession in the circumstances.

The possession of tenants is also affected by policy with regard to husbands and wives and morality in general. A husband is bound to provide a home for his wife. If, therefore, a tenant deserts his wife and leaves the premises, but she remains, he is deemed to remain in possession through her so that she can be protected against eviction[13]. If, however, the wife has been divorced, she is not protected and the tenant will have lost possession[14]. Nor is protection given to a mistress, and a tenant who leaves the place, but leaves his mistress behind, will have lost possession[15]. There is also another special rule: if a tenant sublets, he is still in possession of the whole of the premises as long as he occupies at least a part, but not otherwise[16].

Turning to the law of tort, the axiom is that possession is the basis of

9 *Regional Properties Co Ltd v Frankenschwerth and Chapman* [1951] 1 KB 631 at 636, [1951] 1 All ER 178 at 181. For similar statements, see *Broun v Brash and Ambrose* [1948] 2 KB 247 at 254, [1948] 1 All ER 922 at 925; *Dixon v Tommis* [1952] 1 All ER 725 at 727; *Paisner v Goodrich* [1955] 2 QB 353 at 357, [1955] 2 All ER 330 at 332; *Gofor Investments v Roberts* (1975) 119 Sol Jo 320.

10 [1948] 2 KB 247, [1948] 1 All ER 922, approved in *Poland v Earl Cadogan* [1980] 3 All ER 544. See also *Thompson v Ward* [1953] 2 QB 153, [1953] 1 All ER 1169; *Bushford v Falco* [1954] 1 All ER 957; *SL Dando Ltd v Hitchcock* [1954] 2 QB 317 at 322, 325, [1954] 2 All ER 335 at 336, 338; *Cove v Flick* [1954] 2 QB 326n, [1954] 2 All ER 441; *Gofor Investments v Roberts* (1975) 119 Sol Jo 320.

11 1947 SLT (Sh Ct) 83; *Hoggett v Hoggett* (1979) 39 P & CR 121, CA.

12 [1961] 1 All ER 65. See also *Langford Property Co Ltd v Tureman* [1949] 1 KB 29; *Wigley v Leigh* [1950] 2 KB 305, [1950] 1 All ER 73; *Dixon v Tommis* [1952] 1 All ER 725; *Beck v Scholtz* [1953] 1 QB 570, [1953] 1 All ER 814.

13 *Old Gate Estates Ltd v Alexander* [1950] 1 KB 311, [1949] 2 All ER 822; *Middleton v Baldock* [1950] 1 KB 657, [1950] 1 All ER 708; *Wabe v Taylor* [1952] 2 QB 735, [1952] 2 All ER 420; *SL Dando Ltd v Hitchcock* [1954] 2 QB 317 at 322, 325, [1954] 2 All ER 335 at 336-337, 338.

14 *Robson v Headland* [1948] WN 438.

15 *Thompson v Ward* [1953] 2 QB 153, [1953] 1 All ER 1169; *Colin Smith Music Ltd v Ridge* [1975] 1 All ER 290, [1975] 1 WLR 463. But see *Dyson Holdings Ltd v Fox* [1976] QB 503, [1975] 3 All ER 1030, CA.

16 *Baker v Turner* [1950] AC 401, [1950] 1 All ER 834; *Berkeley v Papadoyannis* [1954] 2 QB 149, [1954] 2 All ER 409; *Crouhurst v Maidment* [1953] 1 QB 23, [1952] 2 All ER 808; *Cove v Flick* [1954] 2 QB 326n, [1954] 2 All ER 441; *Michel v Volpe* (1967) 202 Estates Gazette 213.

trespass[17], and the policy of this branch of the law is to compensate the party whose interests have been affected. In order to enable such persons to recover, the courts have contrived to attribute possession to them. Bailment is a good illustration. A bailee is a person who gets possession of a chattel from another with his consent. A bailment may be at will, ie revocable by the bailor at any time, or for a term, ie a fixed period of time. Even where a bailment is at will, the bailee, who by definition has possession, can sue a third party in trespass. Since it is revocable at will, the bailor, too, has an interest worth protecting. In order that he might bring trespass, his 'right' to possess is treated as being possession itself. Nothing could be clearer than the words of Viscount Jowitt in *United States of America v Dollfus Mieg et Cie SA*:

> 'Under English law, where there is a simple contract of bailment at will the possession of the goods bailed passes to the bailee. The bailor has in such a case the right to immediate possession, and by reason of this right can exercise those possessory remedies which are available to the possessor. The person having the right to immediate possesis, however, frequently referred to in English law as being the 'possessor'—in truth English law has never worked out a completely logical and exhaustive definition of 'possession'[18].

Lord Parker CJ reiterated the point when he said:

> 'In other cases it may well be that the nature of the bailment is such that the owner of the goods who has parted with the physical possession of them can truly be said still to be in possession'[19].

Where, on the other hand, the bailment is for a term, only the bailee can bring trespass, not the bailor[20], so a special action had to be devised.

Where a master has temporarily handed a thing to his servant it is well known that possession remains in the master and the servant gets only 'custody'. *Meux v Great Eastern Rly Co*[1], shows that it is the master who can sue in trespass for an injury to the thing committed by a third party; but A L Smith LJ said *obiter* that he had no doubt that the servant could also have sued in trespass, implying thereby that possession is concurrently in the servant, although the question would be, as he admitted, as to the quantum of damages[2]. There is also a *dictum* in the earlier case of *Heydon v Smith*[3] that a servant is capable, on these facts, of bringing trespass or an appeal of larceny. *Moore v Robinson*[4] actually decided that a servant could maintain trespass, but the facts suggest that the servant had been constituted a bailee by his master.

Lost property provides another example. A person who loses a thing retains his ownership of it. For the purpose of suing the person who takes it in

17 *Rooth v Wilson* (1817) 1 B & Ald 59 at 62; *Wilson v Lombank Ltd* [1963] 1 All ER 740, [1963] 1 WLR 1294.

18 [1952] AC 582 at 605, [1952] 1 All ER 572 at 581, approved by Lord Wilberforce in *Warner v Metropolitan Police Comr* [1969] 2 AC 256 at 309, [1968] 2 All ER 356 at 391-392. See also YB 2 Edw IV, 25 (Laicon *arg*); *Lotan v Cross* (1810) 2 Camp 464 at 465; *Ancona v Rogers* (1876) 1 Ex D 285 at 292. Cf *D* 41.2.17 *pr*, where the 'right' to possess was treated as possession for the purpose of an interdict.

19 *Towers & Co Ltd v Gray* [1961] 2 QB 351 at 361-362, [1961] 2 All ER 68 at 71. The bailor may retain his possession even though the bailment is not gratuitous: *Wilson v Lombank Ltd* [1963] 1 All ER 740, [1963] 1 WLR 1294.

20 *Gordon v Harper* (1796) 7 Term Rep 9.

1. [1895] 2 QB 387.
2. [1895] 2 QB 387 at 394.
3. (1610) 13 Co Rep 67 at 69.
4. (1831) 2 B & Ad 817.

conversion his 'right' to regain possession will suffice, and for the purpose of suing such a person in trespass it seems probable that the 'right' to possess will once more be regarded as possession. On the other hand, for the purpose of claiming from the insurance company for the loss, he will be regarded as having lost possession within the terms of the contract, if the thing is not in fact found[5].

In connection with land, the doctrine of 'trespass by relation' is another example of the artificial manipulation of the concept of possession so as to provide a remedy in trespass to one deserving of compensation. When a person with a 'right' to possess enters in pursuance of it, he is deemed to have been in possession from the time when his title originally accrued so that he can sue for any trespass that has been committed between the accrual of the title and entry. 'Entry' is purely technical, and is satisfied merely by making a formal claim so that, in effect, the 'right' to possess here also is being treated as equivalent to possession itself. Again, if two persons are on a piece of land and both do acts to assert possession, the question to whom it is to be attributed is determined according to which of them is entitled to the land[6]. This shows that there is nothing in the factual situation that determines the incidence of possession. It is determined on the basis of title because, as between the two of them, it is the person entitled to the land who deserves compensation by means of an action in trespass against the other. If it is sought to establish possession without proof of title, the 'exclusiveness' of the plaintiff's possession depends on the facts[7].

Professor Goodhart suggested two further rules[8]. (a) A possessor of land possesses everything attached to or under the land. In *Elwes v Brigg Gas Co*[9], a prehistoric boat embedded in the soil, and in *South Staffordshire Water Co v Sharman*[10], two rings buried in the mud in a pool were held to be in the possession of the respective landowners. In *London Corpn v Appleyard*[11] banknotes contained in a wooden box, which was inside a locked safe in the wall of a building, were held to be in the possession of the party who had possession of the land. On the other hand, in *Hannah v Peel*[12] a brooch, which was found by a soldier on requisitioned premises, was held not to have been in the possession of the landowner, who was not at the time in possession of the premises. (b) Things lying loose on the land are not in the possession of the landowner, but fall into the possession of the first finder, at any rate if he is lawfully on the land. In *Armory v Delamirie*[13] a chimney-sweep, while cleaning a flue, discovered a jewel and was held to have acquired possession. In *Bridges v Hawkesworth*[14] a pocketbook was dropped in a shop and was later

5 See Parker in the 9th edn of Salmond's *Jurisprudence* p 388.

6 *Jones v Chapman* (1849) 2 Exch 803 at 821; *Newcastle City Council v Royal Newcastle Hospital* [1959] AC 248 at 255, [1959] 1 All ER 734 at 736; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, [1969] 2 WLR 1359; *Portland Managements Ltd v Harte* [1977] QB 306, [1976] 1 All ER 225. Cf *D* 41.2.49 *pr: 'plurimum ex jure possessio mutuetur'*, possession borrows a great deal from the right.

7 *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979.

8 'Three Cases on Possession' in Goodhart *Essays in Jurisprudence and the Common Law* pp 88–. See also the 8th Report of the Law Reform Committee (Conversion and Detinue) Annex 1.

9 (1886) 33 ChD 562.

10 [1896] 2 QB 44. Cf *Re Cohen* [1953] Ch 88, [1953] 1 All ER 378.

11 [1963] 2 All ER 834, [1963] 1 WLR 982. But if the owner was known he would have had a better claim: *Moffatt v Kazana* [1969] 2 QB 152, [1968] 3 All ER 271.

12 [1945] KB 509, [1945] 2 All ER 288.

13 (1722) 1 Stra 505.

14 (1851) 15 Jur 1079.

picked up by a customer. It was held that it had never been in the possession of the shopkeeper, and that it was possessed by the finder. So, too, in *Bird v Fort Frances*[15] a boy found some banknotes lying on a sill in private premises, and it was held that he acquired possession of them. In *Grafstein v Holme and Freeman*[16] X found a box in the basement of a building and informed his employer, who instructed him to put it on a shelf. Two years later X investigated the contents and discovered banknotes. It was held that the employer had come into possession when X had reported the find and had placed the box on the shelf. *Crinton v Minister for Justice*[17] shows that if in fact the finder finds as agent for his principal, possession vests in the latter. In *Byrne v Hoare*[18] a police constable, who found a gold ingot on private land, was held entitled to it as against all save the owner[19]. He was not acting as a Crown officer, so the Crown had no claim. Finally, in *Parker v British Airways Board*[20] a passenger, waiting in the lounge of an airways terminal occupied by the defendants, found a gold bracelet, which he handed to an employee of the defendants and gave his name and address. It was held that he had acquired possession of it and not the defendants.

The old law of larceny, which has now been replaced by the Theft Act 1968, provided abundant examples of the manipulation of possession to suit policy, but these need only be summarised[1]. The savagery of the old punishments for even trifling thefts led judges to mitigate the rigour of the law by making it difficult to hold persons guilty. This understandably humane attitude shaped larceny, which required the coincidence of three conditions at the same point of time: (i) a taking of possession, (ii) without the consent of the owner or possessor, and (iii) with intent to steal at the time of the taking. Later the penalties became milder and there was a reversal of policy. The result of making it difficult to secure convictions meant that many obviously dishonest persons escaped punishment. So judges began to juggle with possession so as to make the three requirements coincide with the consequence that possession became completely nebulous. Thus, in cases where a person took possession of a thing innocently and only later formed his intention to steal, several strange rules were evolved. Where the taking of possession was a civil trespass (ie without consent), it was said that this gave rise to a continuing series of fresh takings thereafter so that the subsequent intention to steal could coincide with a taking that was occurring at the moment. In this way it amounted to larceny[2]. In another famous case it was held that a person who received a sovereign in the dark, when both giver and taker believed it to be a shilling, only took possession of the sovereign when he later realised what it was and at that moment intended to appropriate it[3]. Again, a servant, who was handed a thing by his master, could not be guilty of larceny if he was thought to have received possession with consent and

15 [1949] 2 DLR 791.
16 (1958) 12 DLR 727.
17 [1959] Ir Jur Rep 15.
18 (1965) 58 QLR 135.
19 Cf *Moffatt v Kazana* [1969] 2 QB 152, [1968] 3 All ER 271, where the owner was known and was held entitled.
20 [1982] QB 1004, [1982] 1 All ER 834.
1 For fuller treatment, see the 2nd edn of this book, pp 320-325.
2 *R v Riley* (1853) Dears CC 149, especially the judgment of Parke B.
3 *R v Ashwell* (1885) 16 QBD 190; *R v Hudson* [1943] KB 458, [1943] 1 All ER 642; *Russell v Smith* [1958] 1 QB 27, [1957] 2 All ER 796. Cf *Warner v Metropolitan Police Comr* [1969] 2 AC 256, [1968] 2 All ER 356.

without any intention to steal at that moment. In order to catch the servant, who formed his intention to steal later, it was said that he had received only 'custody', not possession, from the master, but that when he formed his dishonest intention, then and only then did he take possession without consent. If, however, a third party took it from the servant, the latter was deemed to have both possession or 'special property' to justify holding the former guilty of larceny from him[4]. Finally, a bailee by definition has possession with consent. Accordingly, to convict the dishonest bailee the courts invented the doctrine of 'breaking bulk'[5], which was to the effect that if the bailee took the thing bailed apart in any way ('broke bulk'), this determined the bailment, possession revested in the bailor and the bailee then took a new possession without consent and with intent to steal.

Larceny also required that possession be 'laid' in someone from whom the theft took place. This, too, was artificially extended. For instance, a loser of a thing was deemed still to be in possession so that a dishonest finder could be held guilty[6]. Things lying loose on land were likewise deemed to be in the possession of the landowner, unlike the rule in tort[7]. These and the foregoing examples should demonstrate the attitude of the old law of larceny towards possession: it was viewed in whatever way was most apt for punishing wickedness. Happily, the Theft Act 1968, has relegated them all to the historical shelf.

An important contemporary concern of the criminal law with possession is in connection with the statutory offence of being in possession of prohibited drugs. The difficulty arises in cases where the accused is shown to have been in possession of a parcel, but he asserts that he did not know it contained drugs. In *Warner v Metropolitan Police Comr*[8] the House of Lords held that the Drugs (Prevention of Misuse) Act 1964, laid down absolute prohibition of possessing drugs, but they in effect mitigated the severity of this by importing a mental element into possession in the context of this particular branch of the law. Approval was given to dicta of Lord Parker CJ that

> 'a person cannot be said to be in possession of some article which he or she does not realise is, or may be in her handbag, in her room, or in some other place over which she has control. That, I should have thought, is elementary; if something were tipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it'[9].

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4 *Heydon and Smith's Case* (1610) 13 Co Rep 67 at 69; *R v Deakin and Smith* (1800) 2 East PC 653; *R v Harding* (1929) 21 Cr App Rep 166.

5 Attributed to *The Carrier's Case* (1473) YB 13 Edw 4, fo 9, Pasch pl 5; doctrine abolished by statute in 1857. See also Larceny Act 1916, s 1.

6 *R v Thurborn* (1849) 1 Den 387. If a third party took from a finder, the indictment could properly lay the thing either in the loser or the finder: *R v Swinson* (1900) 64 JP 73.

7 *R v Rowe* (1859) Bell CC 93; *R v Foley* (1889) 26 LR Ir 299; *Hibbert v McKiernan* [1948] 2 KB 142, [1948] 1 All ER 860.

8 [1969] 2 AC 256, [1968] 2 All ER 356. See also *Hambleton v Callinan* [1968] 2 QB 427, [1968] 2 All ER 943; *R v Hussain* [1969] 2 QB 567, [1969] 2 All ER 1117; *R v Marriott* [1971] 1 All ER 595, [1971] 1 WLR 187.

9 *Lockyer v Gibb* [1967] 2 QB 243 at 248, [1966] 2 All ER 653 at 655. Contrast two earlier statements by Lord Goddard CJ in *Hibbert v McKiernan* [1948] 2 KB 142 at 150, [1948] 1 All ER 860 at 862; and in *Russell v Smith* [1958] 1 QB 27 at 34-35, [1957] 2 All ER 796 at 799. See, too, *R v Peaston* (1978) 69 Cr App Rep 203, CA. *Quantity* may be a factor in determining possession: *R v Boyesen* [1982] AC 768, [1982] 2 All ER 161, HL; need for knowledge: *R v Ashton-Rickardt* [1978] 1 All ER 173, [1978] 1 WLR 37, CA. In *R v Buswell* [1972] 1 All ER 75, [1972] 1 WLR 64, a man who had lost some tablets and found them ten months later at the back of a drawer was held to have continued to be in possession. For

Finally, in connection with adverse possession of land for the purpose of the Statute of Limitations, the policy of the law requires that possession should consist of overt acts which are inconsistent with the title of the owner. Far more is needed to constitute adverse possession against an owner than is needed by an owner to continue his own possession. 'The overall impression created by the authorities', said Ormrod LJ 'is that the courts have always been reluctant to allow an incroacher or squatter to acquire a good title to land against the true owner, and have interpreted the word 'possession' in this context very narrowly'[10]. Much will depend on the nature of the case, particularly the enjoyment of the land concerned. Thus, in *Leigh v Jack*[11], the fact that the defendant had placed his own materials on the land, inclosed a portion of it and had even fenced in the ends, did not amount to adverse possession. In *Littledale v Liverpool College*[12], the erection and locking of gates did not amount to adverse possession; nor in *Convey v Regan*[13] did the cutting and removal of turf. On the other hand, in *Williams Bros Direct Supply Ltd v Raftery*[14] minor acts by the plaintiff owners, such as measuring the land on two occasions and once dumping rubbish on it, were held to constitute continued possession in them as against the defendant's acts of cultivation, putting up of a shelter, some sheds and a fence for keeping in greyhounds. Indeed, *Wuta-Ofei v Danquah*[15] shows that as against a trespasser even the slightest evidence is sufficient to continue possession.

In the light of all this the conclusion must be that in English law, as in the Roman, possession is no more than a device of convenience and policy. This has been appreciated by a few writers and most clearly by Shartel, who said,

> 'I want to make the point that there are many meanings of the word 'possession'; that possession can only be usefully defined with reference to the purpose in hand; and that possession may have one meaning in one connection and another meaning in another'[16].

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possession of premises for the purposes of the Act, see *Sweet v Parsley* [1970] AC 132, [1969] 1 All ER 347, HL; *R v Mogford* [1970] 1 WLR 988 (disapproved in *R v Tao* [1977] QB 141, [1976] 3 All ER 65, CA).

10 *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94 at 114, [1974] 3 All ER 575 at 589.

11 (1879) 5 Ex D 264.

12 [1900] 1 Ch 19.

13 [1952] IR 56. See generally, *George Wimpey & Co Ltd v Sohn* [1967] Ch 487, [1966] 1 All ER 232; *Hayward v Chaloner* [1968] 1 QB 107, [1967] 3 All ER 122; *Paradise Beach & Transportation Co Ltd v Price-Robinson* [1968] AC 1072, [1968] 1 All ER 530; *Hughes v Griffin* [1969] 1 All ER 460, [1969] 1 WLR 23.

14 [1958] 1 QB 159, [1957] 3 All ER 593. See also *West Bank Estates Ltd v Arthur* [1967] 1 AC 665, [1966] 3 WLR 750; *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804; *Tecbild v Chamberlain* (1969) 209 Estates Gazette 1069; *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94, [1974] 3 All ER 575 (distinguished in *Treloar v Nute* [1977] 1 All ER 230, [1976] 1 WLR 1295, CA).

15 [1961] 3 All ER 596, [1961] 1 WLR 1238. See also *Murland v Despard* [1956] IR 170; *Western Ground Rents v Richards* (1961) 177 Estates Gazette 519; *Edgington v Clark* (*Macassey Trustees of Whitley House Trust*) [1963] 3 All ER 468; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, [1969] 2 WLR 1359; *Portland Managements Ltd v Harte* [1977] QB 306, [1976] 1 All ER 225. Acts done on parts of land may be evidence of possession of the whole land: *Higgs v Nassautian Ltd* [1975] AC 464, [1975] 1 All ER 95. Cf *British Railways Board v G J Holdings* (1974) 230 Estates Gazette 973.

16 Shartel 'Meanings of Possession' (1932) 16 Minnesota Law Review 611 at 612. See also Bentham *Works* III, p 188; Lightwood *A Treatise on Possession of Land* passim; Gray *The Nature and Sources of the Law* p 4; Bingham 'The Nature and Importance of Legal Possession' (1915) 13 Michigan Law Review at 638; Kocourek *Jural Relations* p 389; Parker in Salmond on *Jurisprudence* (9th edn) at pp 381, 388, 390; G L Williams 'Language and the Law' (1945) 61 LQR at 391; Fifoot *Judge and Jurist in the Reign of Queen Victoria* p 108.

These are, however, isolated voices in the wilderness, for the classic theories in English law have been dominated by the Savigny-ian *corpus* and *animus* doctrine. Implicit in this are two assumptions: firstly, that Savigny's analysis was correct for Roman law, which it was not; and, secondly, that it must necessarily be correct for English law. English authority is conspicuously lacking. Markby avowedly based his treatment of the subject on Savigny, saying:

> 'Notwithstanding criticisms to which Savigny's conception of possession has been subjected, it seems to me to be still the only one which is clear and consistent and to be in the main that which is accepted by English lawyers. Savigny's treatise is founded upon the Roman law'[17].

The 'clear and consistent' (paying no heed to the fact that the Roman law itself was anything but consistent), 'founded upon the Roman law', 'accepted by English lawyers', are all remarkable propositions. The overriding objections to all these theories are that they are based on the fallacy that the word 'possession' must have some direct physical counterpart, and that the attempt to force the inconsistencies of the law within the four corners of a rigid formula distorts the law.

SALMOND'S THEORY

Salmond[18] began by distinguishing between 'possession in fact' and 'possession in law'[19]. He treated possession in fact as a 'conception', which it undoubtedly is, but this, as Professor G L Williams has pointed out, is as much a conception as possession in law[20]. He also denied that there are two different conceptions of possession. There is only one conception and that is possession in fact, which is possession 'in truth and in fact'. This is no more than the 'one proper meaning' fallacy of language. Having assumed that possession in fact is possession 'in truth and in fact', he was driven to say that possession in law is 'fictitious'. As will have become evident, possession is no longer tied to fact; it has become a concept of the utmost technicality.

Salmond then distinguished between possession of physical objects, which he called 'corporeal possession', and possession of 'rights', which he called 'incorporeal possession'. Corporeal possession is 'the continuing exercise of a claim to the exclusive use of it'. The exercise of this claim involves two ingredients, *corpus possessionis* and *animus possidendi*. Hence, corporeal possession 'is' *corpus* and *animus*. The only authority quoted in support is *D* 41.2.3.1 from Paul. The cases which might have been used in support were decided after Salmond wrote and these, in any case, cannot be generalised.

The *animus possidendi* is an intent to exclude other people, which is simply an adoption of the modified *animus domini* of Savigny. Arguing on this assumption, he explained *Bridges v Hawkesworth*[1] on the ground that the shopkeeper had no intention to exclude people from the pocketbook because he was unaware of its existence, a reason which Professor Goodhart has shown to be a misrepresentation of its *ratio decidendi*[2].

17 Markby *Elements of Law* s 347. Even the shrewd Austin eulogised Savigny on possession: *Lectures on Jurisprudence* I, p 53. See also Holland *The Elements of Jurisprudence* p 199.
18 Salmond *Jurisprudence* (7th edn) chs 13 and 14; (12th edn) ch 9.
19 Salmond p 318.
20 Williams 'Language and the Law' (1945) 61 LQR 391.
1 (1851) 15 Jur 1079.
2 Goodhart 'Three Cases on Possession' in *Essays in Jurisprudence and the Common Law* pp 82-83.

He dealt with the *corpus possessionis* under two headings. (a) The relation of the possessor to the thing, which must admit his making such use of it as accords with its nature. In this connection he said

> 'Whether the possession of one thing will bring with it the possession of another that is thus connected with it depends upon the circumstances of the particular case'[3].

Here there is a glimpse of the truth, but so obsessed was he with his preconception that he failed to develop its significance. (b) The relation of the possessor to other persons. 'I am in possession of a thing', he said, 'when the facts of the case are such as to create a reasonable expectation that I will not be interfered with in the use of it'. This led him to invent reasons to explain *Elwes v Brigg Gas Co*[4] and *South Staffordshire Water Co v Sharman*[5]. Further, an expectation of non-interference is not necessary for the continuation of possession for, as Mr Parker, a former editor of Salmond, pointed out, a man continues to possess his pocketbook although he is being pursued by swifter bandits, who will interfere with his use of it in a few moments[6]. Nor is it necessary even for the commencement of possession for, taking an example from Holmes[7], a child and a ruffian may both make for a purse lying in the road, but if the child is the first to pick it up, can it be doubted that he gets possession even though the ruffian is certain to interfere the very next second?

The trouble arises from the assumption that *corpus* and *animus*, which are only conditions for the acquisition of possession, 'are' possession itself. Salmond denied that possession means one thing at its commencement and something else later on, and he therefore declared that possession is lost when either *corpus* or *animus* is lost[8]. Professor G L Williams, the learned editor of the 11th edition, altered the text on this point, and said that assuming that both *corpus* and *animus* are required to initiate possession, 'the possession once acquired may continue even though *animus* or *corpus*, or even both, disappear'[9]. This, it is submitted, is true, but it destroys the foundation of Salmond's contention that possession 'is' *corpus* and *animus*.

HOLMES'S THEORY

Holmes[10] began promisingly by rejecting *a priori* philosophical criteria. He also perceived that fewer facts are needed to continue possession than to acquire it. He said that the facts which constitute possession are best studied when possession is first gained, and followed this up with the remark:

> 'To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which we are in search'[11].

The 'then' is probably only a rhetorical flourish, but apart from that, the fallacy recurs that the facts needed to acquire possession 'are' or 'constitute'

3 *Salmond* (7th edn) p 304.
4 (1886) 33 ChD 562.
5 [1896] 2 QB 44; *Goodhart* pp 84–88.
6 *Salmond* (9th edn) p 377.
7 Holmes *The Common Law* p 235.
8 *Salmond* (7th edn) pp 314, 318.
9 *Salmond* (11th edn) p 339.
10 Holmes *The Common Law* ch 6.
11 *Holmes* p 216.

possession. The statement is thus tantamount to an adoption of the Savigny-ian *corpus* and *animus* theory, but whereas Salmond at least cited Paul as authority, Holmes offered no authority at all. Having earlier rejected the *a priori* adoption of doctrines, he proceeded to do that very thing himself.

The physical relation to the object he described as 'a manifested power co-extensive with the intent', and treated it as of less importance than the intent. It should be noted, all the same, that the illustrations given of this power[12] show such variety as to render it useless as a criterion.

The intent was said to be an intent to exclude others. On that basis he, like Salmond, was forced into a false explanation of *Bridges v Hawkesworth*[13]. The American case law fared even worse at his hands, particularly *Durfee v Jones*[14], which he admitted was against him, and then alleged to have been wrongly decided, and finally explained in a manner which pretty nearly makes nonsense of both the case and the explanation. The crowning touch comes when, in the midst of his misinterpretation of these cases on the basis of his theory derived from Savigny, he pointed an accusing finger at Stephen for having misinterpreted two other cases on the basis of 'a reason drawn from Savigny, but not fitted to the English law'[15].

POLLOCK'S THEORY

Pollock[16] laid stress, not on *animus*, but on *de facto* control, which he defined as physical control[17]. A general intent seems to suffice. Even the reduction of possession to a general criterion like *de facto* control involved Pollock in two difficulties. The first was the 'custody' of servants and such like. They have *de facto* control, and Pollock was driven to treat these cases as 'anomalous', and then to argue that it is the master who exercises *de facto* control using his servant as an instrument[18]. This explanation is only a device for fitting these cases into the theory, and there is no warrant for treating servants in this mechanical way. Moreover, it fails to explain how it is that servants have 'custody' for some purposes and 'possession' for others. The second difficulty, which Pollock encountered, was the case law, in particular, *Bridges v Hawkesworth*[19]. He reconciled it with his theory on the ground that the shopkeeper had no *de facto* control of the pocketbook, which again is not a reason to be found in the case itself[20].

A recent writer who makes control the central idea of possession is Professor Tay[1]. For her, possession 'is the present control of a thing, on one's own behalf and to the exclusion of all others'[2]. She concedes that not all uses of the term can be reduced to the fact of control, but her thesis is that these are best understood when matched against the paradigm case, which is control

12 *Holmes* pp 217-218.
13 (1851) 15 Jur 1079; *Goodhart* pp 79-81.
14 11 Rhode Island 588; *Holmes* pp 225-226.
15 *Holmes* p 225 n 3.
16 Pollock & Wright *Possession in the Common Law*.
17 *Pollock & Wright* p 26.
18 *Pollock & Wright* p 18.
19 (1851) 15 Jur 1079.
20 *Pollock & Wright* pp 39-40; *Goodhart* pp 81-82.
1 Tay 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1964) 4 Melb ULR 476. See also 'Possession and the Modern Law of Finding' (1964) 4 Sydney LR 383.
2 *Tay* (1964) 4 Melb ULR at 490.

so that departures on policy grounds can be openly acknowledged. The argument against this, however, is that control is an idea so variable in its interpretation that it ceases to serve as a 'paradigm case'. In the light of the vagaries, such as the 'key' cases, how does one construct a 'paradigm'? In any case, even if it were possible to construct one, the departures from it would be so numerous that little, if anything, would be gained by having such a concept. Although it is true that control was the primitive factor to which significance attached in law, it did not continue to serve as the anchor. As Maitland observed, 'it is argued in one case that a man has an action of trespass because he has possession, in the next case that he has possession because he has an action of trespass'[3]. The point which Professor Tay seems to overlook is that the nature of possession came to be shaped by the need to give remedies; and this was so in both Roman and English law. It is because of this that possession is sometimes said to be in X or Y simultaneously in different branches. Further, it is submitted with respect that she underestimates the influence of policy considerations.

CONCLUSIONS

Enough has been said to show how the Roman and English lawyers have handled the concept of possession, and how widely the theories err. Most striking is the correspondence between the two systems, considering the fact that they are separated by centuries, and English law has not borrowed from the Roman. This shows how the law has developed to meet the needs of society, and not in accordance with theories. Only thus could two such widely different systems have arrived at similar results.

There is now so much flexibility in the use of this concept that certainty over a good part of the law in which it figures has disappeared. Such certainty as there may be is preserved by the fact that particular rules prescribe in the particular contexts where possession shall reside. It is therefore submitted that all that is needed are these rules, which determine what view should be taken of different situations of fact. Reference to possession becomes superfluous. Possession was a mould in which the earliest doctrines were shaped, but these have now so outgrown their beginnings that the mould has become a redundant relic. What matters now are the rules which determine the incidence of possession. Analysis reveals the influence of policy behind these rules.

The melancholy record of theorising on this topic should serve as a warning against an *a priori* approach. The jurists, whose theories have been discussed, proceed on the assumption that words always have to refer to some referent and are concerned to discover what this 'thing' is; the law, on the other hand, has proceeded functionally. The result has been misquotation, misinterpretation and allegations of wrong decision in order to force the law as it is into a preconceived pattern. To conclude that Roman and English lawyers reached similar ideas as to possession is one thing; but quite another to twist the rules of both so as to fit them into a single misconceived theory. No single theory will explain possession. The danger to be avoided at all costs is to argue from one branch of the law to another[4].

3 *HEL* ii, 31.

4 Lord Diplock: 'These technical doctrines of the civil law about possession are irrelevant to this field of criminal law': *DPP v Brooks* [1974] AC 862 at 867, [1974] 2 All ER 840 at 843.

Corpus and *animus* are not irrelevant. They have no fixed meaning, but are conditions which the law generally requires for the commencement of possession. Two questions should be distinguished: What is possession? and How is possession acquired? The *corpus* and *animus* theory is only *an* answer, by no means the only one, to the second question.

Possession carries with it the claim to possession and not to be interfered with until someone else establishes a superior title. 'The general principle appears to be that, until the contrary is proved, possession in law follows the right to possess'[5]. It should be noted that the 'right' to be in possession is different from the 'right to possess', ie to be put in possession. It has been seen how, for reasons of policy, the term 'possession' is used to cover both, and this is done when the party concerned is, or has been in possession at one time or another. The earlier possession gives the possessor a 'better right' to possess than any later possessor; even a trespasser has a 'better right' to possess than any subsequent taker. The question to be decided is which of several persons have had possession and when. The answer is determined by considerations of policy and convenience[6]. When the question of the 'right to possess' falls to be decided on grounds other than the mere fact of prior possession, it is said that such right has to derive from ownership[7]. Possession then becomes *prima facie* evidence of title. In this way the role of possession in achieving distributive justice gets subsumed under ownership. For the rest, in relation to justice in deciding disputes and adapting to change, the flexibilities in its use have been amply demonstrated.

In the light of all the foregoing it may be asked whether possession is a matter of law or of fact. The Romans disputed it, and neither in Roman nor in English law is there any simple answer. Possession has three aspects: firstly, the relation between a person and a thing is a fact. Secondly, the advantages attached by law to that relation is a matter of law. Thirdly, these advantages are also attributed to a person when certain other facts exist. What they are in any given type of case is a matter of law.

5 Per Ormrod LJ in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94 at 114, [1974] 3 All 575 at 589.

6 Harris has given nine points which amplify the kind of factors that courts take into account. (1) The degree of physical control which the person claiming possession actually exercises, or is immediately able to exercise; (2) this has to be weighed against the degree of physical control actually or potentially exercised by any other person; (3) the claimant's knowledge (a) of the existence of the chattel, and (b) its major attributes or qualities, and (c) its location at the relevant time; (4) his intention in regard to it; (5) knowledge of another person of its existence, its attributes and location; (6) that person's intention in regard to it; (7) the legal relationship of the claimant, compared with that of another person, to the premises where the chattel is; (8) other legal relationships between the parties, or special rules applicable to the facts; (9) the policy behind the rule: 'The Concept of Possession in English Law' in *Oxford Essays in Jurisprudence* (ed Guest) pp 72–80.

7 *Portland Managements Ltd v Harte* [1977] QB 306, [1976] 1 All ER 225.

READING LIST

J W Bingham 'The Nature and Importance of Legal Possession' (1915) 13 Michigan Law Review 534, especially 549–565, 623 et seq.
H Bond 'Possession in Roman Law' (1890) 6 LQR 259.
A L Goodhart *Essays in Jurisprudence and the Common Law* ch 4.
D R Harris 'The Concept of Possession in English Law' in *Oxford Essays in Jurisprudence* (ed A G Guest) ch 4.
O W Holmes *The Common Law* ch 6.
R von Ihering *Der Besitwille* (trans O de Meulenaere).
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A Kocourek *Jural Relations* (2nd edn) ch 20.
J M Lightwood 'Possession in Roman Law' (1887) 3 LQR 32.
G W Paton *A Text-Book of Jurisprudence* (4th edn G W Paton and D P Derham) ch 22.
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J W Salmond on *Jurisprudence* (7th edn) chs 13–14.
F C von Savigny *Possession* (trans E Perry).
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CHAPTER 14

Ownership

The concept of ownership is of both legal and social interest. Not only have courts utilised the idea in such a way as to give effect to views of changing individual and social interest, but so great are its potentialities that in recent times it has become the focus of governmental policy. It is proposed in this chapter to show how its use as an instrument of judicial policy has come to be eclipsed by its political significance.

Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to the thing owned. Accordingly, some jurists analyse the concept out of existence. When it is said, for example that a person who owns a house has various claims, etc in respect of it, these jurists argue that his ownership means just those claims etc; that there is no point in talking of ownership apart from them. Such a view, it is submitted, is undesirable and inadequate. For the connotation of 'ownership' does not correspond simply with its component elements any more than the word 'team' connotes just a group of individuals. The term is a convenient method of denoting as an unit a multitude of claims etc in a way similar to the term 'person' examined earlier. Another reason is that the various claims etc constitute rather the content of ownership than ownership itself. A person may part with the claims etc to a greater or lesser extent, while retaining the right of ownership. Thus, a person who has the ownership of land, namely the fee simple, may grant the leasehold of it to another with the result that his ownership is denuded of most of its content. As long as he has the fee simple he is 'owner', which shows that his right of ownership is distinct from its contents[1]. Also, it is misleading to talk as if ownership meant only the claims etc; it would be truer to say that a person is entitled to these claims etc by virtue of the right of ownership. Lastly, ownership as an asset has value apart from its component claims etc. It is no doubt true that the exact value of a person's ownership will be affected by the extent of the advantages that he is able to derive, but that is another matter. It is therefore meaningful and necessary to speak of a 'right of ownership' as distinct from a collection of jural relations. The discussion that follows will concern the analysis of ownership as it has been shaped by the progressive adjustment of competing interests, and then its function and functioning in the social regulation of an owner's use and enjoyment of the thing owned. Reference will be mainly to English law, though some of the points may well apply to other systems as well. Ownership is an institution that is generally recognised, so it is not surprising that certain features are shared.

1 It should, perhaps, here be remarked that there are such expressions as 'limited ownership', but these, as will appear, refer to special types of interest.

ANALYSIS OF OWNERSHIP

Ownership in English law has to be approached historically, for its evolution is bound up with the remedies that used to be available. The piecemeal development through actions prevented the formation of a clear-cut conception. The peculiarity of English law is that it did not achieve an absolute ownership, as did Roman law for example. Save in the case of land, the common law knew of no real action corresponding to the Roman *vindicatio*, damages in trespass, or one of its variants, being the usual remedy. The basis of trespass was possession, or entitlement to retain or obtain possession.

Moreover, the idea of ownership did not evolve in the same way in relation to land and chattels. Land used to be held in feudal tenure, which was a system of land holding in return for service. This holding was known as 'seisin', which originally meant no more than possession and denoted the state of affairs that made enjoyment possible. If the person seised was dispossessed, he had to rely on his seisin to get back on the land, and for this the old remedy was the writ of right in which success depended on the claimant being able to establish a superior title to that of the possessor. In the reign of Henry II the possessory assizes were introduced, 'police measures' as they have been described, which were directed at discouraging the use of self-help. They led to a shadowy distinction between seisin and possession, between the respective bases of the writ of right and of the possessory assizes. This, however, was very obscure, since even possession carried with it the 'right' not only to be in possession but also to regain it if dispossesssed until someone else proved a better 'right'. As suggested in the last chapter, this could be 'better' by virtue of being the prior possession; but if it was 'better' for any other reason it gave rise to ideas of ownership. At this early period there was no talk of ownership as such. The earliest known use of the word 'owner', according to Maitland, quoting Dr Murray, occurred in 1340, and 'ownership' in 1583[2]. A further step in the differentiation of seisin and possession came with the tenant for a term of years. Whereas seisin was protected by the writ of right, the termor's interest was protected by a form of trespass, *de ejectione firmae*. His interest was not seisin, it was styled possession, which sharpened the contrast between seisin and possession[3].

In time new remedies replaced the old, trespass came to protect the possessor and ejectment was available to a person out of possession, who could prove a better 'right' to possess than the possessor. These were based on the old principles, so much so that even in modern law there are many cases which show that ownership of land is only a question of the 'better right' to retain or obtain possession relative to the other party to the dispute[4]. Holdsworth, however, argued that the action of ejectment introduced a new idea. He said that in this action a defendant in possession could set up a *jus tertii* in answer to the plaintiff's claim to obtain possession, ie a superior title in a third party. Therefore, according to him, a plaintiff was required to establish a better claim than anyone else and in this way English law may be said to

2 Pollock & Maitland *History of English Law* II p 153n.

3 For further modifications of seisin, see Holdsworth *History of English Law* VII, ch 1, §2.

4 *Dbe d Burrough v Reade* (1807) 8 East 353; *Doe d Hughes v Dyeball* (1829) Mood & M 346; *Doe d Harding v Cooke* (1831) 7 Bing 346; *Asher v Whitlock* (1865) LR 1 QB 1; *Perry v Clissold* [1907] AC 73; *Tickner v Buzzacott* [1965] Ch 426, [1965] 1 All ER 131 (possibly *Delaney v T P Smith Ltd* [1946] KB 393, [1946] 2 All ER 23: not a dispute as to ownership).

have arrived at the conception of an absolute right, namely ownership[5]. Professor Hargreaves challenged this assertion, firstly, on the ground that, except in cases where title has been registered or is derived from statute, no one is able to prove an absolute title which is good against all the world[6]. Secondly, he alleged that the cases do not bear out Holdsworth's contention about the *jus tertii*[7]. The dispute seems to hinge largely on the interpretation of these cases. Leaving these aside, however, there seems to be one respect in which there may be absolute ownership in land, and that is through registration of title under the property legislation of 1925. Subject to certain exceptions, where title is registered proof of a superior right does not assail the registered title, though it may ground some other form of relief.

Another development was the extension of the idea of seisin to certain interests, or collections of claims, liberties etc. These were conceived of as 'things' distinct from the land itself, and the person in whom they were vested was regarded as holding a 'thing' on its own, namely, the totality of his particular interest. This made possible the doctrine of 'estates' in land. The interest which a person enjoyed over a piece of land was treated as an estate, an incorporeal thing, and he was seised of the land for an estate of a certain duration. The same land could thus be subjected to several concurrent ownerships, each person being seised of it for an estate. In this way the concept of 'estates', and with it 'ownership', was shaped by the need to accommodate overlapping interests in land.

The development of the law relating to chattels took a different line. There was nothing resembling a doctrine of estates. Land-holding, not the possession of chattels, was the index to a person's public and political position. Chattels were of comparatively little significance and there was, originally, no ownership in them. They had a fungible character, that is to say, the transfer or restoration of equivalent chattels sufficed, and later money. This was because, in the nature of things, the interest of a person in a particular chattel was neither so important nor so permanent as his interest in land. Indeed, Maitland doubts 'whether there was any right in movable goods that deserves the name of ownership'[8]. When trespass was introduced, the basis of it was, as always, possession. The idea of title as the 'better right' to obtain or retain possession evolved through trover and detinue: the plaintiff succeeded if he could establish a 'better right' to have the possession than the defendant. Once again, this enabled the defendant to raise the *jus tertii* as a defence and, as in the case of land, there has been dispute as to how far this required a plaintiff to prove an absolute right[9]. The Torts (Interference with Goods) Act 1977, s 8, has abolished the restrictions that used to exist on pleading *jus tertii*. The rules of court may require the plaintiff to give particulars of his title and/or identify anyone whom he knows to have or to claim any interest in the goods. Putting *jus tertii* on one side, it would appear that the law has arrived at a more absolute conception of ownership of

5 *Holdsworth* VII, pp 30, 62, 79; *Historical Introduction to the Land Law* p 182; 'Terminology and Title in Ejectment—A Reply' (1940) 56 LQR 480.

6 Hargreaves 'Terminology and Title in Ejectment' (1940) 56 LQR 376.

7 *Hargreaves* pp 379, 397. The Australian case of *Allen v Roughley* (1955) 29 ALJ 603, is in support of Hargreaves: see note by H W R Wade [1956] CLJ 177. For the operation of estoppel, see *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293.

8 *Pollock & Maitland* II, p 153.

9 *Holdsworth* VII, p 425; Atiyah 'A Re-Examination of the Jus Tertii in Conversion' (1955) 18 MLR 97, and reply by Jolly 'The Jus Tertii and the Third Man', at p 371.

chattels, at any rate for some purposes, than of land. The Sale of Goods Act 1979 (replacing the 1893 Act), for instance, refers to 'the property' in goods, which in this context means ownership[10]. Sir Raymond Evershed MR (as he was then) has said:

> 'Although it is, no doubt, true in a sense, and certainly in its original medieval conception, that when one speaks of property in chattels one has in mind the right to their immediate possession, nevertheless the sense of property in chattels is now well understood. It is, of course, involved in the Sale of Goods Act 1893'[11].

In *Raymond Lyons & Co Ltd v Metropolitan Police Comr*[12] X left a ring with jewellers for valuation and they handed it to the police. X did not return and no one claimed it. Accordingly, the jewellers alleged that they were 'owner' within the Police (Property) Act 1897, s 1(1), since they had a better title against the whole world except the true owner. The court rejected the claim saying that 'owner' in the Act had its popular meaning and that they were not 'owner'.

The position, therefore, seems to be that the idea of ownership of land is essentially one of the 'better right' to be in possession and to obtain it, whereas with chattels the concept has moved towards a more absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner[13]. Where the question is one of obtaining possession, the 'better right' may be derived from prior possession, and, if not, it is said to derive from ownership; but where the question is one of retaining a thing, the 'better right' is associated with ownership[14]. The idea of ownership as a right in a comprehensive sense is useful for indicating the whereabouts of certain types of interest. With land, in particular, it has been evolved in such a way as to enable the adjustment of concurrent interests. There are also certain further points to which attention should be drawn.

1. The term 'ownership' is used with reference to 'things'. 'Thing' has two meanings depending upon whether it is used with reference to physical objects, 'corporeal things', or certain rights, 'incorporeal things'[15]. Since

10 'Property' has had many meanings at various times. There is no clear-cut conception, for, as Lord Porter said, 'In truth the word 'property' is not a term of art, but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that Act or document is intended to deal': *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1051, [1940] 3 All ER 549 at 574. 'Property' has meant variously (1) rights *in rem* and *in personam*, eg Blackstone *Commentaries* III, 143, whose use of the term is wider than even *'res'* in Roman law (usually an element in wealth capable of estimation in money for the purpose of the *condemnatio* clause in the *formula* of an action); Hobbes: life, limb, conjugal affection, riches and means of living: *Leviathan* ch xxx; Locke: life, liberty and estate: *Treatise on Civil Government* II, ch v, s 27; (2) rights *in rem* and *in personam*, excluding those relating to personal condition; (3) rights *in rem* only, excluding personal condition; (4) ownership, eg Sale of Goods Act 1979; (5) alienable rights (though pensions and annuities are 'property', but inalienable); (6) physical objects; (7) 'things', as to which see below.

11 *Jarvis v Williams* [1955] 1 All ER 108 at 111. Note that s 61(2) of the Sale of Goods Act 1979, contrasts 'the property', ie the 'general property', with 'a special property', ie a limited interest of a bailee. The term 'owner' is not used in the Act. Cf eg Bills of Exchange Act 1882, s 80, where the term is undefined.

12 [1975] QB 321, [1975] 1 All ER 335.

13 See *Roadways Transport Development Ltd v A-G* [1942] Ch 208, [1942] 1 All ER 52; revsg [1941] Ch 392, [1941] 2 All ER 313.

14 *Moffatt v Kazana* [1969] 2 QB 152, [1968] 3 All ER 271.

15 Cf *Re Knight's Question* [1959] Ch 381, [1958] 1 All ER 812.

ownership is only of 'things', it, too, is 'corporeal' or 'incorporeal', which is but an elliptical way of saying that the ownership is of corporeal or incorporeal things. The former refers to physical objects, the latter to certain groupings of claims, liberties etc. The use of the phrase 'corporeal ownership' with reference to physical objects is simple, and had the term 'incorporeal ownership' embraced *all* claims etc, that too would have been simple. However, the term 'incorporeal ownership' is only applied to some types of claims etc in so far as these are 'things'; but it does not apply to others, because they are not 'things'. This complicates matters by introducing an element of arbitrariness into the use of 'thing' and 'ownership'. There is said to be ownership of copyrights and patents, because these are treated as 'things'; there is no ownership of bodily security or reputation, because these are not 'things'[16].

The history of the common law relating to land shows that different interests came to be treated as 'things' in themselves, known as 'estates', and so there came to be what is describable as ownership of estates. In addition to this, the idea of 'thing' was also shaped by the interaction between remedy and concept—the grant of a remedy stretched the concept, the concept was the basis for granting a remedy. Thus, a feudal tenant performed services for his lord, who was said to be seised of the land in service. The remedies in respect of the sevices were taken over from those available for the land itself. To make these available, the lord was said to be seised of the services as well as of the land. Since seisin meant possession, the services too came to be thought of as capable of being possessed and hence 'things'. Similarly, a lord was seised of rents, non-payment of which was treated as a disseisin of the lord of his rental. On the other hand, it is equally a matter of historical development that the same did not happen with chattels. The use of the term ownership is thus arbitrary so far as it follows the concept of 'thing', and one has to know the conventions of terminology to know how it is used.

Something should be said at this juncture of Salmond's analysis. Analytically, ownership consists of a bundle of claims, liberties powers and immunities. Salmond said that

> 'Ownership in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns in this sense is in all cases a right'[17].

Ownership is, therefore, 'incorporeal'. He then went on to say that to speak of the ownership of physical objects is a figure of speech. What is meant is that that certain claims etc are vested in a person. 'We identify by way of metonymy the right with the material thing which is its object'[18]. Salmond was of course free to give the word 'ownership' any meaning he liked, and he preferred his first wide meaning. The usual meaning, however, is not as wide as that, as Salmond would probably have agreed. There is more cause to quarrel with his statement that the 'ownership of material objects' is a metonymy. He seems to have assumed that his wide meaning is the 'proper'

16 There is talk now of 'property' in a job, but it is not clear whether it is regarded as a 'thing': *Hill v C A Parsons* [1972] Ch 305 at 321, [1971] 3 All ER 1345 at 1355, per Sachs LJ. The liberties of licensed pilots to provide pilotage services and to employ others as pilots are not 'property' according to the Privy Council in *Government of Malaysia v Selangor Pilot Association* [1978] AC 337, [1977] 2 WLR 901.

17 Salmond *Jurisprudence* (7th edn) p 277.

18 *Salmond* (7th edn) pp 278-279.

meaning of 'ownership', which is why he was led to allege that the other must be a figure of speech. That is misleading, because, as Professor G L Williams points out, a word can have more than one usual meaning[19]. He raises another objection that Salmond's way of stating it suggests that the idea of ownership of rights preceded that of physical objects, whereas historically the reverse would seem to have been the case[20].

Professor Williams objects to the suggestion here advanced that ownership follows the concept of 'thing'. He rejects it as a verbal point and as amounting to a substitution of the word 'things' for 'rights'. It is submitted that this objection overlooks the fact that not *all* 'rights' are treated as 'things'. The meaning of 'ownership' is coterminous with that of 'things', which is narrower than that of 'rights'.

2. Ownership is needed to give effect to the idea of 'mine' and 'not mine' or 'thine'. One aspect of it is that the idea becomes necessary only when there is some relation between persons. A man by himself on a desert island has no need of it. It is when at least one other person joins him that it becomes necessary to distinguish between things that are his and those that are not his, and also to determine what he may do with his things so as not to interfere with his companion. Without society there is no need for law or for ownership[1]. Just as the one is an institution of society, so is the other. The social dimensions of ownership will be discussed later in this chapter. The other aspect is the relativity of 'mine' and 'thine'. If X hires a chattel to Y, even during such time as Y may hold it, X is entitled to say, both in law and in ordinary talk, 'That is mine'; and Y would not counter the assertion by claiming it as his as against X. On the other hand, if Y sees Z picking it up, Y may well say to him 'That is mine', meaning that as between the two of them he is more entitled to it than Z. As between the three of them the law would answer the question, 'Whose thing?', in favour of X as far as ownership goes, but would also give Y such remedies as are based on possession. In the case of hiring land, on the other hand, Y's interest might be so substantial, eg a long lease, that even as against X he would be entitled to say 'That is mine'. No accepted linguistic usages apply to these situations, and both in law and in ordinary talk the idea of 'mine' and 'thine' is relative to the kind of thing and kind of interest.

3. The right of ownership comprises benefits and burdens. The former consist of claims, liberties, powers and immunities, but the advantage these give is curtailed by duties, liabilities and disabilities. It is unnecessary to list these in detail and this aspect will be considered later in connection with the social aspects of ownership.

4. The claims etc which comprise the content of ownership may be vested in persons other than the owner. Whether these others may themselves be treated as 'owners' depends on whether the conventions of the law treat their interests as 'things'.

5. An owner may be divested of his claims etc to such an extent that he

19 Williams 'Language and the Law' (1945) 61 LQR 386. See also *Salmond* (11th edn) p 304n.

20 *Williams* (1945) 61 LQR 386.

1 'Property and law are born and must die together. Before the laws, there was no property: take away the law, all property ceases': Bentham *Works* I, p 309. See also M R Cohen 'The Process of Judicial Legislation' (1914) 48 American Law Review 193; Turner 'Some Reflections on Ownership in English Law' (1941) 19 Can BR 342.

may be left with no immediate practical benefit. He remains owner none the less. This is because his interest in the thing, which is ownership, will outlast that of other persons, or, if he is not presently exercising any of his claims etc these will revive as soon as those vested in other persons have come to an end. In the case of land and chattels, if the owner is not in possession, his ownership amounts to a better claim to possession than that of the defendant. It is 'better' in that it lasts longer. This is substantially the conclusion reached by many modern writers, who have variously described ownership as the 'residuary', the 'ultimate', or the 'most enduring' interest[2]. This idea needs elucidation. So far as property escheats to the Crown in default of any other owner, the Crown must be said to have the ultimate interest. So even the fee simple absolute in possession, the widest right possible in land, would not be 'full' ownership. Yet, for all legal purposes the holder of the fee simple is regarded as being the ultimate owner. One consideration would be to see whether what reverts is still the same 'thing' or simply a collection of claims etc. When, for instance, a life interest falls in, the ultimate owner resumes the claims, etc corresponding to those which had been enjoyed by the owner of the life interest, but not the life interest as a 'thing'. Another and better way of regarding the whole matter is to say that the way in which the terms 'ownership' and 'thing' are used is governed by convention and policy.

6. The ways in which ownership arises differ in different systems. These variations depend upon historical and policy considerations. Thus, it is a peculiarity of English law that a contract for the sale of specific goods can in certain circumstances pass immediate ownership without the need for any further conveyance[3], but the same does not apply in the case of land; again, special ceremonies were required in Classical Roman law for the transfer of civil law ownership in certain kinds of things known as *res mancipi*.

Summing up, it may be said that a person is owner at English law when he becomes entitled in specified ways to some thing designated as such, the scope of which is determined by policy; and his interest, constituted in this way, will outlast the interests of other persons in the same thing.

FUNCTION OF OWNERSHIP IN SOCIAL ORDERING

It has been stated that ownership as a right in itself, distinct from its component jural relations, has always been useful for identifying certain groups of interests and for distinguishing them from others. This is because ownership of these special groups was originally an index, not merely to wealth, but to social position, and it was socially significant in other ways as well. Possession, as has been seen, is a juridical concept and an instrument of judicial policy. Ownership is more than that; it is also a social concept and an instrument of social policy. In the words of Lord Evershed 'Property like other interests has a social obligation to perform'[4]. In English law the various forms of landholding designated a man's social standing, whereas chattels, being fungible, did not have this function. Ownership of land was also a

2 *Salmond* (7th edn) pp 280-281; Pollock *A First Book of Jurisprudence* p 180; Kocourek *Jural Relations* p 330; Turner 'Some Reflections on Ownership in English Law' (1941) 19 Canadian Bar Review 352. Cf Buckland's definition of *dominium: A Text-Book of the Roman Law* p 188.

3 Provided the contract is unconditional and the goods are in a deliverable state: Sale of Goods Act 1979, s 18, r 1.

4 Evershed 'The Judicial Process in Twentieth Century England' (1961) 61 Col LR 786.

means of controlling government in so far as the qualification to vote was based upon it. *Dominium* in Roman law connoted sovereignty, which is essentially a social concept and something more than just ownership[5]; and *res mancipi*, 'things of ownership', the earliest forms of Roman property, were precisely the things that were important to a primitive agricultural community.

Ownership and the allocation of benefits and burdens

The social aspects of ownership reveal the manner in which its content came to be regulated over the years so as to determine how and to what extent an owner shall enjoy his interest in a manner compatible with the interests of others. It has been stated that this content consists of innumerable jural relations, which establish relationships between the owner and other persons in society. The extent of these reflects the social policy of the legal system. Broadly speaking, ownership normally carries with it claims to be given possession, against interference, and to the produce, rents and profits. There are

5 It is submitted that the association with sovereignty derived from a primitive identity, or at least a very close connection, between *dominium* and *patria potestas*. The family being the social unit, the social significance of the *potestas* wielded by the *paterfamilias* needs no demonstration. If this and *dominium* were one and the same, the social significance of the latter becomes apparent. There are many indications in support. (i) *Mancipatio* and *cessio in jure* were modes of acquiring both *patria potestas* and *dominium*. In form these were not *transfer*, but creation of a new authority in a new sovereign; which would explain why it was the acquirer who did the talking. (ii) The publicity of these ceremonies indicates that they dealt with matters of social concern, which is obvious if a change of sovereignty was involved. This might explain the presence of five witnesses in *mancipatio*, who probably represented the original five Servian clans that made up the ancient state; and might also account for the presence of the thirty lictors attending on the praetor in the *cessio in jure* ceremony in that they were made to represent the thirty tribes, which later formed the expanded state. (iii) The appointment of an heir looks as if it was treated as the appointment of a successor to sovereignty, which would explain the rule that no one could die partly testate and partly intestate, and also why disherisons had to be justified on grounds of unworthiness (ie unfitness for sovereign power). It may also explain why questions of succession came before the Centumviral Court composed of representatives of the clans (*querela inofficiosi testamenti* and *hereditatis petitio*). (iv) One year's uninterrupted prescription was a means of acquiring *dominium* (*usucapio*) and *patria potestas* over a wife (*manus*). (v) *Patria potestas* originally included the power of life and death, sale and pledge of those *in potestate* as well as the same actions for recovery and theft of them as of property. What is this but ownership? (vi) Acquisitions by slaves (under *dominium*) and by children (under *patria potestas*) both vested in the paterfamilias. (vii) *Capitis deminutio* involved loss of both *dominium* and *patria potestas*. (viii) Etymology: the primitive term for *dominus* was '*erus*' (*D* 9.2.11.6), which means 'head of family'; '*dominus*' and '*dominium*' mean respectively 'lord' and 'lordship', not 'ownership'; the full title of *dominium* was '*dominica potestas*' (G 1.52, 55), which shows that like *patria potestas*, it was a form of *potestas*; '*liber*' is the Latin for both 'child' and 'free', suggesting that originally the whole *familia* was under one jurisdiction, but that the children were distinguished from slaves and animals as being the 'free' members, *liberi*. If, on this thesis, *dominium* and *patria potestas* were one and the same, why did they separate? The answer may lie in the different social policies towards the free and unfree members of the *familia*. Public opinion and laws discouraged harsh treatment of the former long before they did so in the case of the latter. When in time a sufficiently wide gap developed in the treatment of the two categories, the types of authority over them came to be distinguished. This early association with sovereignty accounts for the great respect which Roman lawyers continued to pay to *dominium*. Thus, servitudes were never treated as burdens on *dominium*, but as qualities of the *land*, *jura in re*. There could be servitudes over unowned land: *D* 8.5.6.2. The restrictions on usufruct, especially the vesting of produce only on actual gathering by the fructuary and the denial of *possessio*, were arbitrary limitations on a powerful interest in property with a view to conserving as much benefit as possible for the *dominus*.

liberties to use and misuse and to exercise various powers. There are also powers of alienation and disposal, creation of limited interests, and so forth. There are also immunities, eg against deprivation.

The scope of these benefits is bounded by corresponding burdens, which are an integral part of ownership. There are various duties, liabilities and disabilities, which prescribe and regulate how an owner should utilise his property for the benefit of other individuals or society[6]. An example of a liability in favour of another person is liability to execution, which is leviable only on property owned by a debtor; and examples of liability in the social interest is liability to pay rates, to various forms of wealth and property tax. In modern times landowners are under increasing disabilities as to renting or disposing of their property[7]. In countries where a racial policy obtains there are restrictions on the ownership of certain kinds of property, or the exercise of various liberties and powers pertaining thereto, by members of a particular race.

An important restriction on ownership in the interest of another person is seen in the distinction between 'legal' ownership at common law and 'equitable' ownership at equity. This occurs when there is a trust, which is the result of the peculiar historical development of English law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity, and is perhaps the outstanding product of the policies and values of judges of the old Court of Chancery. The ownership at law of the trustee was admitted in equity, but considerations of justice demanded that the content of his ownership should be exercised for the benefit of another person, who did not enjoy ownership at law. The interest of such a beneficiary was at first merely a personal one availing against the trustee alone, but the increasing need to protect that interest in ever-widening spheres led to it being regarded as a kind of ownership. The question is what it is that the beneficiary owns. The short answer is—the totality of his interest, which consists mainly of the due performance and exercise by the trustee of his duties and powers. The nature of this interest is largely tied up with the other question whether the beneficiary's interest is *in personam* or *in rem*. To those who assert that it is *in personam* there is no difficulty whatever. The beneficiary's interest is simply the totality of claims *in personam* against the trustee. The term 'beneficial ownership' is therefore either a misnomer, or else a novelty bearing no analogy with ownership at law. There is no 'thing' which he owns. To those who accept that equitable interests can be *in rem* the problem remains. One solution might be to treat the totality of the interest as a 'thing' in itself, which is what the beneficiary owns, and there is also the point that, on certain occasions at any rate, he owns concurrently at equity the very things which are owned by the trustee at law[8].

The beneficiary might himself be a trustee of his interest for a third person, in which case his equitable ownership is as devoid of advantage to him as the legal ownership is to the trustee. So, when described in terms of ownership, the distinction between legal and equitable ownership lies in the historical factors that govern their creation and function; in terms of advantage,

6 See Aquinas *Summa Theologica* 11a, 2ae, 66.2.

7 Eg Community Land Act 1975.

8 *Miller v Collins* [1896] 1 Ch 573; *Re Fox, Brooks v Marston* [1913] 2 Ch 75; *A-G v Farrell* [1931] 1 KB 81. Cf *Gresham Life Assurance Society v Crowther* [1915] 1 Ch 214.

the distinction is between the bare right, whether legal or equitable, and the beneficial right[9].

Ownership and liberty

At the height of the individualist era the tendency was to give 'fundamental rights' the fullest possible scope. This is reflected, *inter alia*, in the way in which ownership, as a 'fundamental right of property', was regarded. An example is the definition of Austin, who wrote at the beginning of the nineteenth century. Ownership he described as

> 'a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing'[10].

Such limitations as undoubtedly did exist were treated as exceptions and restrictively. English law, with its continuous history for many centuries, has a large number of principles reflecting the liberties of the individual and the sanctity of property.

From about the middle of the nineteenth century onwards, emphasis began to shift with ever-increasing momentum towards society and away from the individual. The preoccupation was with the wants of people, with one's duties towards others, rather than with one's 'rights'. A person can only do what he likes with his thing within certain limits, which are determined by the interests of others, and which have become increasingly severe. These limitations are integral to the concept of ownership and not exceptions to an otherwise unlimited right. Austin, in fact, was careful to emphasise that the liberties of user are not *unlimited*, but *indefinite*[11]. The limitations may have been fewer in the past than they are now, but they have always represented the need to compromise between individual interests and life in society.

The common law and statutory duties restricting liberty that now exist need not be gone into in detail. An owner may not destroy or damage his own property to injure another[12]. The fact of ownership can give rise to duties. Thus, the tightening of nuisance, for instance, the rule in *Rylands v Fletcher*[13] (both assuming their present form since the latter part of the last century), the rule in *Donoghue v Stevenson*[14], and many other such rules will be familiar to any student of the law of tort. Statutory restrictions are legion, on building, farming etc. Clear illustrations of social policy are to be found in the restrictions imposed in the interests of public health and safety, the drastic restrictions in times of national peril, restrictions on the use, misuse and non-use of patents, and so on. Judicial interpretation of statutory limitations on ownership used to incline in favour of the individual, but there is now a greater awareness of the social purpose behind them.

Ownership and power

Social reformers, notably those who accept the teachings of Karl Marx, have drawn attention to the evil role which ownership has played. The most

9 Campbell 'Some Footnotes to Salmond's *Jurisprudence*' (1940) 7 CLJ at 217.
10 Austin *Jurisprudence* II, p 790.
11 Austin *Jurisprudence* I, p 371.
12 Malicious Damage Act 1861, ss 3, 59; superseded by the Criminal Damage Act 1971, ss 1 (2), 3.
13 (1868) LR 3 HL 330.
14 [1932] AC 562.

reasoned exposition is that of Renner[15]. It is convenient to begin the Marxist analysis with the individual, who at first provided his own tools, raw materials and labour. With these he manufactured a product which he traded at a profit to himself. When he had accumulated sufficient profit in this way, he was in a position to provide the tools and raw material and get other people to provide the labour. The manufactured product, however, was still in his ownership, not in that of the labourers, and he continued to trade with it for his own profit. In this way the worker became alienated from his labour. It is the concept of ownership, coupled with the institution of hire, that enabled this to happen. Ownership of the means of production, ie tools and raw material, thus came to be a source of power over persons for private profit. The power is manifested chiefly in the inequality of the contract of employment, for by utilising the power of dismissal and the threat of unemployment and consequent starvation, the employer was able to dictate unequal terms of service. Also, owners of the means of production tend to grow into industrial commanders, wielding power that strikes at the foundations of society. By obtaining a monopoly in a certain commodity such an owner can corner the market and hold society to ransom as it were. Renner predicted that law would have to take account of the increasingly public character of ownership of property by investing it with the characteristics of public law. Ownership of other forms of capital can also become sources of profit, for instance, by way of interest on loans or rent from letting and hiring. Such a state of affairs, especially the power over persons for private profit, is anathema to socialists. They point to the unified concept of ownership as being the villain of the piece. 'Private property is robbery, and a state based on private property is a state of robbers who fight to share in the spoils': so said Lenin[16]. The remedy, which they advocate, is to apply in varying degrees two concepts of ownership, a public and a private one. Ownership of the means of production should be public, ie nationalised, and only ownership of consumer goods should be open to private individuals. The distinction lies, not in the nature of ownership, but in the things capable of being owned[17].

Some of the tendencies outlined in Renner's analysis can be said to have taken place, especially with regard to the increasingly public character of industrial property and the growth of combines; but Marx's gloomier forebodings have not materialised in Western countries because of developments in curbing profit and power and in certain other directions, which were either unforeseen or not taken into account sufficiently. Professor Friedmann examined the chief of these at some length[18].

With regard to curbs on power, there has been some removal of the old inequalities that used to prevail between employers and employees. Equality of bargaining in industry has been restored by the growth of trade unions and by the recognition of a liberty to strike[19]. Some of the fears of unemployment have been removed, especially since the introduction of unemployment and other welfare benefits. The dictation of terms by employers has become

15 Renner *Institutions of Private Law and their Social Functions* (1949 edited by Kahn-Freund), on which see Friedmann *Law and Social Change* ch 2.

16 Lenin 31 *Collected Works* (3rd edn) p 300.

17 The USSR recognises private ownership: Constitution (Fundamental Law) of the USSR art 12.

18 Friedmann *Law in a Changing Society* ch 3.

19 This kind of control is not possible in Soviet Russia, where union activities are limited to welfare and strikes are forbidden.

a thing of the past owing to the use now of standardised contracts hammered out between unions and employers, and also owing to the power of unions in other ways. Moreover, judges interpret terms of employment more favourably towards employees than was once the case, as pointed out in Chapter 10. Various duties are imposed on employers by statute and common law in the interests of employees, and out of some of these employers cannot contract.

With regard to curbs on profit, it might be noted that legislative controls now exist as to profits, interests and rents. Income tax, and value added tax and rates are arguably a means of forcing people to put their profits to public use, scaled taxation has helped to level the unequal distribution of wealth, while levies of various sorts compel people to discriminate in the national interest between essential and non-essential commodities.

Several other methods have been evolved of controlling power[20]. For instance, the courts now exercise vigilance on the power of owners to forbid competition by means of restrictive covenants in contracts of service; and in the chapter on Persons mention was made of judicial and statutory 'lifting the mask' of corporate unity to check abuses[1].

The most important method of control has been nationalisation of ownership of means of production. As a curb on the misuse of power, its value has proved to be limited owing to the separation of power from ownership, which was mentioned in connection with corporations[2]. Thus, company A can acquire a controlling number of shares in company B with the result that power resides in A and not B, although B remains owner at law. Further, ownership of a share in A carries more power than ownership of one in B, which is deprived of even such power as it had[3]. With complex and highly technical undertakings power now lies, not in the corporation, which owns the property, or in its shareholders, but in managerial experts. The capitalist has become alienated from his capital. One of Marx's more remarkable insights was that he foresaw this very development, only he treated it as an internal development within capitalism and part of the increasing alienation of the worker[4]. Therefore, nationalising ownership has not provided the hoped-for control of power, and the managerial revolution has had a wider and different impact than Marx had envisaged. What is needed is not nationalisation of ownership, but control of power by managers[5]. In multi-party systems of government it is essential that the managerial boards of nationalised concerns should be independent of the government of the day if they are to enjoy continuity and function efficiently. Governmental control of them, therefore, poses problems[6]. In addition to all this, nationalisation has other drawbacks, previously mentioned, in that it adds political power

20 There has been a recent tendency towards profiteering in 'anti-social' ways by means of terms in standard form contracts, eg exclusion clauses, minimum payment clauses in hire-purchase contracts etc. The courts have sought to curb such abuses in various ways—insistence on reasonable notice, strict interpretation, *contra proferentem* rule and, possibly, avoidance for unreasonableness. See also The Unfair Contract Terms Act 1977.

1 See pp 256 et seq ante.

2 See p 256 ante.

3 See p 255 ante.

4 Marx *Capital* III, ch 27, iii. Cf. Burnham *The Managerial Revolution*, on which see Avineri *The Social and Political Thought of Karl Marx* pp 177-179.

5 Eg the Transport Act 1947, Sch 13, attached obligations directly to controlling companies and not to the owner companies; the Health and Safety at Work etc. Act 1974 s 37, makes managers and directors personally responsible for breaches of safety regulations.

6 See H.C. Debates of 3rd March 1948.

to economic power and brings in its train increased bureaucracy and all it entails; and it may also, arguably, hinder rational planning. Besides, nationalisation fails to get rid of one of the very dangers anticipated by Marx. Workers still only receive wages, not ownership in the product, so that they remain alienated from their labour; and they are still open to exploitation, the only difference being that this is not for private profit. Removing the element of profit does not touch the problem of power, which is why workers continue to strike against nationalised concerns as much as they ever did.

The Marxist analysis is thus not wholly applicable to Western societies because it is out of date. It was certainly put into practice with success in Soviet Russia, but easy parallels should not be drawn from this. For one thing, nationalisation was carried out there while the Russian concept of ownership was still in the potentially dangerous state that ownership had been in the West over a hundred years before. Since then in Western countries most of the potential evils have either been removed or curbed. Historically, too, there is an important difference. Owing to the vast area of Russia and the diversity of races and cultures and their traditional resistance to 'Russification', it was the Tsars who inaugurated industrial enterprises and then sold or leased them to individuals. Therefore, nationalisation in 1917 only restored to the state what had historically been its property. The same would not be true of Western countries. The one-party system of government in Russia enables continuous supervision to be exercised over the managerial boards of nationalised concerns, which, as pointed out, cannot obtain in Western type democracies. Nationalisation certainly facilitates a planned economy; but capitalist states have also adopted planning, and a few of them, eg Great Britain, have shown how nationalisation can work within a capitalist framework.

From all that has been said it should be clear that formal analysis of ownership alone fails to convey any idea of the part it has played in society. A functional study is indispensable to a complete understanding, for it reveals that the concept of ownership is full of potentialities as an instrument of policy and social regulation on a large scale. Modern developments, especially the severing of control from ownership, now indicate that it is a man's position and role in society that determines his relation to things, and not *vice versa* as used to be the case.

READING LIST

L C Becker *Property Rights: Philosophical Foundations.*
A A Berle and G C Means *The Modern Corporation and Private Property* Parts I and II.
M R Cohen *Law and Social Order* 41.
W Friedmann *Law in a Changing Society* ch 3.
J N Hazard *Law and Social Change in the USSR* ch 1.
A M Honoré 'Ownership' in *Oxford Essays in Jurisprudence* (ed A G Guest) ch 5.
J M Lightwood *A Treatise on Possession of Land* chs 5–6.
F S Philbrick 'Changing Conceptions of Property in Law' (1938) 86 University of Pennsylvania Law Review 691.
K Renner *The Institutions of Private Law and their Social Functions* (trans A Schwarzschild, ed O Kahn-Freund).
J W Salmond on *Jurisprudence* (7th edn) ch 12.
J W C Turner 'Some Reflections on Ownership in English Law' (1941) 19 Canadian Bar Review 342.

CHAPTER 15

Justice in adapting to change

The fourth task in the achievement of justice, outlined at the start of this book, is adapting to change. Just as consonance with accepted ideas is an inducement to obey, so also when these change, tensions arise between the law on the one hand, and needs and outlook on the other, and there is then an inducement to ignore the law or to disobey. Failure to use power to adapt to change is in its own way an abuse of power. The issue is thus not one of change or no change, but of the direction and speed of change. The Laws of the Medes and Persians were said to be immutable; but unless a system is capable of adapting itself to changing conditions, it can only go the way of the Laws of the Medes and Persians. Adaptability is truly a condition *sine qua non* of the continued existence of a legal system. Lord Justice Scarman epitomised this thesis at the start of his Hamlyn Lectures when he posed the blunt question:

> 'I shall endeavour to show that there are in the contemporary world challenges, social, political, and economic, which, if the system cannot meet them, will destroy it. These challenges are not created by lawyers; they certainly cannot be suppressed by lawyers: they have to be met either by discarding or by adjusting the legal system. Which is it to be?'[1].

Change within a legal system may come in various ways, by day-to-day adjustment of detail and tinkering with the concepts used in legal reasoning, which is appropriate in a slow moving society; or by reform on a larger scale, which becomes inevitable when the whole social structure begins to change. The system itself may be changed, in which case the change may be constitutional or revolutionary. Before considering the ways in which changes may be accommodated within a legal system, it would be as well to pay attention to some of the forces of change.

SOCIAL EVOLUTION

No society is static. Changes develop gradually over the years in practically every sphere brought about by evolution in environmental, economic and political circumstances, national and global, as well as in religious and moral ideas. They may occur slowly or rapidly; they may be ephemeral as with passing fashions, or permanent. What happens is that practices evolve which influence the ways in which laws actually operate, eg trade practices. When the behaviour of people has moved away from the law with a sufficient degree of permanence, tensions arise with varying results. The law itself may be stretched to take account of the development, or it may be ignored until

1 Scarman *English Law—the new Dimension* p 1. See also 'Law and Administration: a Change in Relationship' (1972) PA 253. For change in International Law, see E Lauterpacht 'The inevitability of change in International Law and the need for adjustment of interests', 51 ALJ 83.

it becomes a dead letter, or it may be repealed and a new law substituted. In these ways evolution gives direction to future development.

Evolutionary change has long been the subject of attention by Continental jurists, chiefly German. Savigny, who is accredited as the Father of the Historical School, adopted a conservative approach. Law, he said, is a manifestation of the *Volksgeist*, the spirit of the people, so that it alters with the development of this spirit. Of its very nature such a process is bound to be slow. Although he did not oppose conscious efforts at law reform, he preached that this should always follow the *Volksgeist*, or else it was doomed. His doctrine thus had a depressing effect on law reform. The flaw in his thesis lies in the idea of the *Volksgeist* itself, which is so amorphous as to be unascertainable and meant that reform had to await the clarification of something that could never be clarified. A more acceptable version of evolutionary change came from Ehrlich, who distinguished between what he called 'formal law' and 'living law': the former is represented by laws in statutes, precedents and books, the latter by the way these actually work in social life. The views of Savigny and Ehrlich will be dealt with later[2].

Both these approaches are unable to cope with the palpitating state of society today. Even that of Ehrlich, superior though it is to Savigny's, can only apply while society is evolving comfortably within its legal system. Today, galvanic changes are taking place, each of which can radically alter the system itself. It will require a volume to deal with these changes in detail, but for the purpose of illustrating the theme of this chapter it is only necessary to point to a few examples. For many years business and commercial dealings have been referred to arbitration in the event of dispute, rather than to the courts. This is because the rules and procedures of the latter are not the most suitable means of reaching acceptable solutions. The law still has a supervisory jurisdiction, which in the main is not used. In the sphere of labour relations the movement began in the first decade of this century to oust the jurisdiction of the courts. In torts this had to be done by legislation, in contracts the agreements themselves provide for it. This has dangers. For each union to be able to pursue its own course unhampered is not conducive to a planned economy, while protection of individual workers from abuse of power by their unions disappears. The need for controls in these matters is imperative if industrial and economic chaos is to be avoided. The question is how far a legal framework is suitable in the prevailing climate.

The changes that will have to be made in the wake of the welfare activities of the state are still being realised. Planning, compulsory acquisition, benefits and such like are throwing up increasing problems as between the state and individuals. Lord Justice Scarman in his Hamlyn Lectures drew attention to an important point. The courts can only play a modest role, since from time immemorial their work has been geared to disputes between adversaries, one of whom must be in the wrong, ie their function has been to dispense corrective justice. With welfare-type problems all the parties involved are more or less in the right, ie the function is to adjust distributive justice[3]. The courts are accustomed to deal with the individual, socialism deals with the mass. Legal principles, orientated to safeguarding the interests of the former, are likely to fail even in that task in the areas of planning and social welfare unless the collectivist outlook on such problems is appreciated and new

2 See pp 376, 425, post.

3 *Scarman* ch 3. He also deals with some of the matters mentioned above.

principles evolved. It is not enough to keep adapting the law; there has to be an adaptation of lawyers' thinking. In the sphere of marriage, the law did change its attitude to divorce when the concept of matrimonial offence was replaced by that of irretrievable breakdown[4]. The recent development towards sex equality is bound to have repercussions on family life; the positions of husbands and wives in relation to each other and children are bound to alter. In addition, events are taking place nationally and internationally, which are likely to alter the very constitutional structure of the country. Devolution of power to Scotland and Wales will obviously entail a change in governmental institutions as well as in jurisdiction and authority. These will involve, not just new laws effecting the necessary changes, but a new outlook. It has been pointed out earlier that membership of the European Economic Community, is already having an effect, embryonic as yet, on Parliamentary sovereignty, binding authority, and other cherished dogmas[5]. The courts, too, as acknowledged by Lord Denning, will need to adapt themselves to thinking along unfamiliar lines.

It will be evident from these examples how vital is the need for the law to adapt itself to social change if it is to survive. In a different sphere, consideration should also be given to changes occasioned by scientific advances. What needs to be pointed out is their impact on concepts and doctrines, rather than the host of new laws. It is not possible to deal with each and every such development, but brief allusion will be made to two, namely the introduction of computers and certain medical advances, both of which are likely to have far-reaching effects.

Computers

The influence of computers on law has already effected significant changes, and there is likelihood that there will be many more with the increasing sophistication of equipment and techniques. Analysis of their impact should be sought in specialised works[6]. Computers have brought with them a new jargon: 'input', 'print-out', 'processing', 'programming', 'storage', 'retrieval', 'software', 'hardware'. A fear that needs to be dispelled is that computers will replace the warmth of human justice with an alien philosophy. On the contrary, all that is claimed for them is that they can help and improve human justice and relieve people of drudgery by performing routine jobs more efficiently.

One of the most important facilities provided by computers is the storage and retrieval of information at a greater range and depth than hitherto[7]. The drawback is that however a question is programmed and re-programmed too much tends to be retrieved, which still leaves a formidable job of sifting through it. Certain practical advantages are that computers can assist practitioners by timing and costing interviews with clients; they make light work of conveyancing and patent searches and in drafting documents and letters of a routine nature; they assist with the tasks of crowd control and the detection and prevention of crime. More arguably, they can be used

4 Divorce Reform Act 1969.

5 See pp 104 et seq. ooo ante.

6 For early assessments, see Tapper *Computers and the Law*; also Dickerson 'Some Jurisprudential Implications of Electronic Data Processing' (1963) 28 Law and Contemporary Problems 53; Allen *Computers and the Law* (ed Bigelow) p 167.

7 As provided by Lexis.

to give provisional solutions to problems, but this depends on how the problems are programmed.

Several areas of law have changed and are changing. The threat to privacy, in particular, is giving rise to increasing concern[8]. Copyright and patent law need revision on such questions as the moment at which protection should be available, whether at the input or print-out stage, and patent protection for software. Rules of evidence and procedure, too, have needed modification in important respects, eg enlarging the concept of 'document'; discovery of documents, especially when the information is stored in a neutrally owned data bank; the contemporaneous evidence rule; and the rule against hearsay[9].

Finally, it remains to be seen what effect computers will have on law reporting and the concept of law. The decision whether or not to report a case rests at present with the reporter, which means that what becomes 'law' through *stare decisis* depends on the choice of individual reporters. If every decision were stored in a computer, this would broaden the basis of what becomes 'law', besides eliminating the embarrassments caused by overlooked authorities and divergences sometimes found in different reports of the same case[10]. The further possibility is that because of their ability to collate rapidly masses of heterogeneous information the day may come when computers are able to pick up in detail the prevailing social *mores* and values and relate these to judicial decisions. Decisions will then cease to be 'laws' in themselves and will become only evidence of current value-patterns[11], ie a direct link will have been established between values and the concept of law, which may even yield a new 'social' natural law. Such possibilities are as yet afar, but there is no doubt that computers have brought lawyers to the threshold of exciting new developments.

Medical advances

Medical science has provided examples of the way in which modern developments are forcing the law to restructure certain concepts hitherto supposed to be so obvious and straightforward that few lawyers, if any, even dreamed that they would be seriously challenged. What, for instance, is an 'act' and 'omission', what is 'death', or 'man', or 'woman'? These are now in the melting pot and it remains to be seen in what form modified concepts will emerge. Lawyers must understandably hold back with their revision while the problems are still in ferment, for the profoundest moral, social and scientific issues have still to be resolved. Traditional concepts, however, no longer provide the best tools with which to handle the kind of problems that are emerging.

Taking, first, the terms 'act' and 'omission', it is necessary to begin with

8 Miller 'Personal Privacy in the Computer Age: the Challenge of a New Technology in an Information Oriented Society' (1969) 67 Mich LR 1091; Westin *Privacy and Freedom*; Warner and Stone *The Data Bank Society*; *Tapper* ch 3; 'Computers and Privacy'. (Cmnds 6353, 6354).

9 See eg Criminal Evidence Act 1965, s 1 (4) (for a gap: *R v Pettigrew*, *R v Newark* [1980] Crim LR 239); Civil Evidence Act 1968, s 5; *The Statue of Liberty* [1968] 2 All ER 195, [1968] 1 WLR 739; *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, [1974] 2 All ER 465; *Barker v Wilson* [1980] 2 All ER 81, [1980] 1 WLR 884 ('bankers' books' in the Bankers' Books Evidence Act 1879, s 9, include microfilm); *R v Wood* [1982] Crim LR 667 (a computer print-out is not hearsay).

10 Hudson 'Some Reflections on Information Retrieval' (1968) 6 Osgoode Hall LJ 259.

11 *Hudson* 267.

their accepted usages in order to appreciate the difficulties that have arisen. As with other concepts, 'act' has no one meaning, but a range of applications. (i) The narrowest is 'a bodily movement controllable by will'[12]. (ii) 'A bodily movement controllable by will in relation to circumstances', eg the 'act of shooting' includes the bodily movement of lifting one's hand and flexing one's finger and the attendant circumstances of there being a gun in the hand. (iii) 'A bodily movement controllable by will in relation to circumstances and results, eg the 'act of battery' includes the bodily movement of flexing one's finger in the circumstances of that finger being round the trigger of a gun and the result of the bullet hitting another person. The 'act of killing' requires the further result of death within a year and a day[13].

The element common to these applications is controllability by will. Whenever an action is controllable by will it is classed as 'voluntary', as opposed to 'involuntary', eg sleep-walking. The need for controllability, as distinct from control, is seen with unthinking rather than unconscious actions. An example is tapping a table when one is engrossed in something else; such action is controllable as soon as one thinks of it. So, too, with breathing up to a point; one can consciously hold one's breath, though for a short time only, since unconsciousness will supervene and breathing will then recommence automatically. The point of controllability is that the purpose of the law is to ascribe responsibility justly. It is also to be noticed that voluntariness only comes to the fore when it is sought to excuse an actor from responsibility on the ground that his action was involuntary. In general, legal responsibility attaches only where conduct has been voluntary. Thus, a man is not answerable in trespass to land if he has been carried there by others[14] but he is liable if he has been compelled to enter by threats[15]. In the latter case, the threats only provide the motive for what is regarded in law as his 'voluntary' action in the sense that he was still in control of the movement of his limbs. On the other hand, where an actor is not in control of his movements, eg sleep-walking or in a fit, he is excused as his conduct is involuntary[16]. As a test for ascribing responsibility, controllability is clumsy and gives rise to difficulties. It could lead to absurdity, as where a man who leaps over a fence on to private property to escape from a bull is answerable in trespass, but not if he is tossed over by the bull. To avoid such a conclusion, the concept of necessity will have to be widened. Another difficulty is presented by a case where a man points a loaded gun at another with the sole object of frightening him, but an unexpected noise so startles him that he jerks the trigger. Ascription of responsibility here is better determined with reference to the course of conduct as a whole and not with reference to

12 'An act is always a voluntary muscular contraction, and nothing else': Holmes *The Common Law* p 91 and also p 54. See also Austin *Jurisprudence* I, pp 366, 414-415, 419; Warren and Carmichael *The Elements of Human Psychology* p 419.

13 *R v Robert Millar (Contractors) Ltd* [1970] 2 QB 54, [1970] 1 All ER 577.

14 *Smith v Stone* (1647) Sty 65; *Gibbons (Gibbon) v Pepper* (1695) 2 Salk 637.

15 *Gilbert v Stone* (1647) Sty 72. See also Hale *PC* I, 434. As the Digest aptly puts it, *coactus volui: D* 4.2.21.5.

16 *R v Charlson* [1955] 1 All ER 859 especially at 861, 864. See also *R v Harrison-Owen* [1951] 2 All ER 726; *Hill v Baxter* [1958] 1 QB 277 at 282-283, [1958] 1 All ER 193 at 195; *R v Spurge* [1961] 2 QB 205 at 210-211, [1961] 2 All ER 688 at 690; *Watmore v Jenkins* [1962] 2 QB 572, [1962] 2 All ER 868; *Burns v Bidder* [1967] 2 QB 227 at 240-241, [1966] 3 All ER 29 at 36; *R v Quick, R v Paddison* [1973] QB 910, [1973] 3 All ER 347; *R v Isitt* [1978] Crim LR 159.

the controllability of the action of pulling the trigger[17]. Both these examples show that the requirement of 'voluntariness' is in need of revision.

A different kind of problem is raised by automatism. When through disease or other such affliction a person is deprived of consciousness, then, as just explained, he is not 'acting' in the eyes of the law. Should he be prone to such attacks he constitutes a menace to others. There are two ways of dealing with this situation. One is to impress upon persons the need to provide in advance against the recurrence of the affliction while they are still able to take precautions[18]. Thus, automatism will not be a defence unless the defendant as a reasonable man had no grounds for anticipating the onset of an attack[19]. It will apply when uncontrollability results from wholly extraneous causes, such as a blow on the head. The other way is to hold that every case in which there is evidence of disease likely to produce recurrent attacks should be treated as one of insanity rather than automatism[20]. In this way, as pointed out earlier, the defence of insanity has been given a new dimension.

In contrast to an 'act', an 'omission' is a failure to act. In this sense omission would cover everything that is not an act, which is clearly too wide. It has, therefore, to be restricted and at once becomes technical. The limits become apparent when it is realised that, as with act, lawyers are concerned with omissions for the purpose of ascribing responsibility justly. They are relevant only when there has been a failure to comply with duties to act. Such duties are encountered in various situations and their existence is, as always, a matter of policy. 'An omission on the part of one or other of the defendants' said Willmer LJ 'would not furnish the plaintiff with any cause of action in the absence of some duty to act by the defendant to the plaintiff'[1].

The dividing line between acts and omissions is not clear cut. In the first place, omissions should be distinguished from failures which are incidental to larger activities. A motorist who fails to stop at a 'halt' sign and collides with another vehicle will be answerable, not for an omission as such, but for the bad execution of the active operation of driving. The situation is viewed as a whole, the omission, which is incidental to the larger activity, rendering it a misdoing rather than a pure not doing[2]. The position may be viewed differently in other circumstances. In *Fagan v Metropolitan Police Comr*[3] the

17 For a case similar to this example, see *Ryan v R* (1967) 40 ALJR 488, and especially the judgment of Windeyer J. See also Elliott 'Responsibility for Involuntary Acts: *Ryan v R* (1967-68) 41 ALJ 497.

18 So, voluntarily doing an act, such as taking a drug capable of inducing harmful involuntary conduct, is punishable: *R v Lipman* [1970] 1 QB 152, [1969] 3 All ER 410.

19 *Jones v Dennison* [1971] RTR 174, where the defendant was held not to be negligent in driving a car when he was totally unaware of a tendency to blackout. See also *R v Sibbles* [1959] Crim LR 660. Cf *Hill v Baxter* [1958] 1 QB 277, [1958] 1 All ER 193; *Green v Hills* (1969) 113 Sol Jo 385; *Moss v Winder* [1981] RTR 37; *Boomer v Penn* (1965) 52 DLR (2d) 673.

20 *R v Kemp* [1957] 1 QB 399, [1956] 3 All ER 249; *Bratty v A-G for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523; and see p 202 ante.

1 *Zoernsch v Waldock* [1964] 2 All ER 256 at 262, [1964] 1 WLR 675 at 685. No one is under a duty to play the good Samaritan and rescue another who is in peril: 'Thou shalt not kill, but needst not strive officiously to keep alive'. It has been held in a Canadian case that once a person embarks upon an active task of rescue, he could be liable if the method of rescue, or its abandonment, leaves the party in danger worse off than he would otherwise have been: *The Ogopogo* [1971] 2 Lloyd's Rep 410 (affg [1970] 1 Lloyd's Rep 257). Cf Roman law where also there was no general answerability for omissions: *D* 7.1.13.2.

2 The same view was taken in Roman law: *Coll* 12.7.7; *D* 9.2.8. *pr.*

3 [1969] 1 QB 439, [1968] 3 All ER 442.

Divisional Court was divided in its opinion as to whether the appellant committed an assault by driving his car accidentally on to a policeman's foot and then spitefully letting it remain there. The majority thought this was an assault because it was a continuing act, which became intentional after he realised what he had done; but Bridge J thought that it was at most an intentional omission to remove the car.

Another difficulty lies in applying the idea of voluntariness to omissions. (i) Just as action is excused as involuntary when something is done to or befalls an actor, so too an omission is involuntary when that which is done to or befalls a person prevents him from doing what he should do. Thus, a professional singer may be prevented from fulfilling an engagement through a sudden illness on the eve of a performance. (ii) When a person is aware of the duty to act and abstains, the omission may be said to be voluntary. (iii) When a person is aware of the circumstances that give rise to the duty and abstains, the omission is likewise voluntary. (iv) When a person is not mindful of the duty to act or of the circumstances giving rise to it, the ascription of responsibility to such an omission depends upon whether he should have been mindful or not. Here the terms 'voluntary' and 'involuntary' cease to be appropriate.

Notwithstanding these difficulties, the law has so far managed to steer a clumsy course. Certain medical developments in recent years have necessitated a radical rethinking of act and omission. Ways have now been devised of keeping death at bay by artificial means with the result that the question whether or not to prolong life in the case of terminal diseases has stirred up issues of the deepest concern. For instance, an intentional act, which terminates a 'living death', is *prima facie* punishable as murder. Liability is not quite so automatic in the case of an omission since there has to be a duty to act, which depends upon the circumstances, including, among other things, the relationship between the parties. In this way flexibility enters into the question of liability for an omission; but not for an act, where such considerations come in, if at all, only by way of excuse for *prima facie* liability, or in mitigation of sentence. There is much force in the contention that the same considerations should apply to acts, which end terminal diseases, as to omissions. To achieve this result, however, any such act will have to be regarded as a form of omission, a failure to prolong life. Act or omission, the moral issues remain the same, so there is no justification for a difference in approach. As an acute observer has asked, if difference there has to be, why should it turn simply on whether a person switched off a life-sustaining machine, or failed to switch it on[4]? Two considerations support the treatment of such actions as omissions. One is that some omissions are treated as being absorbed into acts, eg failure to stop at a 'halt' sign. Why, then, should not some acts be absorbed into omissions? The other is that linguistically there is a distinction between 'causing' harm, eg by shooting a person, and 'permitting' harm to occur, eg by not giving help to a wounded person[5]. Acts are generally associated with 'causing' harm and omissions with 'permitting' harm to occur. Consonant with linguistic usage, some omissions may also be spoken of as 'causing' harm, eg failure to take insulin 'causes' a diabetic coma. Likewise, there would be no violation of linguistic usage in saying that some acts 'permit' harm to occur, eg switching off a mechanical respirator,

4 Fletcher 'Prolonging Life' (1967) 42 Wash LR 999.
5 *Fletcher.*

which permits death to supervene. This way of looking at the matter might pave the way towards their acceptance as a species of omission, in short, for a revision of the concepts of act and omission[6].

Techniques of organ transplantation have created other conceptual difficulties. There must always remain a distinction between removing tissue, which is still living, from a dead body and out of a live body, which dies as a result. Organ transplants have raised in an acute form the question: At what point is a body dead?[7] Is it when the EEG recording of the electrical activity of the brain gives a flat reading? What of a person whose brain still registers the barest activity, but who is in an irreversible coma and has lost all meaningful life?[8] Donations by living persons of their organs for life-saving purposes, eg kidney donations, create a problem as to the defence of consent. The accepted rule is that no person may legally consent to the infliction of grievous bodily harm on himself[9]. *Bona fide* surgical operations are exceptions because they are performed in the interest of the person consenting. In the case of organ donation, however, the question is whether a person can consent to the infliction on himself of what is, after all, grievous bodily harm for the benefit, not of himself, but of another. May a third party, eg the parent of a young child, validly consent to the removal of organs from the child? If these are permissible, then the scope of consent will have been enlarged[10]. Finally, some allusion might be made to the possibility of effecting a 'sex change' by means of surgical and hormone treatment. A British court was confronted for the first time with the question, What is a 'woman'?, when a man had himself converted into a 'woman' and then married. The decision that he remained a 'man' turned, not on the application of rules or precedents, but on complex medical criteria and socio-moral considerations of the purpose and function of marriage[11].

6 Switching off a life support machine where the patient was the victim of an assault does not constitute an intervening act. Hence the assailant is regarded as having caused death: *R v Malcherek, R v Steel* [1981] 2 All ER 422, [1981] 1 WLR 690, CA. So, too, *R v Blaue* [1975] 3 All ER 446, [1975] 1 WLR 1411, CA.

7 The South African Anatomical Donations and Post-mortem Examinations Act 1970 (No 24 of 1970) speaks of donations and removal of tissue from dead bodies, but provides no test of death.

8 The quality of life appears to have been the point in the American case of Karen Quinlan, who was in this condition and whose father applied to court for permission to disconnect the life-sustaining machine. The New Jersey Court refused, saying that no one had a constitutional right to die, and that 'there is a presumption that one chooses to go on living'. The court also cast on the doctors the decision whether Karen was to be removed from the machine or not: The Times, 11 November 1975. This was reversed by the Supreme Court, which left the decision to her legal guardian in consultation with doctors: The Times, 1 April 1976. The machine was switched off, but she died only in 1985. See also the case of Judith Ann Debro, whose brain was apparently biologically dead. Both the trial and appellate courts refused to decide whether her husband should be allowed to disconnect the life-sustaining machine by ruling that they had no jurisdiction: The Times 10 November 1975. It would seem that in her case the courts failed to measure up to their responsibility.

9 *R v Donovan* [1934] 2 KB 498.

10 For both points, see the South African Anatomical Donations and Post-mortem Examinations Act 1970. According to the Congenital Disabilities (Civil Liability) Act 1976, s 1, a child is prevented from suing in respect of a preconceptional occurrence, which results in the child's disability, if the parents had accepted the particular risk.

11 *Corbett v Corbett* [1971] P 110, [1970] 2 All ER 33. See also *W v W* 1976 (2) SA 308; *R v Tan* [1983] QB 1053, [1983] 2 All ER 12, CA.

CHANGE THROUGH DISOBEDIENCE

Civil disobedience has become a problem in many societies in recent times, and changes have been brought about in consequence. The question is how far, if at all, disobedience can be accommodated within a theory of law. On the face of it, there is an obvious contradiction here; but if law is thought of in a continuum and ability to change is regarded as a condition of the continuity of law, then disobedience could, within limits, be included among the phenomena inducing legal change.

It is necessary, first, to consider what 'disobedience' means. It is in permissive societies that disobedience begins to assume the proportions of a problem. In them, the emphasis on liberty inevitably inspires resistance to duty, and coupled with this there tends to be in such societies an amelioration of sanctions and consequent weakening of fear of them. The fear motive should not be exaggerated, but equally it should not be ignored. Also, where there are deep-seated religious or social antagonisms, a permissive attitude sharpens the tensions by encouraging minorities. Finally, a permissive society fosters rapid changes in moral ideas, thus producing increasing tensions between laws and behaviour.

There are different ways of disobeying. Disobedience could be directed at a particular law, or at all laws; it could be disobedience of a duty not to do something, or of a duty to do something; it could be in secret, as in ordinary criminality, or open and coupled with a readiness to undergo the penalty, which is defiance of the law. Further, individuals may disobey in any of these ways, or there may be mass disobedience. In the case of the latter, if the challenge is to all laws, the position is one of revolution; but so far as the challenge is of a particular law or group of laws, the aim is change rather than destruction. In the view of those advocating a change of system, it is not enough for individuals to disobey and show themselves willing to accept the penalty, for they are thereby submitting to the system. If the system needs to be changed, then everyone should disobey. It need not amount to revolution; it could be a process for remedying an evil and is, therefore, connected with morality. So far as mass disobedience stops short of permanent anarchy, there is implicit in it a willingness to abide by a better system. Also, if laws cannot bind conscience, it would seem that conscience is guided by some other superior dictate, which is somehow knowable. Such a dictate has to be something other than self-interest, which is incompatible with any kind of order. Finally, it is questionable whether mere non-co-operation should be treated as a form of disobedience.

Non-co-operation is a means of challenging some policy and may even succeed in changing it, eg the refusal by trade unions to co-operate under certain industrial legislation. Perhaps it is better not to treat non-co-operation as disobedience.

Two questions that have been distinguished earlier in this book are: why people *do* obey law, and why they *ought* to do so. The former has been considered[12]. The problem of disobedience concerns the latter.

It is meaningless to ask whether there is a legal duty to obey the law; the question is how far there is a moral duty to obey the legal duty, or preferably, how far disobedience should be allowed[13]. As has been pointed out, even

12 See pp 48 et seq. and 248 ante.

13 See *Law and Philosophy, A Symposium* (ed Hook) Part I; Wasserstrom 'The Obligation to Obey the Law' in *Essays in Legal Philosophy* (ed Summers) p 244.

where there is a legal duty, the individual has the inner moral liberty to obey or disobey[14]. The inquiry thus becomes a socio-moral one into the limits of disobedience to which there is no easy answer. Disobedience of an immoral law would not necessarily be thought immoral even by those who would still deem it 'law', though they would treat it as illegal; but neither would it necessarily be immoral to obey such a law, eg because of the need to prevent social disruption[15]. There could be moral justification either way, so other considerations have to come in.

One reason why people ought to obey may be dismissed at the outset. This is the charismatic authority of the law-giver, eg the divine right of kings. Another reason is consent, which looks plausible, but does not bear examination. Why should consent make obedience obligatory? The answer cannot be a legal one, since any rule that makes consent obligatory would itself require some other rule to make it obligatory, and so on. Consent makes contractual agreements obligatory because of a rule of law to that effect; the point is why this other rule is obligatory. To offer instead a moral justification for consent can only work in cases where consent has actually been given, eg contracts. The implication of the consent argument is not so much that consent is the reason why people ought to obey laws, but that once consent is withdrawn laws cease to be binding[16]. This is unreal since in vast areas of law, such as criminal law, torts and so on, no one has ever been asked if he or she consents to laws which are treated as binding, legally and morally, irrespective of consent or its withdrawal. If some people declare that they no longer consent to abide by certain laws, then the organised force of the state can be brought to bear on them thereby making consent or its absence immaterial. The real question is when it is justifiable for people to challenge the organised force of the state and when it is justifiable for the state to use its force, since there may be reasons why it is not always politic to use force. The problem thus moves away from consent and becomes one of striking a balance, ie fixing the limits within which disobedience can be tolerated.

Leaving consent aside, another reason sometimes offered for obedience is that disobedience sets a bad example. In so far as obedience by others exerts a psychological pressure to obey, disobedience relaxes that pressure. While it is true that disobedience of *this* law at *this* moment does not imply that it may be disobeyed all the time, still less that all laws may be disobeyed, nevertheless disobedience of this law now may inspire another to disobey in circumstances in which the first person would still have obeyed. In this way it could be the first step along the slippery slope towards breakdown and anarchy[17]. Again, it is said that disobedience may inflict hardship on others, and may entail undue expense in preventing or minimising its effects. Professor Rawls advances a 'fair-play' argument[18]. A just legal order, he says, is a system of co-operation by which people are bound as long as they accept its benefits. Such an order is founded on two Basic Principles: (1) Each person is to have the most extensive liberty compatible with a similar liberty in others; (2) social and economic inequalities must be for the greatest benefit

14 See pp 118 et seq ante.

15 This point seems to be overlooked by Wasserstrom. Cf Allen *Legal Duties* p 198; St Thomas Aquinas, p 474 post.

16 On the 'binding force' of law, see p 248 ante.

17 Goodhart *English Law and the Moral Law* p 25.

18 Rawls *A Theory of Justice* discussed at pp 480-484 post.

of the least advantaged (subject to the 'just savings principle'[19]) and should attach to positions and offices equally open to all. If an order is just, or nearly just, according to these criteria, fair play requires that those who accept its benefits are bound to obey laws of which they disapprove, provided that the burdens are evenly distributed and not too onerous and do not violate the Basic Principles. Professor Rawls would thus support limited disobedience, ie when these Principles are violated, if other means of obtaining redress fail and injury is not inflicted on the innocent. Similar to this is the argument put forward by Singer that the duty to obey derives from participation in a system which represents a fair compromise[20]. If one accepts decisions of which one approves, one is bound by a kind of quasi-consent or estoppel not to protest at decisions of which one disapproves. Singer would accept disobedience in order to restore the fair compromise basis of the system, because if this fails the reason for participation fails too[1]. Dworkin does not address himself primarily to obedience, but argues a case for disobedience deriving from what he calls 'the right to equal concern and respect', which is promised to minorities by the majority[2]. Based on this, he says, there are certain 'fundamental rights', which are akin to principles and are 'rights' against government. In these cases people have the liberty to follow conscience and to disobey the law, and it is wrong for government to punish them. The limits are, first, infringements of the 'fundamental rights' of others and, secondly, restrictions imposed by government to prevent catastrophe or to obtain a clear and major public benefit. No justification short of these will suffice. Finally, Raz says that 'there is no obligation to obey law', nor do moral or prudential reasons invest it with moral authority. In his view, obedience derives from 'respect for law', which is an aspect of loyalty to society analogous to friendship, which likewise presupposes mutual loyalty[3].

Are there situations of justified disobedience?

Two American authors have argued that some actions are, as they put it, 'legitimated' by law even when they are departures from it[4]. In addition to linguistic usages, which they say support their contention, they cite examples not all of which are convincing. A troublesome case is necessity, where a person does something which, but for necessity, would be illegal. If the limits of necessity are prescribed by law in advance of the action in question, then, assuming that the act falls within those limits, it cannot be described as disobedience since the law permits it. If, however, a court interprets necessity

19 This is that each generation must not only preserve the gains of culture and civilisation, but must also set aside 'a suitable amount of real capital accumulation': *Rawls* p 285. For the Basic Principles, see pp 60, 302.

20 Singer *Democracy and Disobedience.*

1 Singer goes on to argue that in large communities direct participation by every member has to yield to representative participation, which weakens the participation basis. Thus, representatives have to act according to conscience rather than the wishes of constituents when these are irreconcilable. Even if they act according to the wishes of the majority, those whose wishes are disappointed cannot be said to participate through their representatives. Singer contends further that in Western countries fair compromise tends to be negatived and participation weakened still further by the political party system and pressure groups.

2 Dworkin *Taking Rights Seriously*; and see p 501–503 post.

3 Raz *The Authority of Law, Essays on Law and Morality* Part IV. On respect for law see *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, [1980] 1 WLR 142, HL.

4 Kadish and Kadish *Discretion to Disobey, A Study of Lawful Departures from Legal Rules.*

retrospectively in such a way as to cover the act, there are two ways of looking at the matter. It could be said that since the act was held to be justified, it was not illegal and hence not disobedience; but this is applying hindsight. At the time of the act itself, it looked like disobedience, may have been thought to be disobedience by the authorities and may well have been intended to be such by the actor. The most that can be said is that where the law is uncertain, an action may be performed to provide a test case with full acceptance of the consequence of it being held to be disobedience. In *R v Bourne*[5] a doctor performed an abortion on a girl, who was pregnant as a result of rape, knowing full well that as the law then stood he was committing a crime. He was in fact held not guilty because the court retrospectively enlarged the scope of necessity. A more difficult case is *Johnson v Phillips*[6] where a policeman was held to be justified on grounds of necessity in requiring a motorist to reverse in the wrong direction down a one-way street; and the motorist was convicted of obstruction when he refused. The value consideration behind the decision was the sanctity of life and limb, which had been endangered by an affray in a public house. It would seem that the policeman had not disobeyed traffic regulations by ordering the motorist to go against them. If the motorist had complied, would he have been convicted of disobeying regulations? One hopes not. A different situation, but similar in principle, is where an act is done in contravention of a statute, but is later held not to have been illegal since the statute is declared unconstitutional. (This cannot happen in Britain.) The same alternative ways of looking at the situation apply here as in necessity.

Non-enforcement or non-prosecution of some offences, eg unauthorised parking or the Attorney General entering a *nolle prosequi*, is also offered by the authors as an example of 'legitimated' disobedience, but this needs careful examination. To some extent it seems that their argument is based on a failure to distinguish between duty and the operation of sanction. Failure of the latter does not 'legitimate' the fact of a breach of duty. The argument tacitly assumes that the actual operation of a sanction is the test of a breach of duty; which it is not[7]. Further, a distinction has to be drawn between officials, who refuse to take action, and offenders. With regard to the former, their refusal cannot be 'legitimated' disobedience of the law by them as long as they have a discretion to take action or not given by law[8]. Similarly, another example given by the authors, that of juries acquitting in defiance of directions to convict, is not 'legitimated' disobedience since juries, too, have discretion. Where there is no discretion, officials who refuse to act are liable[9].

On the other hand, from the point of view of offenders, there does appear to be some substance in the argument, though the position is arguable. If acquittal by a perverse jury 'legitimates' an offender's disobedience, then every failure of the legal process, such as lack of evidence, or acquittal for

5 [1939] 1 KB 687, [1938] 3 All ER 615.

6 [1975] 3 All ER 682, [1976] 1 WLR 65.

7 P 237 ante. This might also be the answer to their example of a judge refusing to follow a precedent.

8 *R v Metropolitan Police Comr, ex p Blackburn* (1980) Times, 7 March, CA. Even when they have a discretion, if they exercise it carelessly they will be liable: *Smith v Jago* (1975) 11 SASR 286 (transport inspectors ordering the driver of a large vehicle to execute a dangerous manoeuvre at night without taking adequate precautions).

9 *R v Metropolitan Police Comr, ex p Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763, CA.

misdirection or on a technicality, 'legitimates' disobedience. However, the point in all such cases is that there is no proof in law that a disobedience had been committed, so on the face of it there is nothing to be 'legitimated'. It has also to be remembered that refusal by officials to take action is generally no bar to a successful civil action by the aggrieved party. In what sense, then, does failure of official action in enforcing or prosecuting 'legitimate' the disobedience? The situations, which do seem to support the authors, are those in which there is undoubted disobedience and officials refuse to act for reasons of policy and no private actions lie. The Attorney General's *nolle prosequi* could be one example, but an outstanding case is *Gouriet v Union of Post Office Workers*[10]. The House of Lords upheld the Attorney General's political discretion in refusing to invoke the law in the face of a threatened criminal offence in deliberate defiance of an Act of Parliament and organised on a national scale by two trade unions. The House also refused to allow the plaintiff to proceed personally on the ground that he had no 'right' recognised at law. In the event the threatened disobedience did not take place, but if it had, presumably it would have been 'legitimated'.

Limits of disobedience

In the light of the foregoing, it is submitted that the following considerations should apply to disobedience. (1) Obedience should always be the norm so that disobedience needs to be justified. If a society is to continue, there must be law and order and conformity with it. As Fox LJ has said: 'The proposition that citizens are free to commit a criminal offence if they have formed the view that it will further what they believe to be the public interest is quite baseless in our law and inimical to parliamentary authority. I do not disregard the existence of what is called the moral imperative. But such cases are rare in the extreme'[11]. (2) Available means of obtaining redress must be tried first, and in this connection the degree of likelihood of their success has to be taken into account. (3) Action by way of disobedience should not impair the equal liberty of others to continue to obey. (4) Disobedience in order to provide a test case is acceptable. (5) When disobedience is resorted to as a plea for the reconsideration of some decision, the disobedience should cease when reconsideration has been given, even if the result is that the decision should stand. (6) Disobedience is persuasive when it is designed to gain publicity and a hearing when other means fail. It has been pointed out[12], however, that there is a danger that the public will in time grow used to this kind of demonstration with the result that disobedience will keep intensifying in order to hold public attention. (7) Disobedience should not involve violence or infliction of hardship on others, because it then becomes coercive and not persuasive. 'Hardship' includes breakdown of social existence, social services or undue expenditure in preventing or repairing the effects of disobedience. (8) Disobedience of a national law in order to protest against some evil in another country, especially if it inflicts hardship or inconvenience on innocent persons, is not permissible[13].

10 [1978] AC 435, [1977] 3 All ER 70, HL. For the implications of this on the freedom of the subject, 'rule of law', judicial independence and the authority of Parliament, see the author's paper, '*Götterdämmerung*: Gods of the Law in Decline' (1981) 1 Legal Studies 3.

11 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 415, also 412-413, [1984] 1 WLR 892 at 901, also 897.

12 *Singer* p 81.

13 This is what was threatened in the *Gouriet* case: see supra and note 10.

When disobedience reaches the point of successful revolution, there is an overthrow of the régime and an end of its legal system. The situation raises entirely new problems concerning legality, which are discussed elsewhere in this book[14].

MACHINERY OF CHANGE

Change may be effected judicially or through legislation. Judicial methods include conceptual tinkering, use of fictions and equity. The first of these has been demonstrated in the foregoing chapters. With regard to the rest, it was Sir Henry Maine who propounded the classic thesis that what he called 'progressive societies' develop beyond the point at which 'static societies' stop through the use of fiction, equity and finally legislation[15]. Modern authorities question whether these stages ever were as clearly separated as he had imagined[16], but whatever the sequence, as agencies of legal development they merit attention.

Fiction

Maine defined this as 'any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified'[17]. Fictions need to be distinguished from shifts in the meanings of words. For example, the word 'possession' was originally applied to physical control; then it came to be applied to situations where there was no physical control[18]. There was no pretence about the facts of either situation; there was simply the application of a word to a new situation. Adoption, on the other hand, is not a shift in meaning, but the name for a pretended fact, namely, that the adopted child was born into the family. A more difficult case is that of the corporate person. One application of the word 'person' is to a human being, and it was submitted in Chapter 12 that its application to a corporation is best treated as a shift in meaning. Supporters of the 'fiction theory', however, seek to explain it on the ground that a corporation is treated 'as if' it is a human being.

Are fictions something to be ashamed of? In the opinion of Bentham the answer was yes, and he repeatedly attacked them in various parts of his many writings. Vaihinger, on the other hand, contended that they are indispensable to the working of the human mind[19]. In the workings of the law there is an additional reason behind the use of fictions, namely, to introduce change behind the façade of adherence to existing law. It is thus a manifestation from early times of how the law can be adaptable and also stable. Both adaptability and stability are responses to different calls of justice. In the words of Coke '*in fictione juris semper aequitas existit*'.

Professor Fuller detected the following motivations behind the use of fictions[20].

14 See chs 5 and 17. For the Marxist 'philosophy of revolution', see ch 18.
15 Maine *Ancient Law* (ed Pollock) p 31.
16 Eg Diamond *Primitive Law* (2nd edn) p 346. Kahn-Freund 'Recent Legislation on Matrimonial Property' (1970) 33 MLR 601, 630, points out that in matrimonial property the courts appear to have moved from equity to fiction.
17 *Maine* pp 32-33.
18 See p 272 ante.
19 Vaihinger *The Philosophy of 'As If'* (trans Ogden); Fuller *Legal Fictions* ch 3.
20 *Fuller* pp 57 et seq.

POLICY. Bentham believed that judges resorted to fictions in order to conceal something from others, and pointed to the fiction that judges do not make law, but only declare what has always been law. Maine himself thought that this fiction may have had some justification in the past, but was now so threadbare that everyone could see through it[1]. The point that most fictions in fact deceive no one weakens the charge of concealment. Besides, there are other reasons of policy behind fictions, eg the rule that husband and wife are one. Even the old rule that a wife was deemed to have committed a crime under her husband's compulsion was not originally introduced in order to deceive anyone, although the absurdity of it did wring from Mr Bumble the comment 'If the law says that, the law is an ass'.

EMOTIONAL CONSERVATISM. Fuller said this is the judge's way of satisfying his own craving for certainty and stability. If there is any deceit, it is not intended to deceive anyone but himself; it is at most a process of self-deception.

CONVENIENCE. This consists of making use of existing legal institutions by pretending that certain facts exists. Ihering gave the example of the Roman *hereditatis petitio*, the action by which an heir claimed the estate. When later it became necessary to enable the purchaser of a bankrupt's estate (*bonorum emptor*) to claim the estate, the same action was made available, but with the pretence that the *bonorum emptor* was heir[2]. Adaptation of existing institutions reflects at bottom the need to preserve respect for the law; open innovations are unsettling, while novel applications of established institutions are not.

INTELLECTUAL CONSERVATISM. 'A judge', said Fuller, 'may adopt a fiction, not simply to avoid discommoding current notions, or for the purpose of concealing from himself or others the fact that he is legislating, but merely because he does not know how else to state and explain the new principle he is applying'[3].

Equity

In one sense equity is synonymous with justice. In so far as the purpose of law is to do justice, Cicero spoke of *aequitas* as the principle which makes possible any systematised administration of law, namely, deciding like cases alike[4]. However, there develops before long a need for justice over and above that available at law, and it was in the sense of this further justice needed to correct legal justice that Aristotle spoke of equity[5]. Maine defined it as 'any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles'[6]. Broadly stated, one function

1 *Maine* p 38.

2 *Geist des römischen Rechts* (6th edn) III, pp 301 et seq. So also in the *actio Publiciana* the lapse of the period of prescription was assumed. Cf. *mancipatio* and *cessio in jure*, which were actual conveyancing forms put to new uses without pretended facts. Early English law was full of procedural fictions, eg the writ *latitat*. The law of quasi-contract is based on pretended contract. 'Deeming' provisions in statutes are fictions. So is 'summer time'.

3 *Fuller* pp 63–64.

4 Cicero *Topica* 4.23.

5 Aristotle *Nicomachean Ethics* V.

6 *Maine* p 34.

of equity is to mitigate in various ways the effects of the strict law in its application to individual cases[7]. Another function is to procure a humane and liberal interpretation of the law itself[8].

It is clear, therefore, that equity arises out of the processes of law-applying, and is fashioned by the hands of those charged with that task. In Roman law the rigidity and shortcomings of the civil law were remedied by the Praetors; in English law similar deficiencies were remedied by the Chancellors. As with the Roman civil law, the common law, too, became technical, so appeals were addressed by aggrieved litigants to the King himself, as the 'fount of justice', to give relief as a matter of conscience. The King handed these petitions to the Chancellor, who as an ecclesiastic in the early days and as 'Keeper of the King's conscience', was best fitted to deal with them. Thus, there grew up a new jurisdiction in Chancery, as the Chancellor's court came to be called, and this is why English equity can be identified historically as the body of rules evolved by the court of Chancery. The Praetors and Chancellors are the parallel sources of equity in the two systems[9].

The description given by the jurist Papinian of the function of praetorian equity is equally apt for the Chancellor's equity. 'Praetorian law', he said 'is what the praetors introduced for the purpose of assisting, supplementing and correcting the civil law': *jus praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia*[10]. It is not possible here to do more than instance a few, almost random, examples of the ways in which the equitable influence worked in the two systems. The Praetors 'assisted' the civil law in many ways. For example, they aided the owner at law by devising interdictal protection of possession, since by protecting possession they were in most cases protecting title. In English law the equitable remedy of injunction protects various rights at common law; so also specific performance reinforces certain contractual claims at common law. The Praetors 'supplemented' the civil law and filled out its deficiencies by inventing new doctrines. Outstanding among these was the institution of praetorian ownership side by side with civil law ownership. The Praetors also gave protection to minors and other persons not capable of looking after themselves; they recognised doctrines of fraud, coercion and mistake; and they invented as well as extended existing remedies by means of *actiones in factum* and *utiles*. The most important creation of the Chancellors was the trust, but they also recognised fraud, coercion and mistake. More rarely the Praetors 'corrected' the civil law and in effect nullified it. Their most drastic remedy was *restitutio in integrum* by which a completed transaction at law could be erased and the parties allowed to begin afresh. The Praetors could also refuse to allow plaintiffs to proceed with actions at law if it was unconscionable for them to do so: *denegatio actionis*. The entire civil law of intestate succession was nullified in favour of a fairer scheme of distribution which, unlike the civil law, took account of the entitlement of blood relations: *bonorum possessio*. In English law the question of conflict between common law and equity has been the subject of some controversy. The Judicature Act 1873, s 25[11] provided: 'Generally in

7 It was in this sense that Aristotle dealt with equity: V, 10. 3-8.

8 *D*.50.17.90.

9 The parallel should not be pushed too far: Buckland *Equity in Roman Law*; 'Praetor and Chancellor' (1939) 13 Tulane LR 163. See also Stein 'Equitable Principles in Roman Law' in *Equity in the World's Legal Systems* (ed Newman) p 75.

10 *D* 1.1.7.1.

11 See now Supreme Court of Judicature (Consolidation) Act 1925, s 44.

all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail'. The implication of this provision clearly is that some conflict at any rate did exist. Nevertheless, Maitland contended that this provision was only added *ex abundanti cautela*, since the relationship between law and equity, to use his own words, 'was not one of conflict'.

> 'Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require'[12].

This is a debateable statement, and perhaps the argument turns on what exactly is signified by 'conflict'. Hohfeld showed, it is submitted successfully, that there were many instances where the position was indeed what one might fairly describe as conflict[13].

During the formative periods of Roman and English law the creative function of equity was most marked. In the more developed law it tended to be less active, but remained in the form of a cloud of principles to guide and ameliorate the application of the law, eg no one shall profit from his own wrong, nor be unjustly enriched at the expense of another. These and other such principles were crystallised in the concluding Title of the Digest, and it was these that came to be absorbed as the fundamental principles of modern civilian systems[14]. In English law, which did not 'receive' Roman law, equity solidified in time in much the same way as the common law had done, so much so that there has been a call for a revival of the old spirit of equitable justice. Lord Denning, in particular, ever since he became a High Court judge, has been foremost in striving to inject a new equity into the law.

> 'If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity, to make good the omissions of the old'[15].

Some of his experiments have met with success[16], others have not[17]. Perhaps the reluctance of some of his colleagues to go along with him reflects the age-old need to strike a balance between certainty and adaptability.

Legislation

Even while social conditions were relatively stable, the gradual dimming of the fires behind the forces of fiction and equity in keeping law adaptable

12 Maitland *Equity* (ed Brunyate) p 17.

13 Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed Cook) pp 115 et seq and for a few examples, see p 31 ante.

14 Stein 'The Digest Title, *De diversis regulis juris antiqui* and General Principles of Law' in *Essays in Jurisprudence in Honor of Roscoe Pound* (ed Newman) pp 1 et seq. See also *Regulae Juris: From Juristic Rules to Legal Maxims*.

15 *Solle v Butcher* [1950] 1 KB 671 at 695, [1949] 2 All ER 1107 at 1121. In another place he said, 'It may be that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better': *Re AG's Application, A-G v Butterworth* [1963] 1 QB 696 at 719, [1962] 3 All ER 326 at 329. See also his paper 'The Need for a New Equity' (1952) 5 Current LP 1.

16 Eg *Central London Property Trust v High Trees House* [1947] KB 130, [1956] 1 All ER 256; and see now *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865.

17 The 'deserted wife's equity', which he introduced in *Bendall v McWhirter* [1952] 2 QB 466, [1952] 1 All ER 1307, was overruled in *National Provincial Bank v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472. For a partial remedy by statute, see the Matrimonial Homes Act 1967.

made that task devolve increasingly on legislation. With the rapid changes now taking place, this is the only efficient way of dealing with the problem. In addition to the aspects of legislation dealt with in Chapters 5 and 8, something should also be said about its application to law reform and codification.

LAW REFORM. There is a great deal of room for improvement short of drastic change of the system itself. It is in the business of law reform that all the insights of legal and sociological analysis, philosophy and morality are called into service.

The task of making proposals for law reform used to be in the hands of *ad hoc* bodies, and this is still possible. Royal Commissions may be cited as an outstanding example[18]. The first permanent arrangement came in 1934 when the Law Revision Committee was set up to report on matters referred to it by the Lord Chancellor. This was superseded in 1952 by the Law Reform Committee, and also in that year the Private International Law Committee was established. These were followed in 1959 by the Criminal Law Revision Committee. Then, in 1965 by the Law Commissions Act two Law Commissions (one of them the Scottish Law Commission) were set up as permanent, independent bodies, charged with keeping 'under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particluar the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law': s 3 (1)[19]. These bodies have shown considerable activity.

A prerequisite to deciding what the law ought to be is to discover what it is at present. To this extent positivist philosophers, notably Bentham and Austin, were correct[20]. There is a difficulty raised by the fact that in a large number of matters where the rule is not clear, the rule is stated to be what it ought to be[1]. The distinction between what the law is and what it ought to be is thus by no means sharp, but for practical purposes this difficulty does not and, indeed, should not stand in the way of reform. If the law on a point in unclear, then that is how the position has to be accepted.

Information about existing law includes the collation of all rules likely to be affected by the topic being reformed. Here, computers can be of help, since they are able to gather information at great depth and range in next to no time. However, the difficulties that were mentioned earlier apply here too. Two bases of information retrieval are the 'key-word' basis and the 'full text' basis. The former operates by identifying relevant documentary material through key-words; but this depends on the human element in choosing the appropriate key-words and also requires co-ordination and consistency in choice. To avoid this difficulty, the alternative is the 'full text' basis, which is that entire texts of documents are stored, not by page, but by

18 Eg in 1973 a Royal Commission was set up to consider the law relating to compensation for personal injuries: *On Civil Liability and Compensation for Personal Injury* (Cmnd. 7054).

19 For development, see *The Reform of the Law* (ed G L Williams); *Law Reform and Law Making, A Reprint of a Series of Broadcast Talks; Law Reform* Now (eds Gardiner and Martin). On the Law Commissions, see Chorley and Dworkin, 'The Law Commissions Act 1965' (1965) 28 MLR 675; Scarman 'Law Reform—the Experience of the Law Commission (1968) 10 JSPTL(NS) 91; Farrar *Law Reform and the Law Commission* chs 1-4.

20 See ch 16 post.

1 See p 333 post.

sentences. All relevant matter can thus be retrieved, but the drawback is that a vast quantity of irrelevant matter is dredged up as well. Experiment so far has shown that human techniques retrieved little that was irrelevant, but could not guarantee to be comprehensive; computers guaranteed comprehensiveness but brought in far too much irrelevant matter; which meant that the task of sifting still remained[2].

After collating the existing law, its adequacy has to be assessed. Of course, it must have been thought unsatisfactory, else it would not have come up for review; but the matter has to be thoroughly explored. The criterion of 'adequacy' is ability to fulfil some purpose. Morals, ethics, social needs and all other relevant considerations have to be pressed into the service of such evaluation. Sociological research is needed to discover how the law has been working and how far behaviour has corresponded with legal norms. Law reform is thus a collective job[3].

In the actual business of reforming the law, the first and most difficult decision concerns the basis on which reform should proceed: should there be a completely new restructuring of the law?, or should reform be carried out within existing categories, such as contract, criminal law etc? The Law Commission has opted for the latter course, and has proposed a beginning with the reform and codification of the general principles of contract[4]. A more radical proposal was put forward by Professor Jolowicz, who argued that reform should be based on the factual problems involved, rather than on the artificial categories of the law[5]. He pointed out that if, for instance, the category of 'nuisance' was being reformed, the case of a person hit by a tile off a roof would come within the ambit of the review if he happened to be standing one foot outside the gate on the pavement, but not if he happened to be one foot inside the gate, for then the case would come under 'occupiers' liability'. A wider example would be 'consumer protection'. This is a social problem, which straddles contract, torts, criminal law etc. Reforming contract alone would leave many aspects of the factual social problem untouched. The existing divisions of the law into contract, torts etc were products of historical problems, chiefly procedural, which have disappeared. If, as the Law Commissions are charged with doing, the whole law is going to be overhauled, then the opportunity should be seized of restructuring it according to contemporary problems. There is much substance in this view, but there are also considerations the other way[6]. One is that the existing divisions are so ingrained in the law and, indeed, have even become parts of social life, eg business and industry, that so radical a restructuring might be impractical. Another is that experiments in teaching law along the sort of lines suggested have not been successful. However, a cogent point has been raised, to which too little attention seems to have been paid as yet.

Another matter, which it may become necessary to consider, is the best machinery for implementing reform. In what way might the purpose be achieved, or better achieved than hitherto? Are the existing courts, for instance, the most suitable institutions, or should there be some new kind of

2 Tapper *Computers and the Law* Ch 4, discussing the pioneering experiments of Professor Horty; see also p 307 ante.

3 Scarman (1968) 10 JSPTL(NS) 91 *passim; Farrar* Ch 6.

4 First Annual Report, para 31.

5 Jolowicz 'Fact Based Classification of Law' in *The Division and Classification of the Law* (ed Jolowicz).

6 See the other contributions to *The Division and Classification of the Law* especially Ch 2.

tribunal? The Restrictive Practices Court and a Registrar of Restrictive Trading Practices were created by the Restrictive Trade Practices Act 1956, which introduced a much needed reform. Should there be special industrial courts[7], family courts, and courts for dealing with sexual deviance? Even if separate bits of machinery were to be created in this way, it is important that there should remain some overall control, otherwise too much fragmentation could destroy the system as a system. In connection with all these matters there is a core of truth in Savigny's doctrine that reforms at least have a better chance of success if they keep within the traditions and stream of continuity of the society. Those which go against deeply-rooted ideas are likely to be sloughed off[8].

Finally, there is a problem of the language in which the reform is to be drafted. Legal language is peculiar in that it seeks to control behaviour, but is non-emotive[9]. Laws are communications designed to have continuing operation; they are addressed to different audiences, those who are expected to act on them, and those who have to apply them. With regard to the former, it has previously been pointed out that the language of drafting should take account of different kinds of measures[10]. Traffic laws are expected to be understood by the motoring public and should, therefore, be drafted in language intelligible to a lay audience. On the other hand, with technical matters of the sort that laymen would be ill-advised to tackle without expert advice, the language could afford to be what experts would readily understand. There is peril in trying to make highly technical matters comprehensible to laymen. With regard to those who are called on to apply laws, eg judges, it has to be remembered that the wording of laws should leave room for doing justice according to values and at the same time provide a measure of precision. The selection of suitable concepts becomes important here. Concepts are retrieval tools in that they are generalised means of referring to groups and types of situations. They should provide the right balance between precision and vagueness, which requires that they be appropriately structured.

A word might also be added about drafting[11]. This is far more than putting something into words. It has a substantive aspect and the draftsman can help the policy-makers. Consistency of terminology, expression and lay out induces consistency in policy and thought. The division of a measure into Parts, Headings, Sub-headings, Sections and Provisos requires decisions as to the relative importance of various points of substantive policy. All these assume special importance in long and complicated statutes.

CODIFICATION. This is a phenomenon, which is found at various stages of development. Undeveloped systems often start with codes. The 'start' of Roman law, for instance, is usually taken to be the Twelve Tables. Maine opened his classic work with the remark, 'The most celebrated system of jurisprudence known to the world begins, as it ends, with a code'[12]. In

7 The court set up by the Industrial Relations Act 1971, was abolished with that Act.

8 As to which, see pp 377-378 post.

9 For the semantic problems, see Scarman *Law Reform--the New Pattern* (Lindsay Memorial Lecture, University of Keele) p 56; *Farrar* ch 5.

10 See p 185 ante.

11 Dickerson *The Fundamentals of Legal Drafting*; Smith 'Legislative Drafting: English and Continental' [1980] Stat LR 16.

12 Maine *Ancient Law* p 1.

pre-Norman Britain there were various Anglo-Saxon codes. Codes are also introduced in mature systems to unify diverse jurisdictions, an outstanding example of which is the Uniform Commercial Code of America, unifying the diversities that had grown up in the jurisdictions of the several states. Codes may also be introduced in systems which have exhausted their powers of development.

Codification is said to provide a 'fresh start', but this must not be misunderstood. 'Fresh start' cannot mean an entirely new kind of law, for, in the first place, it is impossible to invent such a thing 'out of the blue'; and, secondly, the new law must keep within the stream of continuity of existing law, especially in commercial and other such long established areas.

Codification, therefore, must be of the existing law, and the question is what shape and form it should assume. This makes the problem inseperable from law reform. Reform must precede codification[13]. Clearly, conflicts, anomalies and complexities will have to be ironed out, but this is only a prelude. More important is the question, previously considered, of the basis of codification: should the law be completely restructured, or should codification proceed within the established divisions of the law? One of the earliest, and still most radical, proposals for restructuring was Bentham's. He began by elucidating the nature of 'a law'. This is not the same as a statutory provision, which is compounded of parts of other laws created at different times. Thus, the provision against being drunk when in charge of a car is made up of laws establishing a police force, breathalyser tests, courts etc. He accordingly sought to isolate 'a law' in a jurisprudential sense, which he did by assigning each law to a separate act-situation[14]. Codification on this basis would restructure the law beyond all recognition, existing categories would disappear, and even the distinction between 'penal' and 'civil' laws would acquire a wholly unfamiliar appearance. A less radical proposal is that of Professor Jolowicz, who proposed restructuring according to factual and social problems[15]. The alternative to wholesale restructuring is to codify within the existing divisions; and this is the course favoured by the Law Commission. The chosen field with which they propose to make a start is the general law of contract. The wisdom of this is not self-evident. The issue is whether codification of general principles of contract law should precede codification of particular types of contracts, eg hire-purchase, marine insurance etc. There may be some case for suggesting that the latter should come first, since attention will thereby be focused on problems in particular contracts, which will provide a better informed and meaningful basis for the codification of general principles[16]. Against this, it has been pointed out by one of the original Law Commissioners that it is unsatisfactory to impose codes, eg Sale of Goods Act, on the *corpus* of an uncodified general law of contract, and that it is absurd that there should be fundamental differences between English and Scots law[17].

Another debate surrounds the degree of generality of a code. Are the detailed rules, already evolved in case law, to be included? If they are, this would make codification incline towards consolidation. Or are there going

13 *Reform of the Law* (ed G L Williams) p 19; *Law Reform* Now (eds Gardiner and Martin) p 12.
14 See pp 342, 343 post.
15 See p 323 ante.
16 Wilson 'Evolution or Revolution?—Prospects for Contract Law Reform' (University of Southampton 1969).
17 Gower 'A Comment' (1967) 30 MLR 259.

to be only general principles? On the one hand, if the wisdom contained in the rich storehouse of case law is to be reduced to a few simple formulae, much of it will be lost. Answers to problems of detail will have to be sought outside the generalisations of the code, which, it is said, would be a waste of effort if the answers had already been worked out in the earlier cases. The code will inevitably accumulate an increasing volume of 'secondary' rules, which for practical purposes will represent the 'living law' (to use Ehrlich's phrase). This is bound to keep growing, not only in volume, but also in complexity, which means that the simplicity of the original conception will get progressively swamped by the rising tide. In the French Code, for example, the law of torts is contained in five sections, but for all practical purposes the 'law' is to be found in the case law and doctrine. On the other hand, if the code tries to preserve the accumulated wisdom of the case law, it will simply be a restatement minus anomalies etc. This is hardly preferable, since the complexity of such a restatement will be considerable, and it will not get rid of the pevious law, which will remain to be consulted on doubtful points. A compromise might be to keep the code itself to broad, general principles, but to couple it with a detailed commentary referring to previous case law, or else with selected examples which could serve as analogies. In any case, the previous law will cease to be authoritative, but it might be permissible to refer to it for the purpose of elucidating the wording of the code[18]. A related point concerns the status, not of pre-code cases, but of post-code cases. It was argued in an earlier chapter that *stare decisis* was inappropriate to statute interpretation[19]; this is *a fortiori* the case with a code[20]. It must be remembered, however, that *stare decisis* is so ingrained in the habit of thinking of British lawyers that it may not prove easy to abandon. It will take time; codification is a lengthy process.

What, finally, is the case for and against codification as such? This has been a well-gnawed bone of contention. In Germany in the early 19th century the proposal for codification propounded by Thibaut was powerfully opposed by Savigny, whose doctrine gave rise to the Historical School[1]. Towards the end of that century in America the Thibaut–Savigny controversy was parallelled by the Field–Carter controversy[2]. There is little new that the protagonists are able to advance even today, and little can be offered as factual evidence, which means that empirical support for a good many contentions is hard to find. It is thus very much a matter of preference. The degree of persuasiveness of an argument depends on the reader: if he is pro-code minded, it will be less of an effort for him to see the weaknesses in the case for the other side, and *vice versa*. The problem is the psychological one of how to convert people from positions they already hold. One of the stock arguments in favour of a code is its accessibility, intelligibility and simplicity, as well as its general convenience[3]. Simplicity is undoubtedly a boon when, as in America, there is much diversity[4]. However, there are some

18 *Bank of England v Vagliano Bros* [1891] AC 107 at 145, per Lord Herschell; Scarman *Law Reform—the New Pattern*. Cf the American Restatements.

19 See p 184–185 ante.

20 Scarman *English Law—the New Dimension* p 80. See also his 'Codification and Judge-made Law' (University of Birmingham 1966).

1 See ch 18 post.

2 For references, see the companion *Bibliography* pp 261–262.

3 Diamond 'Codification of the Law of Contract' (1968) 31 MLR 361; *Farrar* ch 5.

4 Eg Uniform Commercial Code.

considerations the other way which weaken the force of the general point. 'Accessible', 'intelligible' and 'simple' to whom? Technical matters, for instance, cannot be made intelligible and simple to laymen[5]. Problems of 'fringe' meanings in unforeseen situations will always be matters for experts. It has also been pointed out that there is bound to be a period of uncertainty after the introduction of a code until case law clarifies one by one the many doubts and obscurities: a point which is not disputed by proponents of codification, but which they think can be exaggerated[6]. A further point is that the inevitable silting-up of case law will gradually reduce accessibility and simplicity. As to general convenience, it has been objected that the cost, time and labour spent in preparing a code will be disproportionate to its value, and that lawyers and others will have to put in an immense effort in re-educating themselves to think along the new line; but these points, too, as proponents of codification point out, are exaggerated and, in any case, very much a matter of opinion[7].

Another claim in favour of codification is that it will unify the law by providing 'a logically articulated skeleton for the law' as well as 'an authoritative point of departure' from which practitioners can find answers to problems[8]. The value here will depend on the basis of the codification. It might be worth considering the relative value to practitioners of a code unified on the basis of factual and social problems and one unified on the basis of existing categories. The answer must remain speculative since there is no evidence which could give a pointer one way or the other.

Finally, there is a claim that a code will have the beneficient effect of facilitating and expediting future reforms[9]. This again may well prove to be so, but such evidence as there is does not bear out the hope. In France, there was no revision of the Code for 140 years; in Germany, the problem of exception clauses had to be dealt with judicially as in Britain. To speak of future reform being facilitated raises the query: what sort of reform—reforms within the structure of the code, or recodification? Society is never still, and as new developments take place, the unifying pattern of the code will tend to become out-moded and new unification needed. Such an argument seems somewhat unrealistic, and should not stand in the way of codification now. In view of the balance between these various considerations, perhaps one ought to ask whether there is a risk that a code would actually do harm and whether such risk, if there is one, is worth taking. All in all, codification of English law will be an act of faith.

5 Hahlo 'Here lies the Common Law. Rest in Peace' (1967) 30 MLR 241.
6 *Hahlo* p 249; contra *Gower* p 261; Topping and Vandenlinden '*Ibi Renascit Jus Commune*' (1970) 33 MLR 175.
7 *Hahlo* p 253; contra *Topping and Vandenlinden* pp 174–175.
8 *Topping and Vandenlinden* pp 173–174.
9 *Diamond*; *Topping and Vandenlinden*.

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PART III

Legal theory

SUMMARY