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ELEMENTS OF ENGLISH LAW

By W. M. GELDART

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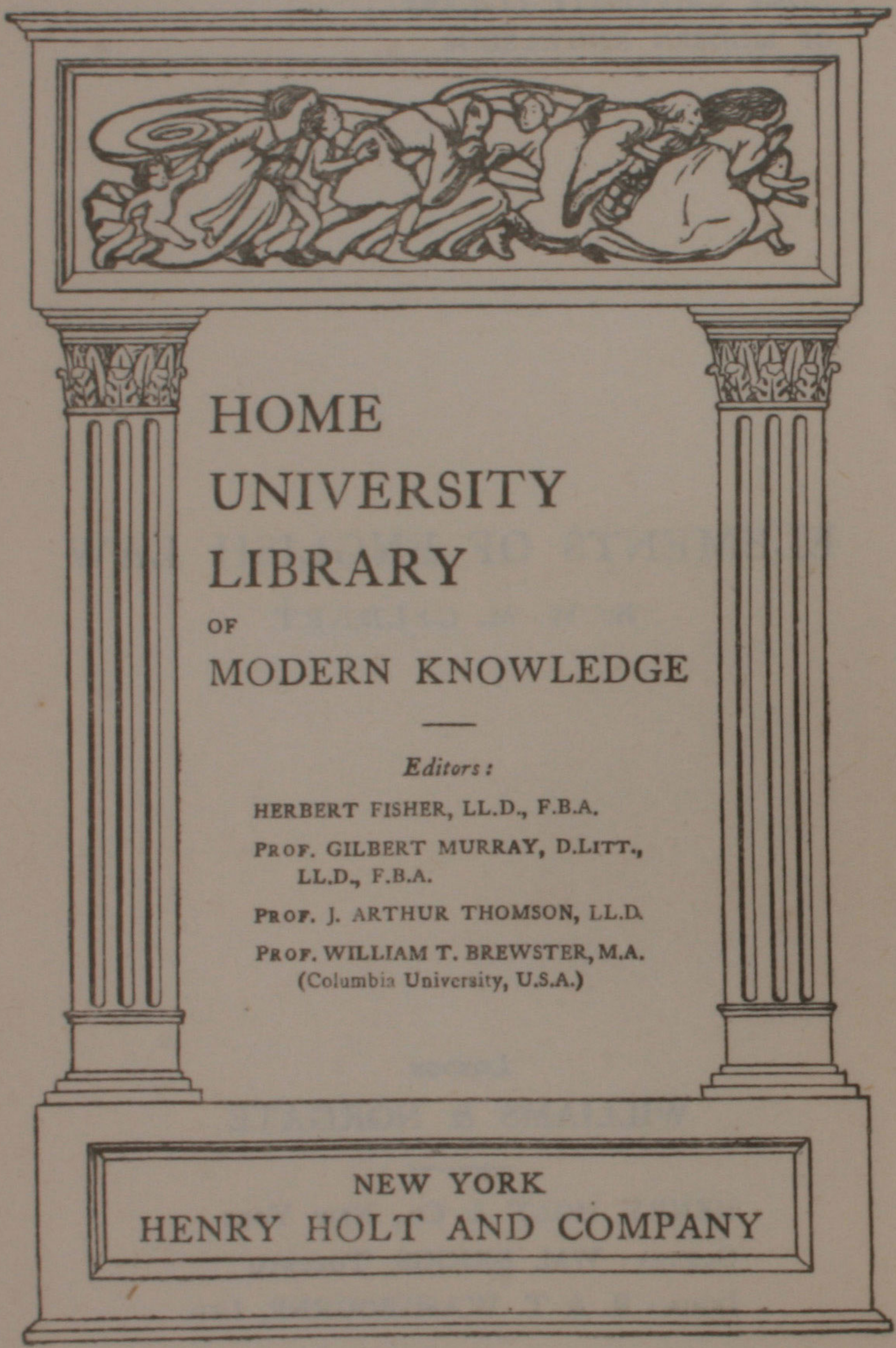

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ELEMENTS OF ENGLISH LAW

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ELEMENTS OF ENGLISH LAW

CHAPTER I

STATUTE LAW AND COMMON LAW

1. LAW AND LAWS.—We commonly speak both of law and laws—the English Law, or the Laws of England; and these terms, though not used with precision, point to two different aspects under which legal science may be approached. The laws of a country are thought of as separate, distinct, individual rules; the law of a country, however much we may analyse it into separate rules, is something more than the mere sum of such rules. It is rather a whole, a system which orders our conduct; in which the separate rules have their place and their relation to each other and to the whole; which is never completely exhausted by any analysis, however far the analysis may be pushed, and however much the analysis may be necessary to our understanding of the whole. Thus each rule which we call *a* law is a part of the whole

which we call *the* law. Lawyers generally speak of *law*; laymen more often of *laws*.

There is also a more precise way in which we use this distinction between law and laws. Some laws are presented to us as having from the beginning a separate and independent existence; they are not derived by any process of analysis or development from the law as a whole. We know when they were made and by whom, though when made they have to take their place in the legal system; they become parts of *the* law. Such laws in this country are for the most part what we call Acts of Parliament, or, as they are called generally by lawyers, statutes; collectively they are spoken of as Statute Law. On the other hand, putting aside for the present the rules of Equity, the great body of law which is not Statute Law is called the Common Law. The Common Law has grown rather than been made. We cannot point to any definite time when it began; as far back as our reports go we find judges assuming that there is a Common Law not made by any legislator. When we speak of an individual law we generally mean a statute; when we speak of *the* law we are thinking of the system of law which includes both Statute and Common Law, perhaps more of the latter than of the

former. A rule of the Common Law would rarely, if ever, be spoken of as *a* law.

This distinction between law as a system and laws as enactments is brought out more clearly in those languages which use different words for each: the French *droit*, the German *Recht* mean "law"; *loi* and *Gesetz* mean "a law."

2. THE RELATIONS BETWEEN STATUTE LAW AND COMMON LAW.—(1) In spite of the enormous bulk of the Statute Law—our statutes begin in 1235 in the reign of Henry III, and a large volume is now added every year—the most fundamental part of our law is still Common Law. No statute, for instance, prescribes in general terms that a man must pay his debts or perform his contracts or pay damages for trespass or libel or slander. The statutes assume the existence of the Common Law; they are the addenda and errata of the book of the Common Law; they would have no meaning except by reference to the Common Law. If all the statutes of the realm were repealed, we should still have a system of law, though, it may be, an unworkable one; if we could imagine the Common Law swept away and the Statute Law preserved, we should have only disjointed rules torn from their context, and no provision at all for many of the most important relations of life.

(2) On the other hand, where Statute Law

and Common Law come into competition, it is the former that prevails. Our law sets no limits to the power of Parliament. "The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions."[1] No court or judge can refuse to enforce an Act of Parliament. No development of the Common Law can repeal an Act of Parliament. The Common Law cannot even correct its own defects by taking away what it has once finally laid down. Thus large parts of the Common Law have from time to time been abolished by Act of Parliament, and their place has been taken by statutory rules.

This supremacy of the statute-making power is not a logical or even a practical necessity; it is a rule of our Constitutional Law. It is quite conceivable, and it was at one time supposed to be the case, that there were principles of the Common Law which would control an Act of Parliament. We read in a seventeenth-century report: "It appears in our books that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void; for whenever an Act of Parliament is against right and reason or repugnant or impossible to be performed, the Common

[1] Dicey, *Law of the Constitution*, p. 37.

Law will control it and adjudge such Act to be void." There is a faint echo of this view in Blackstone's *Commentaries* (1765), p. 41, but it has long ceased to be held. It is well known that under the Constitution of the United States neither the Congress nor the State legislatures have an unlimited power of legislation.

(3) How do we know the law? Here there is a great difference between Statute and Common Law. A statute is drawn up in a definite form of words, and these words have been approved by Parliament and have received the Royal assent. In general there is no difficulty in ascertaining the words of a statute. At the present day two identical printed copies are made, each bearing a certificate of the Clerk of Parliaments that the Royal assent has been given, and in the last resort reference can be made to these copies for the purpose of ascertaining the true words of the statute. For practical purposes any copy made by the King's printer is sufficient. In the case of some old statutes there is a possible doubt not only as to the exact words of a statute, but even whether such a statute was ever made; but in practice such doubts hardly ever arise.

Still the words of the statute are not the statute itself; the law expressed by the

words is not the same thing as the words which express it. Thus a person imperfectly acquainted with English may know the words of the statute, but he will not know the law. The same is true in a greater or less degree of any one who comes to the reading of a statute without sufficient legal knowledge. The interpretation of a statute requires not only a knowledge of the meaning of legal technical terms, but also of the whole system of law of which the statute forms a part; in particular it requires a knowledge of the legal rules of interpretation, which are themselves rules of law. Some of these are Common Law rules; some are themselves statutory. Thus there is Common Law rule that in interpreting a statute no account must be taken of anything said in debate while the statute was passing through its various stages in Parliament; as far as possible the words of the statute must speak for themselves. So there is a statutory rule that in Acts made since 1850, unless a contrary intention appears, masculine words shall include the feminine, words in the singular shall include the plural, words in the plural shall include the singular.

Even lawyers may differ as to the meaning of a statute. If such a question arises for the first time in a lawsuit, the judge will have to decide the meaning in accordance

with the recognised rules of interpretation, and his decision will be a binding authority for all future cases in which the same question arises, just as we shall see that a judge's decision is a binding authority for future cases where a question arises as to the Common Law. In this way many statutes—especially the older ones—have become overlaid with a mass of judicial interpretation which cannot be departed from. The Statute of Frauds[1] is a notable instance.

On the other hand, we have no authoritative text of the Common Law. There is no one form of words in which it has as a whole been expressed at any time. Therefore in a sense one may speak of the Common Law as unwritten law in contrast with Statute Law, which is written law. Nevertheless the sources from which we derive our knowledge of the Common Law are in writing or print. First among these come the reported decisions of the judges of the English courts. Ever since the reign of Edward I there have been lawyers who have made it their business to report the discussions in court and the judgments given in cases which seemed of legal interest. Thus we have the Year-Books, which are reports of cases made by anonymous reporters from

[1] See p. 185.

the time of Edward I to that of Henry VIII. These are followed by reports produced by lawyers reporting under their own names, reaching down to our own time, and receiving fresh additions every year. At the beginning these reports seem to have served mainly the purpose of instruction and information. The fact that a judge had stated that such and such was the law was evidence, but not more than evidence, that such was the law. He might have been mistaken; another judge might perhaps decide differently. But in course of time we find a change in the attitude of judges and lawyers towards reported decisions. The citation of decided cases becomes more frequent; greater and greater weight is attached to them as authorities. From the sixteenth century onwards, if not earlier, we may say that decided cases are regarded as a definite authority, which, at least in the absence of special reasons to the contrary, must be followed for the future. For the last three hundred years, at any rate, the decisions of judges of the higher courts have had a binding force for all similar cases which may arise in the future.

3. The Binding Force of Precedents.—This binding force is not, however, in all cases an irresistible one. The highest Court of Appeal in the country for the overwhelming majority

of English cases—the House of Lords—has held more than once during the last hundred years that it will not allow a previous decision given by it to be called in question. It seems unlikely that in the future it will depart from this view of the absolutely binding nature of its own decisions. All English courts which rank below the House of Lords are absolutely bound by its decisions. So, too, the judgments of the Court of Appeal, which stands next below the House of Lords, are binding declarations of the law for all lower courts, and even for itself. There have, however, been one or two cases in which a decision of the Court of Appeal, when given in obvious forgetfulness of what had been previously decided, has not been followed, even by a lower court.

A decision given by a court lower than the Court of Appeal is binding on courts of equal rank, except where it is clearly inconsistent with established principles of law, or where (if there is no previously settled rule) it is clearly unreasonable.

On the other hand, a decision of a lower court is not, in the first instance, binding on any court ranking above it. But in the course of time it may acquire an authority which even a higher court will not disregard. It may happen that a question has never been

carried up to the Court of Appeal or to the House of Lords, but that the lower courts have repeatedly decided it in the same way; or it may be that even a single decision of a lower court has remained for a long time unquestioned. In such a case the necessary result will be that lawyers and the public have come to regard such a decision as law, and have acted as if it was law. People will have made contracts, carried on business, disposed of their property, on the faith of such a decision, and the reversal of the rule would involve enormous hardship. It is often more important that the law should be certain, than that it should be perfect. The consequence is that even a higher court, though it may think a decision of a lower court wrong in principle, will refuse to overrule it, holding that the evil of upsetting what every one has treated as established is greater than the evil of allowing a mistaken rule to stand. The cure in such a case is an alteration of the law by statute, for an alteration by statute does not work the same hardship as a reversal by a higher court of what was supposed to be the law. A statute need not, and as a rule does not, affect anything done before it was passed. Previous transactions remain governed by the law in force at the time they were made. But the theory or

fiction of our case law is that the judge does not make new law, but only declares what was already law; so that if a higher court overrules the decision of a lower court, it declares that what was supposed to be law never really was law, and consequently past transactions will be governed by a rule contrary to what the parties believed to be law. A curious case occurred recently with regard to the Earldom of Norfolk, where the House of Lords held that the rule that a peerage cannot be surrendered, though it was first established in the seventeenth century, must be treated as having been in force at the beginning of the fourteenth century. "Whenever," said Lord Davey, "a court or this House acting judicially declares the law, it is presumed to lay down what the law is and was, although it may have been misunderstood in former days."

4. RATIO DECIDENDI AND OBITER DICTUM.—If you open a volume of the Law Reports and read the report of a case, how will you discover the law which the decision lays down? how will you find what is called the *ratio decidendi*—the principle on which the decision is based? Remember that the judge is not a legislator. It is not his business—in form at any rate—to *make* rules of law; his first duty is to decide the dispute between the parties.

The dispute may be largely a question of fact. In some cases the questions of fact will have been already answered by a jury; in others the judge himself will have to decide questions of fact. At any rate, the judgment will involve the application of principles of law to concrete facts. The reader of a Law Report must therefore first disentangle the law stated in a judgment from the facts to which it is applied. That may be a difficult matter. No form is prescribed in which judgments must be delivered, and it may often be a matter of doubt how far a decision turns on the view which the judge took of the facts, and how far on a rule of law which he considered applicable. The head-note which is put at the beginning of a report of a case generally contains a statement of the rule supposed to be involved. But this headnote is not part of the report; it is merely the reporter's own view of the effect of the judgment. In using a Law Report, therefore, every one is free, where there is room for doubt, to hold his own view of what was the law laid down in any particular case, unless and until the doubt has been settled by a subsequent decision.

From the *ratio decidendi* we must carefully distinguish what are called *dicta* or *obiter dicta*—"things said by the way."

An *obiter dictum*, strictly speaking, is a statement of the law made in the course of a judgment, not professing to be applicable to the actual question between the parties, but made by way of explanation or illustration or general exposition of the law. Such *dicta* have no binding force, though they have an authority which is entitled to respect and which will vary according to the reputation of the particular judge.

We sometimes find that a judge in deciding a case will profess to decide it on a principle really wider than is necessary for the purpose, when it might have been decided on some already recognised but much narrower ground. In such a case the supposed principle is in effect equivalent to an *obiter dictum*; it will not be treated as the true *ratio decidendi* of the case. But of course it may be a difficult problem to determine how far the rule is really wider than necessary.

Another difficulty sometimes occurs where the judges of a court agree in the result, but give different reasons. In such cases the matter is left open for a judge in a subsequent case to decide which reason is the right one.

5. How far do the Judges make the Law?—I have spoken hitherto of judicial decisions, not only as the source from which

we get our knowledge of the Common Law, but also as binding authorities. But this is consistent with two different views of the relation of the judges to the law. First, and this is the older theory, we may suppose that a judicial decision is no more than a declaration and evidence — but conclusive evidence — of what already exists; the Common Law, as a whole, it is said, has existed from time immemorial in the minds of judges and lawyers—perhaps in the minds of the people at large so far as they could understand it—and every decision is merely a manifestation of it. We find this view in Hale's *History of the Common Law* (1713) and in Blackstone (1765). Secondly, we find writers like Bentham and Austin speaking of "*the childish fiction* employed by our judges that Judiciary or Common Law is not made by them, but is a miraculous something made by nobody, existing I suppose from eternity, and merely declared from time to time by the judges." According to the view of these writers and others who have followed them, like Salmond and Gray, judges are really law-makers, and in laying down the law exercise a function almost, if not exactly, like that of the legislator in making new law from time to time. The two points of view are admirably stated in

Maine's *Ancient Law*:[1] "With respect to that great portion of our legal system which is enshrined in cases and recorded in Law Reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before our English court for adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have—to use the very inaccurate expression sometimes employed—become more elastic; in fact, they have been changed. A clear addition has been made to the precedents,

[1] P. 35 (ed. 1908), and see Sir F. Pollock's note, p. 46.

and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example."

I think that neither of these views is the whole truth. On the one hand, it is, of course, untrue that our Common Law has always been the same, even if we disregard the changes made by statute. No one can seriously imagine that the Common Law of five hundred years ago would have had an intelligible answer to many of the legal questions of modern life. We know, as a matter of fact, that it answered some questions in the opposite sense to that in which we now answer them, *e.g.* a simple executory contract had no legal effect then, and we can trace the steps by which it acquired legal effect. On the other hand, to say that a judge in deciding is ever doing anything analogous to legislation is really doing violence to the facts. In the majority of cases where a new precedent is established, the process is obviously that of applying existing acknowledged principles to a new set of facts. The principles, it may be, give no explicit answer to the question put. It does not follow that they give no answer at all. By a process of deduction, by argument from analogy, the existing principles

may be made to yield a new principle, which is new because never explicitly stated before, but which in another sense is not new because it was already involved in what was already acknowledged. Just in the same way the conclusions of a science may be involved in its premisses, and yet when first made constitute something new, an addition to what was before acknowledged. Even where a decision does not follow a definite logical process from acknowledged principles, it has not the arbitrary character of legislation. In the absence of clear precedents which might govern a question, we find judges relying on such considerations as the opinions of legal writers, the practice of conveyancers, the law of other modern countries, the Roman Law, principles of "natural justice" or public policy. The proper application of these may be a matter of dispute and difficulty, but in any case the judge is applying a standard; he shows that he is not free to decide, as a legislator would be, as he pleases; he is bound to decide according to principle. If we say that the judge really *makes* the law like a legislator, we shall be bound to say that the facts of the case were previously governed by no law;[1] they fell outside the

[1] Professor Gray accepts this conclusion (*Nature and Sources of the Law*, p. 96).

realm of law when they occurred, and are only brought within it when the decision is given. To argue that this is so, because before the decision no one knew with certainty what the law was, is like arguing that a piece of land is valueless until it has been sold, or until a valuer has made a valuation of it, because till then no one knows with certainty for what it will be sold or for at what figure it will be valued. In truth, the parties in fixing the price, or the valuer in making the valuation, have really tried to discover something already existing. The analogy goes further; just as the price or the valuation, even though mistaken, will be a new element which will help to determine the value for the future, so the judge's decision of the law on a given question, whether right or wrong, fixes or helps to fix the law for the future.

Again the view that till a rule is laid down in a legal decision there is no law governing the facts of the case, will really lead to the conclusion that no concrete set of facts is governed by any law till a decision has been given, because in every case the process of decision involves the mental process of bringing the particular facts within some principle. Suppose, on the one hand, a question whether A's conduct amounted to an acceptance of an offer; on the other, whether a given

transaction is contrary to public policy. There is an apparent, but not a real difference. In the former case the existing principles are so well defined that it looks as if the facts automatically, as it were, fall into the pigeon-hole which the law provides; in the latter the principle is so wide, that in order to apply it the judge must explicitly and openly say, "conduct which has such and such qualities is contrary to public policy," and so frame a rule which defines and develops the conception of public policy. But in the former case the same process has really been gone through. The act does not really fall automatically into the pigeon-hole; the judge must have had in his mind the qualities of an act which will make it an acceptance; the judge really says, "conduct such as that in this case amounts to an acceptance." The bringing of concrete facts under a rule is always a mental process, and a process of generalisation. In this way every case which is decided means a development of the principle which is applied. The practical difference is that in the majority of cases the application is so easy, and the development of the existing principle so infinitesimal, that the case is not worth reporting, and therefore, for *practical* purposes, adds nothing to the law.

A distinction is sometimes made between

"declaratory" precedents, which merely declare existing law and "original" precedents which lay down new law. In truth the difference is one of degree and not of kind. If we have a case which deals with certain facts by applying an acknowledged rule, we really have an addition to the rule, because we now know that a certain kind of fact falls within it, and in the nature of things we can never have two sets of facts which are precisely similar. No precedent is purely "declaratory" or purely "original."

The contradiction between the view that judges merely declare the Common Law, and the view that they make new law in the same way as a legislator does, is solved by the conception of evolution or development which was not familiar either to the old lawyers like Blackstone or to their critics like Austin and Bentham. The essence of that conception is that a thing may change and yet remain the same thing. To ask whether our law of to-day is the same law as the English law of five hundred years ago, is, to use a phrase of Sir Frederick Pollock,[1] "like discussing whether the John Milton who wrote *Samson Agonistes* was really the same John Milton who wrote *Lycidas*." It is the same and not the same. Every legal decision is a step

[1] *First Book of Jurisprudence*, p. 226.

in the process of growth. In every case it is true that there is already a law applicable to the facts; it is equally true that when the decision has been given, the law is not precisely what it was before. The "*double language*" which Maine refers to as evidence of a deep-seated fiction is really an expression of a fundamental truth.

6. ADVANTAGES AND DISADVANTAGES OF CASE LAW.—The system of Case Law is peculiar to England and the countries which have derived their law from England. Its essential principle is the rule that decided cases are binding authorities for the future. In other countries this is not so, or was not so till recently. In other countries the judge, in his application and interpretation both of enacted law and of the general principles which will always underlie and supplement enacted law, is not bound by previous decisions of the same or any other court, but is free and indeed is bound to decide according to the best of his own judgment.

The great advantages of a system of Case Law in the English sense are three:

(1) *Certainty.*—The fact that decided cases are binding authorities for the future makes it certain or at least highly probable that every future case which is essentially similar will be decided in the same way. People

may therefore regulate their conduct with confidence upon the law once laid down by the judges.

(2) *The possibility of growth.*—Wherever the way is not closed by statute or precedent, new rules of law will from time to time be authoritatively laid down to meet new circumstances and the changing needs of society. Where there is no system of Case Law the work of the judge who decides a case leaves no lasting mark on the law for the future: it is, as far as the development of the law goes, thrown away.

(3) *A great wealth of detailed rules.*—Our law is much richer in detail than any code of law (unless based on Case Law) can possibly be. The German Civil Code, for instance, consists of less than 2500 paragraphs.

The great disadvantages of Case Law are:

(1) *Rigidity.*—Where a rule has once been decided, even though wrongly, it is difficult or impossible to depart from it. I do not agree with those who think that *flexibility* is a characteristic of Case Law. The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand.

(2) *The danger of illogical distinctions.*—When a rule which is binding is felt to work hardships, a judge will often avoid applying

it to cases which logically ought to fall within it, by laying hold of minute distinctions which will enable him to say that the later case is different from the earlier case in which the rule was established. Every now and then a precedent leads one into a blind alley, from which one has to escape as best one can. So, too, rules which are logically inconsistent with each other are sometimes developed along distinct lines of cases, which ultimately meet and come into conflict.

(3) *Bulk and complexity.*—The wealth of detail and the fact that the rules of law are to be found scattered over some 1000 volumes of law report, make the law extraordinarily cumbrous and difficult to learn and apply.

I have no doubt that the advantages of our system far outweigh the disadvantages. Still, the disadvantages are serious. The cure for them is to be found, and has from time to time been found, in Statute Law. Where rules have been definitely laid down which produce hardship, where the rules have been made complicated and illogical by attempts to avoid hardship, Statute Law must intervene to remove the hardship or to lay down simple and intelligible rules. So, again, where the law has been satisfactorily worked out in detail, but the mass of scattered decisions is unmanageable, Statute may undertake

the work of codification, an orderly arrangement of the established rules in statutory form. In this way some considerable portions of the Common Law have from time to time been converted into Statute Law without material alteration of substance; the labour of searching for decisions is removed or lessened, and the law is to some extent made accessible to persons who are not professional lawyers. Examples of such codification may be found in the Bills of Exchange Act, 1882, the Sale of Goods Act, 1893. How far the Common Law as a whole is capable of being or is likely to be codified in this way is a question which cannot be here discussed. But, at any rate, two conditions of a satisfactory codification may here be indicated: (1) It must reproduce without material loss the richness of detail which is a characteristic merit of our system of Case Law; we should not be content with a code of the brief and abstract kind which has been adopted and used with success in foreign countries; (2) the adoption of a code must not deprive us of the advantages which we at present enjoy from the principle of binding precedents; *i.e.* judicial decisions interpreting the code will still be binding, will still be a means by which the law will develop, will still be capable of enriching the law by framing detailed rules.

7. Other Sources of the Common Law.—The decisions of courts of other countries which administer a law derived from our own, such as the Irish, Colonial, and American courts, though not binding upon our courts, are entitled to great respect. Even the judgments given by the Judicial Committee of the Privy Council, which acts as a final Court of Appeal from the courts of the Colonies, are, strictly speaking, not binding upon our courts; but the fact that the members of that tribunal are to a large extent the same persons as the members of the House of Lords when it sits as an Appeal Court, greatly increases their authority. The House of Lords is a common Court of Appeal for England, Scotland, and Ireland, and where the principles involved are substantially the same, or where the question turns on a statute common to England and one or both of these countries, its decision on a Scotch or Irish case will be treated as binding authority for English cases.

Some of the works of the older writers, such as the *Commentary* written by Coke in the seventeenth century on the fifteenth century treatise of Littleton on *Tenures*, and Sir Michael Foster's work on *Crown Law*, written in the eighteenth century, are known as "books of authority," and have a

force nearly equal in binding effect to judicial decisions. Other treatises on law have a merely "persuasive" authority which will vary with the reputation of the writer. The practice of conveyancers—lawyers whose business it is to draw up conveyances, wills, and other legal documents—is sometimes valuable as evidence of what the law is.

8. DELEGATED POWERS OF LEGISLATION.—In many cases Parliament has conferred by statute on public officers or bodies the power of making by-laws, rules, or regulations for definite purposes and within prescribed limits, and the exercise of such a power produces rules of law which are equivalent in force to statutory enactment. Thus a committee of judges and lawyers has power to make rules for the procedure in the High Court. In exercising this power they are genuinely legislating, they are not bound by precedent, but make such rules as they think proper. Among other bodies which have similar powers we may instance the Board of Agriculture, Municipal Corporations, and even Railway Companies.

CHAPTER II

COMMON LAW AND EQUITY

1. EQUITY AND MORALITY.—Apart from Common Law and Statute Law, the most important department of our legal system is Equity. We sometimes use the term "equity," or words corresponding to it, in popular language as if it was something altogether outside law. We speak of a judgment in a particular case or of a rule laid down in a judgment as being undoubtedly according to law, but as being "unfair," or "unjust," or "inequitable." In cases of this sort we are really passing a moral judgment upon the law. Such a moral judgment in no way affects the law. It may be a reason why the law should be altered by statute; it does not prevent it from being law, or affect its operation, as long as no alteration in the law is made by statute. But when a modern lawyer uses the terms law and equity he does not mean to say that equity is not law. He is speaking really of two different kinds of law—the Common

Law on the one side, the rules of Equity on the other, which are equally law. They are rules which are not merely morally but legally binding: they are enforced by the courts.

2. The Relation between Law and Equity.—(1) The fact that we have, not, it is true, two systems of law,[1] but two distinct bodies of rules known as Common Law and Equity, is due to the historical fact that we have had for centuries and until recently (*i.e.* till 1875) distinct courts, each of which administered only one set of rules.

(2) These two sets of rules, though distinct, must not be looked upon as two co-ordinate and independent systems. On the contrary, the rules of Equity are only a sort of supplement or appendix to the Common Law; they assume its existence but they add something further. In this way Equity is an *addendum* to the Common Law.

(3) Further, the rules of Equity, though they did not contradict the rules of Common Law, in effect and in practice produced a result opposed to that which would have been produced if the Common Law rules had remained alone. A Common Law right was

[1] The distinction between Law and Equity, or between strict and equitable law, occurs in other systems, such as the Roman. But in no other system have we two bodies of rules so sharply separated.

practically, though not theoretically, nullified by the existence of a countervailing equitable right. In this sense we may speak of a 'conflict or variance' between the rules of Law and the rules of Equity, in the language of section 25 of the Judicature Act, 1873.

(4) Though since the Judicature Acts came into force in 1875 the rules of Common Law and Equity are recognised and administered in the same court, yet they still remain distinct bodies of law, governed largely by different principles. In order to ascertain the rights of any set of facts, we must always ask (i) what is the rule of Common Law? (ii) what difference (if any) is made in the working of this rule by the existence of some rule of Equity applying to the case?

(5) Like the Common Law, the rules of Equity are judicial law, *i.e.* to find them we must look in the first instance to the decisions of the judges who have administered Equity.

3. History.—In the thirteenth century we find three great courts definitely established: King's Bench, Common Pleas, Exchequer. All are King's Courts, as opposed to Local Courts, Lords' Courts, Ecclesiastical Courts. Each has its proper sphere, but in course of time each of them extends its jurisdiction, so that the same matters may often be dealt with indifferently by any

one of them. All these three administer substantially the same law, which, by the time of Edward I, is already called Common Law, and is becoming a fairly definite body of rules, not incapable of growth and expansion in various directions, but still with well-marked outlines which cannot be transgressed. These Courts continue to exist till 1875, and are known as the Common Law Courts.

Standing outside these courts is the Chancellor. He is not originally a judge, nor has he a court. He is the head of a great Government office—what may be called the secretarial office; he is "the King's Secretary of State for all departments";[1] whatever writing has to be done in the King's name is done by the Chancellor or through him and his officers.

In one way the Chancellor is already brought into relation with the administration of justice, though not so as to enable him to modify the law at his pleasure. The writs, *i.e.* the King's commands that a person shall appear in one of the King's Courts in

[1] Maitland, *Equity*, p. 3. I take this opportunity of acknowledging my debt to Maitland's work for a great part (both in form and substance) of what I have to say in this chapter, and of referring the student to that work for fuller information.

answer to a claim, are issued in his name, as they still are to-day, and are issued from his office. Many writs are already framed and well recognised to meet the cases that usually arise; you can have them for the asking, if you pay the fee.

The question whether a man who considers himself wronged has a claim which he can make good will depend on the answer to the question, Is there a writ to meet his case, or if there is not one, can one be framed which the King's Courts will hold good? The Chancery, *i.e.* the Chancellor's office, has a power (Statute of Westminster II, 1285) of framing new writs *in consimili casu*—*i.e.* to meet new cases sufficiently like those for which writs already exist, and new writs are from time to time framed. But here the Common Law Courts have the last word, for they can decide whether the writ is good or not, and if not, the fact that the plaintiff has got the writ will not help him; and in deciding whether a writ is good or not the judges will be guided by the already accepted Common Law principles. Now it will sometimes happen that the working of the law and procedure of the Common Law Courts will result in particular cases in injustice and hardship. *We* might feel inclined to say: Well, that is a pity, but it would be

a greater evil to interfere; it would be worse to make the law uncertain than to leave a particular hardship unredressed. That was not the way that our ancestors looked at the matter. Law and morality were not yet clearly distinguished, nor could one even say that the whole of law or justice was to be found in any one court; the Ecclesiastical Courts, the Local Courts, administered a justice which was not the justice of the Common Law Courts; so the thought was natural that even the King's justice was not exhausted in the powers conferred on his courts. A reserve of justice remained with the King, and so those who could not get relief in the King's ordinary courts might, with some hope of success, petition the King and his Council for redress, if not as a matter of right at least as a favour. These petitions in practice were referred to the Chancellor, who was the chief minister and secretary and the most learned member of the King's Council. In course of time these petitions came to be addressed direct to the Chancellor himself.

Putting aside what does not concern us here, cases where the petitioner asked for redress against the King himself, we may note two kinds of cases where this extraordinary relief is asked for: (1) where the petitioner

has suffered an undoubted legal wrong—been assaulted and beaten, or turned out of his property, but for some reason cannot get redress, because he is poor and his opponent is rich and powerful, because juries are corrupt or timid. In this class of cases the Common Law Courts and public opinion are too strong to tolerate interference; the rule is soon established that the Chancellor is not to hear cases which might be heard by the Common Law Courts. (2) Cases of transactions which give, at any rate, a moral right, but a right which the Common Law Courts cannot or will not protect. In particular we find the cases of what are called "uses" or trusts—transactions whereby a man legally transfers land to another, but with an understanding that the transferee will hold it for the benefit of the former, or for the benefit of those whom he will name in his will. The Common Law has already very strict notions as to the kinds of rights in land which it will protect, and the methods of transfer which it will allow. Uses and trusts the Common Law will not recognise; wills of land, it has decided, are void.[1] But the practice of creating these uses and trusts was popular and was growing, and the absence of all legal protection for

[1] It was only in 1540 that a statute was passed giving power to leave land by will.

them was a great hardship. So we find, by the end of the fourteenth century, that persons are directing petitions to the Chancellor, claiming that they have at least a moral right to the benefit of these uses, and begging him to give them help against the legal owner who is setting up his Common Law rights against them.

Now the Chancellor is at this time usually an ecclesiastic, commonly a bishop, and, as such, interested in, and, at least in his own opinion, a good judge of, questions of morality or "conscience." He is commonly spoken of as the keeper of the King's conscience. What can he do to help the humble suppliant? He cannot interfere directly with the proceedings of the Common Law Courts; he cannot issue a new writ which will have much chance of being held good by those courts. But he can do this: he considers the petition, or Bill, as it is called; if he thinks there is anything in the case, he issues a writ which requires the person complained against to appear, not in a Common Law Court, but before himself, and answer the petition on oath. The writ is called a *subpœna*, because it requires him to appear upon pain of forfeiting a sum of money.

When the defendant comes before the Chancellor, he will have to answer the Bill on

oath. This is very different from the Common Law procedure, which will never compel, or even allow (at that time), one of the parties to an action to give evidence; but it is a procedure, and the only procedure which is suitable for trying such questions as uses and trusts, for which no open public acts, no formal documents may be available as evidence. So, too, the Chancellor tries the whole case himself; he does not—as must be done in Common Law cases—send it to be tried by a jury. It is true that in later times particular questions arising in a case before him, suitable for trial by jury, are sometimes directed by the Chancellor to be so tried.

Suppose now that the Chancellor has decided in favour of the petitioner, has held that the land which legally belongs to the defendant ought to belong, or, 'in conscience,' in equity, morally, does belong to the petitioner. What will he do? He cannot reverse the rule of Common Law; he cannot interfere—at least directly—with proceedings in the Common Law Court; he cannot say that the legal owner is *not* the legal owner. What he can do is to say that the legal owner cannot in conscience, in equity, make use of his Common Law right for his own benefit; he must use it for the benefit of the man for whom he holds it in trust. He does not stop at saying so.

He can, if the legal owner will not act as equity and conscience dictate, punish him, if necessary, by putting him in prison. He can even indirectly, but effectively, interfere with the legal owner's attempts to enforce his legal rights by action in the Common Law Courts. He cannot forbid the Common Law Courts to try an action; but he can forbid a man to bring it, or to go on with it, or to take advantage of the judgment which he has got, and can put him in prison if he does not obey. He has the less scruple in issuing such orders because he can say that he is really doing what is in the man's own highest interests. If he is doing what is against conscience, he is injuring his soul—remember that the Chancellor is an ecclesiastic—and it is better that he should be prevented from inflicting such injury on himself.

This sort of interference, which had started as a matter of special favour in special cases, gradually becomes a regular practice. It becomes popular; uses and trusts become part of the ordinary machinery by which people deal with their property; they even lend themselves to abuse, which has to be checked by Act of Parliament in the fifteenth and sixteenth centuries. The Chancellor develops what in effect is, and comes to be known as, a court—the Court of Chancery. And then

that general principle of Equity, which began as the mere application of moral sense to particular cases, develops into more and more definite rules. If a Chancellor has decided that certain conduct in one case is against conscience, he is likely to decide that similar conduct is against conscience in another: the chances are that another Chancellor will decide the same. You get what in reality is a new set of rules of law—rules which you can rely on as likely or certain to be applied uniformly in the future. And you get a new set of rights—rights which can be enforced in the Chancellor's Court side by side with the Common Law rights, which alone can be enforced in the Common Law Courts, the former in effect, though not in theory, over-riding the latter. You even get to think of two sorts of ownership. From saying that a thing ought to belong to a man, that it ought to be used for his benefit, you come to saying that it actually *is* his, "in equity" or "in conscience."

A few points in the development of Equity may be here noted. In 1535, Henry VIII struck a great blow at uses in the Statute of Uses; but it was a blow that missed its mark Under the name of trusts, equitable rights in property grow up again and flourish. From the Reformation onwards the Chancellor is

usually a layman: Bishop Williams under Charles I was the last clerical Chancellor. Again the Chancellor comes to be usually a lawyer: Lord Shaftesbury under Charles II was the last Chancellor who was not a lawyer. All this tends to create a more definitely legal character for the rules of Equity. Meanwhile Equity is adding new fields of jurisdiction. In the sixteenth century and the beginning of the seventeenth, *fraud* and *accident*—especially the accidental loss of a document—are regarded as matters peculiarly appropriate for relief in a Court of Equity—matters which a Common Law Court cannot sufficiently deal with. Mortgages form a special subject which the Chancellor deals with. A man borrows money and transfers his land to the creditor, making the creditor legally owner. He promises to pay on a definite date. If he keeps his promise, his land is to be returned to him; if not, it is to belong to the creditor for ever. Suppose by mistake or accident he fails to repay on the day named, is it fair that he should be held to the terms of the deed? Equity says no, and soon goes so far as to lay down a rule that a mortgage is a mere security for money, and something quite different from a genuine transfer of the ownership. The debtor remains in a sense owner; he has a new sort of equitable ownership,

an "equity of redemption," which he is only to lose after the court has given him ample opportunity to repay, and it becomes plain to the court that he cannot or will not pay.

In the seventeenth century the Chancery had to struggle for its life against the Common Law Courts. They resented the way in which the Chancellor interfered—in effect, though not in theory—with their judgments, by prohibiting the man who was successful at Common Law from putting them in force. A great quarrel broke out between Chief Justice Coke and Lord Ellesmere, the Chancellor: it was decided by King James I in favour of the latter. Under the Commonwealth there were proposals for reforming, and even abolishing, the Chancery. Its extraordinary jurisdiction in civil matters was compared with the extraordinary jurisdiction of the now defunct Star Chamber in criminal matters. These proposals came to nothing. It was clear that Chancery was doing work which the Common Law Courts could not or would not do, and without which men's rights could not be sufficiently protected. Equity had come to stay as part of the law of the land.

The work increases. The Master of the Rolls, who is originally a very subordinate officer, with charge of the documents of the court, comes to be at the end of the seventeenth

usually a layman: Bishop Williams under Charles I was the last clerical Chancellor. Again the Chancellor comes to be usually a lawyer: Lord Shaftesbury under Charles II was the last Chancellor who was not a lawyer. All this tends to create a more definitely legal character for the rules of Equity. Meanwhile Equity is adding new fields of jurisdiction. In the sixteenth century and the beginning of the seventeenth, *fraud* and *accident*—especially the accidental loss of a document—are regarded as matters peculiarly appropriate for relief in a Court of Equity—matters which a Common Law Court cannot sufficiently deal with. Mortgages form a special subject which the Chancellor deals with. A man borrows money and transfers his land to the creditor, making the creditor legally owner. He promises to pay on a definite date. If he keeps his promise, his land is to be returned to him; if not, it is to belong to the creditor for ever. Suppose by mistake or accident he fails to repay on the day named, is it fair that he should be held to the terms of the deed? Equity says no, and soon goes so far as to lay down a rule that a mortgage is a mere security for money, and something quite different from a genuine transfer of the ownership. The debtor remains in a sense owner; he has a new sort of equitable ownership

able interest is good against every one who gets hold of the property, unless he has the legal ownership and acquired the property for value without notice, *i.e.* without knowledge of, and without reason to suspect, the existence of the equitable interest. Common Law knows next to nothing of notice. At Common Law either you have got no rights at all, or you have rights which are good against every one, notice or no notice. That doctrine of notice has got into the Common Law in one or two places, *e.g.* in the law about the sale of goods in market overt, and in the law of negotiable instruments; but; broadly speaking, whenever you have got rights which depend upon notice; you may be pretty sure that you are in the sphere of Equity.

Then as regards contracts. Notice, first, the doctrine of undue influence. Common Law treats a contract as voidable if made under duress, *i.e.* threats of violence to life or limb; it took no account of more subtle forms of pressure—the unfair advantage taken of a man in distressed circumstances, the influence exercised in certain relations, such as that of a guardian and his former ward, or solicitor and client. But Equity treated such pressure as a ground for holding the transaction voidable. It would not allow it to be enforced against the promisor; and

real property in the strict sense, *i.e.* freeholds and copyholds, it is true that the trust is not necessary. Common Law will allow us to cut up a freehold estate into successive estates, each recognised by Common Law.[1] Still even there it may be useful. You may want to make sure that the legal ownership shall not vest in an infant, who would be unable to manage or deal with it; you vest it in grown-up trustees who can do so for his benefit. If you are settling a leasehold, you cannot do without the trust, because you cannot (except perhaps by will) create such successive interests in it which the Common Law recognises. You give it to trustees, who hold it upon trust for the various persons in succession. So, too, if a settlement is made of money or stocks and shares. So with mortgages. We have not yet invented a way of mortgaging property without creating equitable interests. Either the debtor conveys the legal right to a mortgagee, and retains an equitable interest—the "Equity of Redemption"—or else he retains the legal right himself, and gives an equitable interest to the lender, as by a deposit of title-deeds.

Very characteristic in connection with these equitable interests is the doctrine of notice, or, more fully, the doctrine that an equit-

[1] See Chapter V, p. 124.

able interest is good against every one who gets hold of the property, unless he has the legal ownership and acquired the property for value without notice, *i.e.* without knowledge of, and without reason to suspect, the existence of the equitable interest. Common Law knows next to nothing of notice. At Common Law either you have got no rights at all, or you have rights which are good against every one, notice or no notice. That doctrine of notice has got into the Common Law in one or two places, *e.g.* in the law about the sale of goods in market overt, and in the law of negotiable instruments; but; broadly speaking, whenever you have got rights which depend upon notice; you may be pretty sure that you are in the sphere of Equity.

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if property had been transferred, the recipient was treated as holding it for the benefit of the person who had parted with it, and as bound to restore it. So in the case of fraud and misrepresentation Equity interfered, though Common Law took account of them too. It is not clear that the rules in Common Law and Equity were quite the same on these subjects; but, at any rate, Equity had a special protection for the party who had suffered. Common Law might enable the defrauded party to resist an action brought against him on the contract; Equity could order the document to be handed up and destroyed or cancelled. That might be a necessary protection in order, *e.g.*, to prevent a cheque obtained by fraud from getting into the hands of an innocent holder, who would be in a better position than the original party to the fraud. So, too, Equity might order a document executed under a mistake to be rectified; Common Law would at most treat it as void.

Then there are the rules about time and penalties. Common Law would treat a provision in a contract as to time as being "of the essence of the contract," meaning that if a certain act was not done by one party within a certain stipulated time, he should lose all rights under the contract; Equity

treated such a provision in general as not being of the essence of the contract, but as giving a right only to damages. Again, where a contract provides, *e.g.*, that A shall pay £100 on the 1st January next, and if he does not do so, shall pay £200, Equity would not allow the £200 to be claimed, but treated it only as a security for the £100 with interest. The equitable rules about penalties were, however, to a large extent already introduced into the Common Law Courts by statutes passed at the end of the seventeenth and early in the eighteenth century.

Again, we have the rules about the assignment of rights under contract. A owes money to B. Common Law regards this as purely a relation between A and B. B agrees with C that C shall have the right to claim the debt from A. Common Law pays no attention, C cannot claim the debt. The most that can be done is that B may allow C to use his name to claim the money. But Equity treats the debt as transferable. It will compel B to let C make the legal claim in his name; in the worst case it might allow C to take proceedings in Equity in his own name against A. Thus it came to be said that "in Equity debts and choses in action are assignable."

Further, we must notice the law about

married women. Common Law put the wife, both as regards rights and liabilities, in a very subordinate position to her husband. Her tangible moveable goods simply became her husband's property. Debts due to her might be collected by the husband; and if that was done, of course the money was his. If he did not collect it, and the wife survived him, the claim for the debt remained hers. Her freehold and copyhold land, it is true, remained her own; but the husband had the enjoyment of it at least during the continuance of the marriage. Neither could dispose of the inheritance without the consent of the other Leaseholds were in a position very much like debts. The husband had a right to dispose of them for his own benefit while he lived, and his wife had no power of disposition during that time, though, if she survived him, and they had not been disposed of, they would be hers again. Further, no married woman could make a will without her husband's consent, nor (with trifling exceptions) make any contract, except as his agent: it would have been absurd to let her contract when she had no free property out of which she could pay. But then about the end of the seventeenth century Equity invented the separate use for married women. Property might be given to a trustee upon trust for the

separate use of the married woman, free from the control and liabilities of her husband. Now, if it had simply been given to the woman, Common Law would have said, "We can pay no attention to this separate use. If it is the woman's, it comes under the husband's control, in spite of anything you say to the contrary." But then the property was not given to her; it was given on the face of it to the trustee. Common Law could not prevent the trustee employing it for the wife's benefit, and Equity would compel him to do so. And then Equity went one step further. Suppose a man who knows nothing of trusts and trustees, but has heard something of the separate use, leaves property—say £1000—to his married daughter "for her separate use." The husband pounces on it: the Common Law makes it his. But Equity will not be baulked. True, the £1000 belongs to the husband at law—there is no denying it; but Equity will compel him to apply it for the wife's benefit. Has not the testator, in fact, declared a trust in saying "for her separate use"? Nothing easier than to turn the husband into a trustee for his own wife. And so this property held for the wife's separate use comes to be her "separate estate" in Equity. Equity treats her as if she was the unmarried owner of it;

it lets her dispose of it as she pleases in her lifetime, it lets her leave it by will, it even lets her make contracts which can be enforced against it, and against it only. And then Equity gets afraid of what it has done. If the wife can so easily dispose of this property, it may be that her husband will coax or bully her into parting with it to him or to his creditors, and so it allows her a privilege which no other grown-up person of sound mind in the country can enjoy. The will or settlement may impose the restraint on anticipation. In that case, no act of the married woman is to affect her right to the capital or future income of the property. It is just because the whole of this institution of married women's property existed in Equity only that Equity could mould the institution just as it pleased.

And then, finally, look at what Equity can do for the successful plaintiff—the 'remedy,' the 'relief' which it can give him. With few exceptions the only thing that Common Law can do is to give him *money* compensation. If you have been wrongfully turned out of your land, then, it is true, Common Law will put you back into possession; but this is practically the only exception from the rule that the Common Law remedy for every wrong and every breach of contract is *dam-*

ages. With the one exception mentioned, Common Law will not order a defendant to do anything except pay money. It is a much easier order to enforce. It is easier to say whether a man has paid the money or not than to say whether he has complied with other orders; and if he fails to pay, it is easy to get the money by selling his goods, if he has any. But it is not always satisfactory to the plaintiff. It may not be money that he wants; and even if he would be satisfied with money, it may be very hard to say what would be a fair compensation for his loss, and a jury may not be the most suitable body for assessing it. Suppose a contract for the sale of land; the seller refuses to perform it. In the eye of the Common Law there is plenty of land as good elsewhere; but the purchaser has set his heart on just this piece of land, and damages (even if liberally assessed, which is not always the case) are not what he wants. Or suppose the purchaser backs out. It may be of vital importance to the seller to get the money instead of the land; but he will rarely succeed in getting more than his out-of-pocket expenses. Or suppose, again, that your neighbour has agreed with you that he will not open a public-house or carry on a school of music next door, and does and threatens to continue doing

one or the other; or that you have a right to light for your windows, and he threatens to build a building within three feet of them. In all such cases you may not be satisfied to receive even large damages for the wrong done; and what the amount of damages is to be may be very uncertain. At any rate, if damages are the only thing to be got, your wealthy neighbour might buy the right to annoy you. It was to meet cases of this kind that Equity invented the great remedies of *specific performance* and *injunction*: specific performance to compel a man actually to do what he has promised; to give you the land in return for the money; to pay you the purchase-money in return for the land; injunction to forbid him to do what he has promised not to do, or what he has no right to do; forbid him to open the public-house or the music-school, forbid him to build so as to block up your light, even compel him to pull down the objectionable wall; the last sort of injunction is called *mandatory*.

5. THE EFFECT OF THE JUDICATURE ACTS.—Now, what have the Judicature Acts, 1873 and 1875, done?

(1) They have established a single court with all the powers both of a Court of Law and a Court of Equity. The distribu-

tion of work between the divisions of that court is only a matter of convenience; the King's Bench Division can never say "here a matter of Equity is involved; we cannot decide it," or the Chancery Division "this is a question of Common Law; you ought to have gone to a Common Law Court." At the worst the plaintiff who starts in the wrong division will be removed to another division, and may have to pay the expenses, if any, incurred by his mistake; but he cannot fail altogether for his mistake.

(2) Multiplicity of proceedings is avoided. Suppose a dispute about a piece of land. A is the legal owner; B has an equitable claim. Under the old system, A takes proceedings in the Common Law Courts to establish his rights; B has no defence; he must go to the Court of Chancery to get, among other things, an injunction to forbid A to go on. Under the Judicature Acts no injunction can be granted by one division of the Court against proceedings in another division; but in every branch of the court an equitable right may be directly asserted and may be pleaded as a defence to a legal claim. So, again, suppose A is blocking up B's light. Under the old system B might have had to bring two actions against A: in the Common Law Courts to get damages,

in the Chancery to get an injunction to forbid the continuance of the building. He can now get both in the same action, because the same court can both give damages and also grant an injunction. Or suppose that A has broken his contract to sell land to B; here, again, B might have had to bring one action in a Common Law Court for damages, and another in the Chancery to compel specific performance. Or, again, A has a purely legal claim against B; but in order to prove his case he wants to make B disclose facts or documents which support A's claims. There A would have had to take proceedings for 'discovery' against B in Chancery to get the disclosure, and another action in the Common Law Courts for his actual claim. He now brings an action in the High Court, in the course of which he gets an order for discovery. B is compelled to disclose the documents which he has that support A's case, and A may be allowed to administer interrogatories to B—questions in writing which B must answer also in writing but upon oath.

(3) On the other hand, the old Chancery practice which compelled B to go through the whole of A's story and give an answer upon oath to everything said in it has disappeared; the evidence in the ordinary

course is given *viva voce* in court when the trial comes on.

(4) The Acts introduced a whole code of procedure, the Rules of the Supreme Court, which in various ways assimilated the Common Law and the Equity procedure, taking the good points of both.

(5) The 25th section of the Act of 1873 dealt specially with a number of points in which there was a difference between Law and Equity, of which the following may here be mentioned:

(*a*) Mortgages. Common Law treated the mortgagee as the owner of the land in case of the ordinary legal mortgage; Equity treated the mortgagor as still being in a sense owner. It is true that it would not prevent the mortgagee taking possession, though it made his position as uncomfortable as possible if he did take possession. But suppose that, as usually happens, the mortgagor is left in possession, and that a stranger turns him out, or tries to do so. Common Law found a difficulty in protecting him against the stranger. The mortgagee would have to be joined as plaintiff. The Judicature Act decided that as against a stranger the mortgagor in possession must be treated as owner. He can sue in his own name.

(*b*) Assignment of debts and choses in

action. Here you remember that Common Law would not recognise the assignment; Equity in effect would, by compelling the assignor to lend the use of his name to the assignee for the purpose of suing the debtor, or, in the worst case, allowing the assignee to sue directly against the debtor, but requiring him, as a rule, to make the assignor a defendant. Here the Judicature Act made a definite alteration in the law. It left the old equitable assignment untouched, and it may be used still. But it created a new kind of assignment, which was a legal assignment in the sense that the assignee might sue directly in his own name without making the assignor a party; but it made certain special requirements: (1) the assignment must be absolute, (2) it must be in writing, (3) notice in writing to the debtor is required. None of these requirements exist for the equitable assignments, though notice to the debtor determines the order in which assignments take effect. On the other hand, the new kind of assignment resembles the equitable assignment in being subject to equities, *i.e.* to claims or defences which the debtor or other person might have set up against the assignor.

(*c*) The rules of Equity as to stipulations about time and other provisions which would

not be held by Equity to be of the essence of the contract, are to prevail in all cases.

(6) Finally, the 25th section contains a general provision that in all other matters where there is a conflict or variance between the rules of Law and the rules of Equity the latter are to prevail. This last provision looks so sweeping that there is a danger of supposing that it has swept away all difference between legal and equitable rights. That would be a great mistake. One might imagine, for instance, that it has turned equitable estates and rights into legal estates and rights. That is not so. The great characteristic of equitable estates, namely, that they will be destroyed if the legal estate gets into the hands of a purchaser for value without notice, still holds good. A is a trustee of property for B, *i.e.* A has a legal right which he is bound to use for B's benefit; B is said to have an equitable right to it or an equitable estate in it. Since the Judicature Act, just as much as before it, if A sells the property to C, who knows nothing of the trust, and transfers the legal ownership to him, B's rights to the property are destroyed; he can only look to A for compensation for the breach of trust. Or, again, one might suppose that this section has extended equitable doctrines to cases to

which Equity did not apply them, because they formerly never came into a Court of Equity. One might suppose that since they now come into a court with an equitable jurisdiction, the equitable doctrine must be applied. That is not so. Take the doctrine of part performance. The Statute of Frauds [1] made certain contracts unenforceable without written evidence; a Common Law Court could not enforce them. But in special classes of cases which came before a Court of Equity, especially in contracts for the sale of land, of which specific performance could be obtained, Equity held that if the contract, though not in writing, had been partly performed, as by giving and taking possession of the land, it was equitable that specific performance should be granted. In 1879 a case arose where a contract for service was made unenforceable by the statute because it was not to be performed within a year, and there was no writing. The servant was wrongfully dismissed. But there had been part performance, for the servant had actually served for part of the time. He therefore argued that he was now entitled to succeed on the equitable doctrine of part performance. He relied on this section, which says that where there is a difference between rules of Law and

[1] See Chapter VI, p. 185.

rules of Equity the latter must prevail. He failed, however. It was held that the equitable rules were not extended by the Act to cases which before the Act could not have come into a Court of Equity at all; an action on a contract of service could not have come into a Court of Equity, because specific performance of such a contract was never granted under any circumstances.

The general result of the fusion of Law and Equity has been, then, not to alter substantive law, but merely to alter and simplify the procedure. In order to find out what the substantive law is, we must still go back to the time when Law and Equity were administered in different courts; we may still have to picture to ourselves distinct proceedings taken about the same matter in those courts, and work out the result of those separate proceedings.

CHAPTER III

PROBATE, DIVORCE, AND ADMIRALTY

THERE are three minor bodies of law, Probate, Divorce, and Admiralty, which were developed in jurisdictions distinct from the Common Law Courts and the Court of Chancery. In these we see more influence of foreign law than elsewhere in our legal system.

1. THE CHURCH COURTS.—From William the Conqueror onwards the Church Courts are separated from the Lay Courts: the Bishop has his court; the Archbishop a superior or prerogative court; from him before the Reformation there is an appeal to the Pope. The law of these courts is the Church or Canon Law—the Common Law of the Western Church. That law was formed by ecclesiastical lawyers who knew the Roman law. It was first systematised by Gratian of Bologna in the twelfth century. It was the law of the Church in England, as in other parts of Western Europe, though within limits local and provincial variations were possible. These courts were treated by the

King's Courts as subordinate, in the sense that the King's Courts could issue prohibitions to prevent them from dealing with matters that did not concern them. In spite of this they acquired and kept for themselves a large sphere of jurisdiction. With a great part of the matters with which they dealt we have not much concern. Their exclusive claim to punish clergymen for ordinary offences has long since disappeared; the power to try and punish laymen for immorality has become practically obsolete; their jurisdiction over strictly ecclesiastical offences of clergymen, such as heresy and ritual, still remains and is still exercised by them. In the struggle between them and the King's Courts for jurisdiction over ecclesiastical property—the right to present a clergyman to a living, for instance—the King's Courts were successful at an early time in getting and keeping the jurisdiction in their own hands. But in two matters which concern primarily what we should consider the civil rights of every one, the Church Courts long retained their jurisdiction: the disposition of the goods of the dead, and questions of marriage and divorce

2. PROBATE AND ADMINISTRATION. — As regards the real estate of the deceased, it is settled by our early Common Law that he

can make no will, except where there is a local custom to that effect. But as regards his goods and chattels, which include his leaseholds, it is early admitted that he has at least a limited power to dispose by will —limited because his wife and children may have rights which he cannot override. If he makes no will, we can hardly say that there is in early times any common law how his goods shall be divided; much or all will depend on local custom. The Common Law takes little interest in the goods, which are of far less importance, and especially of far less public importance, than the land. Now the Church has a definite interest in the goods of the deceased. The religious belief of the time requires at least a substantial part of his property to be devoted to the good of his soul. If he makes a will, as most men do, it is almost certain that he will set apart a considerable proportion for the saying of masses; if he should neglect to do so, and in the twelfth and thirteenth centuries it is regarded as almost a sin to die without making a will, the Church ought to make the provision which he has failed to make for his soul. Thus the Church Courts assume a jurisdiction over dead men's goods. If there is a will—and wills at that time are very easy to make, mere word of mouth is

sufficient—the Bishop's Court is the proper place in which it must be proved; the Bishop's Court will see that the executor carries out his duties properly. If there is no will, then the Bishop will take charge of the goods that he leaves, and make a suitable disposition of them. He seems to have had a wide discretion, which was not always well exercised. Two statutes provided a remedy. In 1285 the "Ordinary," *i.e.* the ecclesiastical superior who has the jurisdiction, is required by statute to pay the debts of the intestate, just as the executor, (*i.e.* the person appointed by the will to carry out the will) is required to pay them. In 1357 he is required by statute to entrust the administration of the property to the near relations of the deceased. Then we get the office of *administrator*. The administrator is the person who, in the absence of an executor, must deal with the deceased's property, pay his debts, and make a proper division among those entitled. He receives what are called *letters of administration*, which give him the title to the property; even where there is a will, but no executor is appointed, there must be a grant of letters of administration *cum testamento annexo*, "with the will attached."

It is true that the Ecclesiastical Court is

not the only one which deals with the goods of dead men; the executor or administrator may have to sue in the Common Law Courts to recover the claims or property of the deceased, and the deceased's creditors can sue him there. But neither the Ecclesiastical Courts nor the Common Law Courts are well adapted to settle the numerous conflicting rights of creditors, legatees, and next of kin; trusts are often involved, and during the last two centuries the most effectual and usual method of asserting a claim to or against the estate of a deceased person is to get the estate administered in Chancery. That Court tells the executor or administrator what to do, or takes the whole estate under its charge and distributes it. But all this supposes that there is already a will proved, or letters of administration granted by the Ecclesiastical Court. Without probate of the will or letters of administration, neither executor nor administrator can take any steps in any other court of law, for the executor's proof of his title, and the administrator's title itself can only be given by the Ecclesiastical Court. That court keeps the key which unlocks the estate. The Reformation left the jurisdiction untouched. The Statute of Distribution, 1670, established a code for the distribution of the property of

intestate persons, modelled largely on the Roman law. Local customs which gave rights to wife and children which could not be overridden by will were to a great extent removed in 1692 and finally swept away in 1857.

The system lasts into the middle of the nineteenth century. There are as many Probate Courts as there are dioceses, in addition to the Prerogative Courts of the two Archbishops, and a number of courts in places called Peculiars, places outside a bishop's jurisdiction, and under a special ecclesiastical jurisdiction of their own. The appropriate court was usually the court of the diocese in which the deceased's property happened to be; if there was property in several dioceses, it was necessary to apply to the Prerogative Court. The records of these numerous courts were often badly kept, and there might be damage or loss of the original wills which the courts kept under their custody. In 1857 the whole of the jurisdiction of the Ecclesiastical Courts in Probate and Administration was taken away and was vested in a new court—the Court of Probate.

3. Marriage and Divorce. — This also, from an early time in the Middle Ages, fell largely into the hands of the Ecclesiastical Courts. They assume a jurisdiction to declare

whether a marriage has taken place or not, whether there is any impediment which makes it void or voidable. Questions of legitimacy may also be decided by them. They grant also what is called a divorce *a mensa et thoro*, or rather what we should call a judicial separation, *i.e.* they release the parties from the duty of living together on grounds of cruelty or misconduct; but a divorce in the modern sense, which allows the parties to marry again, is not recognised by the medieval church in the case of any marriage which is originally valid. After the Reformation it looks for a moment as if the Ecclesiastical Courts would allow even a divorce in the modern sense; but the attempt fails, and the only way of getting a complete dissolution of marriage is by special Act of Parliament (as is still the case for people domiciled in Ireland). This Divorce Act was only allowed after proceedings had been taken both in the Ecclesiastical Courts for separation, and in the Common Law Courts for damages. The expense of these combined proceedings was enormous, and made divorce a luxury of the very rich.

Here again, in 1857, statute took away the whole of the matrimonial jurisdiction from the Ecclesiastical Courts and vested it in a new court, the Divorce Court, which was

enabled to do not only everything that the Ecclesiastical Court could have done, but also what previously needed the combined efforts of the Ecclesiastical Courts, the Common Law Courts, and an Act of Parliament.

4. ADMIRALTY.—The Middle Ages knew of a number of courts with a commercial and maritime jurisdiction, dealing with commerce and shipping, mainly local courts, *e.g.* in the Cinque Ports. It knew of a Law Merchant which was different from the Common Law and had an international character, a law founded on the custom of merchants and seafaring men of all nations. Gradually these courts decay, partly owing to the encroachment of the Admiralty, partly owing to the jealousy of the Common Law Courts, which interfere with them and extend their own jurisdiction. In the course of the seventeenth and eighteenth centuries the Law Merchant, apart from maritime law, is absorbed into the Common Law; thus the law of such matters as Bills of Exchange comes to be part of the law of the land, and comes to have a specially English character. On the Continent mercantile law is still regarded as something separate from the ordinary law.

The Admiral whose office dates from the end of the thirteenth century has at first no jurisdiction apart from the discipline of the fleet,

but in the course of the fourteenth century we find him assuming a jurisdiction to punish crimes, such as piracy, committed at sea, as well as a civil jurisdiction over shipping and commercial matters. The law and procedure of his court has an international rather than a purely English character; it administers a law which is to be found in the medieval maritime codes, such as the Laws of Oleron and the so-called Law of Rhodes: in the background, as a supplementary law, is the Civil or Roman Law. Its procedure is that of Roman Law: the parties can be examined on oath. But the Admiralty Court also suffers from the jealousy of the Common Law. Its criminal jurisdiction is, in the sixteenth century, vested in a set of commissioners who come in practice to be invariably judges of the Common Law Courts. Its civil jurisdiction was encroached upon, as contracts made and wrongs done abroad or at sea were brought within the jurisdiction of the ordinary courts by fictions, such as that Bordeaux was in Cheapside. Prohibitions were issued to prevent the Admiralty from dealing with any case that the Common Law Courts could deal with.

The result of this struggle, which lasted through the sixteenth and seventeenth centuries, was to confine the court to a very limited

jurisdiction, dealing with purely maritime matters, such as salvage and damage by collision at sea. It still retained such jurisdiction, and received some increase and confirmation of it in the nineteenth century. The Maritime Law which it administered—though it gradually became more English and less international—still retained a peculiar character. It is, for instance, still the rule, in the case of collision at sea, that contributory negligence[1] does not deprive a plaintiff of his remedy altogether as it does at Common Law, but the loss is divided.

The Acts of 1857 which established the Probate and Divorce Courts provided that the ordinary judge of these courts should be the same person as the Admiralty judge. Thus it was a natural step that in 1875 the Probate, Divorce, and Admiralty jurisdictions should be entrusted to a single division of the High Court.

[1] See Chapter VII, p. 208. The old rule in Admiralty was that the loss should be equally divided, but the Maritime Conventions Act, 1911, directs that it shall, if possible, be divided in proportion to the degree of fault.

CHAPTER IV

PERSONS AND PERSONAL RELATIONS

1. UNBORN PERSONS.—Even before birth a human being is not without legal recognition. The ante-natal life is protected by stringent provisions of the criminal law, and an ancient rule postpones the execution of a woman with child till she has been delivered. The Irish courts have held that a child which was born deformed in consequence of an injury to its mother, caused by the fault of a railway company on whose line she was travelling, could not recover damages; but the decision turned on the view that the company, not having means of knowledge of its presence, owed no duty towards it, and it is not clear that under no circumstances could damages be recovered for such injuries.

In the law of property, a child conceived, but not yet born, will be treated as born, at any rate where it is for its advantage that it should be so treated. For instance, even a bequest to persons "born previously to the date of my will" will include a person born within

due time afterwards. But if the child is never born alive, things will remain as if it had never existed. Further, by wills and settlements, provision may be made for those who may come into existence at a future time, subject to rules restricting the indefinite tying up of property, the most important of which — the "rule against perpetuities" — forbids any disposition which is not certain to take effect (if it takes effect at all) within lives in being and twenty-one years afterwards.

2. INFANTS.—At birth a child enters the condition of infancy — a condition which ceases at the age of twenty-one years, or, rather, at the first moment of the day preceding the twenty-first birthday. In what follows the term "infant" will be used in its strict sense of a person who is in the condition of infancy as above defined. It would be a mistake to regard the condition of infancy as one of uniform incapacity throughout and for all purposes. In Criminal Law the material periods are those up to seven and between seven and fourteen years. A child under seven incurs no criminal liability for its acts; a child over seven, but under fourteen, incurs no such liability, unless it is shown that it had sufficient capacity to know that its act was wrong. A person above the age of four-

teen, though under twenty-one, does not differ in general as regards criminal liability from a person of full age, though modern legislation has made special provision for the trial and punishment of persons under sixteen. The marriages of boys over fourteen and girls over twelve, if duly celebrated, are completely valid, and the only check on such marriages without the consent of parents or guardians is the difficulty of getting them celebrated by the clergyman or proper officer without making a false declaration, which involves penal consequences. Even marriages at an earlier age were once common, and are still legally possible; but such a marriage would not be binding unless affirmed when the age of fourteen or twelve, as the case might be, was attained.

There is no general rule which exempts infants from liability for "tort," *i.e.* civil injury other than breach of contract or trust. An infant who damages another by carelessly running into him on his bicycle is liable just as a person of full age would be. Practically, the liability is not often of much value to the injured person, for the infant probably has no property available to satisfy it, and his parents are not liable for his acts. In two ways, however, the liability of an infant for civil wrongs is restricted. It sometimes

happens that the wrong is so closely connected with a contract that the enforcement of liability for the wrong would in effect amount to an enforcement of the contract. An infant who has hired a horse injures it by careless riding. In such a case an adult might be held liable either for breach of his contract to use proper care or for a wrong independent of the contract; an infant has been held not to be liable at all. Again, some wrongs, such as fraud, in their essence involve a guilty state of mind, and in such cases the extreme youth of the wrong-doer may be inconsistent with the existence of such a state of mind.

It is in respect of property and contract that the incapacity of infancy has its most general operation. This incapacity is a one-sided one. Property may be transferred, binding promises may be made to an infant, but in general he is unable to make a binding disposition of his property or to make binding promises to others. As regards property, it should be noticed that law and practice, to a large extent, make it unlikely that property of any considerable value will come into the direct ownership of an infant. When property passes on death, it will go in the first instance to the executor appointed by will, or the administrator appointed by the court and

charged with the duty of dealing with it and transferring it to the persons entitled. Similarly, under the settlements which people of property commonly make, the property will be in the hands of trustees. The infant cannot give a receipt which such persons can safely take, and they must therefore retain the property to which an infant is entitled till he attains full age, and meanwhile deal with it under the directions of the will or settlement or under the orders of the court. In some cases they may relieve themselves by transferring it into the control of the court.

Where an infant actually has in his hands tangible moveable property, it would seem that he has a power of disposing of it, of which the limits—if such there are—have not been determined. It cannot be supposed, for instance, that a sale by an infant of years of discretion of his books or personal effects could (in the absence of fraud or unfair dealing) be called in question. It is clear that a payment made by him for goods bought is binding, though payment could not have been enforced against him. A gift of a large sum of money by an infant was after her death held valid. But the bulk of "property," in the modern sense of the word, is not of this kind. Land can only be disposed of by sealed

writing; and a writing or a sealed writing is necessary for the transfer of such things as stocks and shares, claims against debtors, and interests in property held by others upon trust. In all such cases the rule would seem to apply that the infant's acts are "voidable"; they become binding on him only if, after attaining full age, he fails within a reasonable time to repudiate them. The rule has been relaxed so as to enable infants—if male, at the age of twenty, and if female, at the age of seventeen—to make a binding settlement of their property upon marriage, but only with the sanction of the court.

With the exception of soldiers on active service and mariners while at sea, no infant can dispose of his property by will. But in some cases a person of the age of sixteen can make what is in effect equivalent to a disposition by will: a member of a Trade Union or Friendly Society may, for instance, at that age nominate in writing a person to receive moneys payable on his death by the Union or Society

The contracts of an infant are at Common Law voidable. But in this connexion the word "voidable" has two senses. In the case of contracts creating continuing or recurrent liabilities incident to the disposition or holding of property, such as a settlement or a leasehold tenancy, the infant, on attain-

ing full age, becomes bound unless within a reasonable time he takes steps to repudiate liability. In all other cases—as, for instance, a sale of goods or a contract for services or a loan of money—the contract was voidable in the sense that the infant would not, on attaining full age, become liable unless he took steps to ratify it. As regards this latter class of contracts, the Infants' Relief Act, 1874, has very much altered the law. Contracts for the loan of money and supply of goods to infants and "accounts stated" with infants are made altogether void, while the possibility of ratification is taken away from all contracts; and even a new promise to perform the contract, whether made upon a fresh consideration or not, cannot be enforced by action. Whether an infant has now any right under a contract which the Act declares void is not clear; but in other cases it is certain that he may still sue an adult upon a contract (*e.g.* mutual promises of marriage) which is unenforceable against the infant and incapable of ratification by him.

To the general invalidity of infants' contracts the Common Law recognised the exceptions of contracts for necessaries and contracts for the infants' benefit, and these exceptions are not affected by statute. Contracts for necessaries include contracts

for such goods, lodging, and instruction as are reasonably necessary for the infant, having regard to his station in life and his needs at the time of the contract. The party who supplies the infant does so at his peril; it will not avail him that he did not know that he was dealing with an infant, or that he thought that his position in life was such as to make the goods necessary, or that he did not know that the infant was already sufficiently supplied. Of contracts for the benefit of the infant, so far as they do not coincide with contracts for necessaries, a contract for the employment of the infant, where his position in life makes employment desirable for him, is a typical case.

3. PARENTS AND GUARDIANS. — In some systems of law the disability of persons under full age is helped out by the powers of the parent or guardian, who can represent the child, and, by acting on his behalf or giving concurrence to his acts, can make dispositions of his property and contracts binding on him. Of such an institution we see but the rudiments or isolated survivals in English law. Our medieval law of guardianship was concerned mainly with infants who were heirs of land; and though the "guardian in socage" —the nearest relation of the infant to whom the infant's land cannot descend—has not

been abolished, the practice of settlement and of appointing trustees in whom the land, or at least powers over it, are vested, has in practice rendered rare the occasions on which the very limited powers of such or any kind of guardians can be exercised over an infant's land. Over other property of an infant, neither parents nor guardians have now—if they ever had—any effective powers, except such as a will or settlement or an order of the court may give them; they cannot, for instance, give a valid receipt for a legacy or money payable to the child. For purposes of litigation, it is true, an infant can and must be represented by an adult, who will be called "the next friend" of an infant plaintiff, the "guardian *ad litem*" of an infant defendant; but such a next friend or guardian represents the infant only for the purposes of the particular lawsuit, and is not necessarily, though he is commonly, the infant's parent or general guardian.

Broadly speaking, then, the powers and duties of parents and guardians relate not to property, but to the care and custody of the infant's person. The father is, in the first instance, and to the exclusion of the mother, entitled to the control and custody of the infant child, and is at the same time liable for its maintenance—a liability, however, which can

be effectively enforced only by the machinery of the Poor Law. A mother who is a widow or has separate estate is under the like liability, and in case of need children are similarly bound to maintain their parents. The father cannot by agreement deprive himself of his right, except in the case of a separation agreement between husband and wife; and even such an agreement will not be enforced by the court if the court considers it not to be for the child's benefit. Upon the father's death the mother will, under comparatively recent legislation, become guardian of the child, though jointly with any guardians appointed by the father by deed or will. The mother may similarly appoint guardians; but a guardian appointed by her cannot act until after the death of both parents, and then jointly with any guardian appointed by the father. The court has always had power to take a child out of the custody of a parent—even a father—or guardian in cases of misconduct or unfitness, and in such cases, or in the absence of any lawful guardian, to appoint a suitable person as guardian.

The powers of parents and guardians include the power of administering reasonable punishment, and such a power may be delegated by them to others, such as school-

masters, under whose control the child is placed.

4. Legitimacy. — Broadly speaking, one may say that every child is legitimate which is born during the continuance of a marriage or within due time afterwards. The presumption that the husband is the father of his wife's children is one that can be overthrown only by evidence of the most cogent, though not of the most direct, kind. The rule adopted in most countries that an illegitimate child is made legitimate by the subsequent marriage of its parents has never been followed in England. On the other hand, legitimacy is with us, owing to the complete freedom of will-making, a matter of less importance than elsewhere. Yet even under a will illegitimate children or relations may fail to obtain what was intended for them, since words such as "children" will be taken to refer to legitimate relationship only, unless there are circumstances or expressions inconsistent with such an interpretation. Where there is no will, illegitimate children or relations are excluded from the succession altogether. The mother of an illegitimate child is entitled to its custody to the exclusion of the father, and is primarily liable for its maintenance, though, upon application to a court of summary jurisdic-

tion and sufficient proof of the paternity, she can compel the father to make a limited contribution until the child reaches the age of sixteen. Under the Workmen's Compensation Act, 1906, illegitimate relations are included among the dependants who are entitled to claim compensation for the death of a workman caused by accident.

5. Married Women.—Women, though, for the most part, excluded from public functions, are not by reason merely of their sex in a substantially different position from men as regards criminal liability, property, and contract, if we except the rule which prefers males to females in the succession to real estate on intestacy. A married woman, on the other hand, has at Common Law a very peculiar status involving both disabilities and privileges. Even now the rigour of the criminal law is relaxed in her favour by the presumption that, when she commits theft and some other offences in her husband's presence, she is presumed (unless the contrary is shown) to have acted under his compulsion; she does not become an accessory after the fact by assisting her husband to escape punishment for a felony which she knows him to have committed, and it is only within certain limits that husband and wife can be received or compelled to give evidence

against one another in criminal proceedings. Husband and wife cannot even now recover damages against one another for torts, except in respect of property.

An account has already been given of the proprietary and contractual disabilities of married women at Common Law and the creation by the Court of Chancery of an equitable separate estate which a married woman can freely deal with and bind by her contracts, so far as no restraint on anticipation has been imposed, and which, in any case, she can dispose of by will. But this equitable separate estate existed only where it was created by a will or settlement, or in the comparatively rare cases where the Court of Chancery exercised its jurisdiction to compel a husband to make a settlement upon his wife. Married women of the classes in which settlements and elaborately drawn wills were unknown thus remained subject to the Common Law. A half-hearted step towards the creation of a separate estate in the earnings of married women and small properties coming to them on intestacy was taken by the Legislature in 1870. It was not until 1882 that Parliament revolutionised the law by providing that women married after that year should hold all their property as separate estate, with full power to dispose

of it in their lifetime or by will and to make contracts binding it. The same provision applies to property subsequently accruing to women previously married. The result is that at the present day an English married woman, as regards her property and power to contract, enjoys a complete independence of her husband, and is in a far better position, if she has any considerable property, than she would be under such a system as the continental "community of goods." At the same time, the effect of existing and future settlements has not been interfered with, and a married woman may still enjoy the unique privilege of the restraint on anticipation.

The husband will be presumed, in the ordinary case where husband and wife live together, and she provides for the needs of the household, to have authorised her to pledge his credit for that purpose, unless he has supplied her with sufficient ready money. Where he has left her destitute, she is entitled as an "agent by necessity" to contract on his behalf—though it may be against his will—in order to meet the needs of herself and children living with her. But there is no general rule that the husband is liable for his wife's debts. The husband may, for instance, decide that the needs of the household shall be provided for by a housekeeper, and that

the wife shall have no authority to contract on his behalf. And the tradesman who supplies goods to a married woman without inquiry is not entitled to assume that she has her husband's authority. It is only when the husband, by meeting the liabilities which his wife has incurred (whether for necessaries or not) to a particular tradesman, has "held her out" as his agent that the tradesman is entitled to hold the husband liable until he has received notice to the contrary. The notice sometimes published in the papers to the effect that Mr. Smith will no longer be liable for his wife's debts has a much more limited operation than is generally supposed. It is unnecessary as regards persons whom the husband has not by his previous conduct induced to look to him for payment; it is ineffectual as regards those who do not happen to see the advertisement. Another risk run by the tradesman who deals with a married woman, is that he may find that though she has a sufficient separate estate her husband is insolvent. In such a case, if it appears that the wife was acting on behalf of her husband, even in matters of her own personal adornment or luxury, she incurs no liability, though the tradesman who did not make inquiry thought that she was dealing on her own behalf.

Liabilities for contracts and torts incurred by a married woman before marriage are binding on her separate estate, but they also bind her husband to the extent of any property which he may have acquired from her, as under a marriage settlement. Torts committed by the wife during marriage not only bind her separate estate, but impose an unlimited liability on the husband during the continuance of the marriage, with the exception that he cannot be made liable for a wrong so connected with a contract of the wife, that the enforcement of the liability would in effect be an enforcement against him of the contract.

6. Marriage and Divorce.—Historically there seems to be no doubt that the English Common Law required nothing for the celebration of a marriage beyond the declared agreement of the parties, which might take the form either of a declaration of present intention, or of a promise to marry followed by actual union. This was the general law of Western Europe in the Middle Ages, and such marriages are still possible in Scotland. The House of Lords, however, in the nineteenth century decided in an Irish case that the Common Law had always required the presence of an ordained clergyman. The question is now for England an academic one; for statutes,

of which the first was passed in 1753, have long since prescribed the formalities necessary for a valid marriage. A marriage must be celebrated either in the presence of a clergyman of the Church of England, or (since 1836) of a Registrar of Marriages, or (since 1898) of an "authorised person" who is usually the minister authorised by the trustees of a Nonconformist place of worship. Two other persons must be present as witnesses. The celebration must be preceded by the publication of banns or the obtaining of a Registrar's certificate or a Bishop's or Registrar's licence, and, unless a special licence is obtained from the Archbishop of Canterbury, must take place in a recognised place of worship or registrar's office situate in the district in which one at least of the parties resides. The marriages of Jews and of members of the Society of Friends are exempt from these provisions, and may be celebrated according to the rules of these religious bodies. In any case provision is made for preserving a record of every marriage celebrated in the country.

A marriage is void on the ground of nearness of relationship if it is entered into (1) between ascendants and descendants, *e.g.* parent and child, grandparent and grandchild, (2) between brother and sister, uncle and niece, nephew

and aunt, (3) between persons who, by reason of the previous marriage of one of them, are related in a way corresponding to one of the relationships above mentioned, except in the case of a marriage between a man and his deceased wife's sister, which was legalised in 1907. Thus marriages between stepson and stepmother, between a woman and her deceased husband's brother, between a man and his deceased wife's niece are all prohibited. But the relations by blood or marriage of a wife are not regarded as being related to the relations of her husband; thus if A and B are two brothers and C and D two sisters, the marriage of A with C will be no bar to the marriage of B with D.

A marriage celebrated between two persons, one of whom is at the time validly married, is in any case void; and any person knowingly entering into such a marriage is guilty of bigamy.

Apart from the setting aside of a marriage on the ground of mistake as to the nature of the transaction or of insanity or physical incapacity existing at the date of the marriage, a marriage duly contracted can be dissolved by the court only on the petition of one of the parties who proves the sexual misconduct of the other. Adultery on the part of the wife will by itself entitle the husband