United Kingdom

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The United Kingdom of Great Britain and Northern Ireland is a constitutional monarchy and a unitary state which is made up of the island of Great Britain (including England, Scotland and Wales) and of Northern Ireland (which consists of the County Boroughs of Belfast and Londonderry, and the counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone – being part of the ancient Irish province of Ulster). The common language is English; Welsh and Gaelic are spoken regionally. The British Islands are not constitutionally part of the United Kingdom; these islands, comprising the Channel Islands (of which the principal islands are Jersey, Guernsey, Alderney and Sark) and the Isle of Man are separate dependencies of the British Crown; see the report on United Kingdom – British Islands (*infra* Appendix).

The independent Kingdoms of England and Scotland were first linked by personal union of the Crowns of both countries when *James VI* of Scotland succeeded to the throne of England (as *King James I*) in 1603. The political unification of the two countries was only effected more than 100 years later through the Treaty of Union of 1707 (6 Anne, c. 11). The Treaty and the subsequent Acts of Union abolished the separate parliaments and established one parliament for Great Britain which was situated in London. Great Britain was united with Ireland by the Act of Union of 1800 (39 & 40 Geo. 3, c. 67) which came into effect in the following year. By this Act provision was made for Irish representation in the Parliament at Westminster, as provision had been made for Scottish representation in the Act of 1707. The United Kingdom of Great Britain and Ireland existed from 1801 until 1922, at which time, in consequence of the partition of Northern and Southern Ireland, the title was changed to the present one of The United Kingdom of Great Britain and Northern Ireland.[1] The Irish Treaty of 6 Dec. 1921 gave Dominion Status to 26 Irish counties under the name of the Irish Free State (*Saorstat Eireann*);[2] in 1937 the Irish Free State assumed a republican form of government (see the report on Ireland) but the new state continued in association with the British Commonwealth until 18 April 1949.[3] Under the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), as amended by the Irish Free State (Consequential Provisions) Act, 1922 (12 & 13 Geo. 5, c. 4), a separate parliament and government, each with limited powers, were established for Northern Ireland. The Northern Ireland Assembly Act, 1973 (c. 17) and the Northern Ireland Constitution Act, 1973 (c. 36) established a new constitutional framework to replace that provided by the Government of Ireland Act, 1920. The Northern Ireland Parliament was replaced by an elected Assembly and the government by an executive, the composition of which was to be agreed by the Assembly. The Northern Ireland Act, 1974 (c. 28) dissolved the Assembly, and provided that a Constitutional Convention should be held on the future of Northern Ireland. The Convention has since collapsed, and rule at present is direct from Westminster.

English law and Scots law are very different from each other in form and substance. The separate evolution of the two legal systems, both before and after Union, has resulted in different principles, institutions and traditions. Although in modern times Scots law has been greatly influenced by English law, it is still based upon principles of Roman or Civil law and upon rules of Canon, feudal or customary law origin. In spite of the existence of a common Parliament for England and Scotland for over 250 years there has been no assimilation of the legal systems of the two countries. A fusion of law has, however, taken place between England and Wales, as a consequence of the subjugation of the latter country in the middle ages. The law of Northern Ireland, although administered as a separate system, is similar in many essentials to English law.

A Royal Commission on the Constitution pro-

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[1] See *Sir Kenneth Roberts-Wray*, Commonwealth and Colonial Law (1966) 32 ss.

[2] See Irish Free State (Amendment) Act, 1922 (12 & 13 Geo. 5, c. 4).

[3] Ireland Act, 1949 (12, 13 & 14 Geo. 6, c. 41) s. 1 (1).

duced in 1973, after four years work, a very substantial majority report, together with an accompanying memorandum of dissent from a minority of its members, on the "present functions of the central legislature and government".[4] The *Kilbrandon* Report, as the majority report is known, is principally concerned with the issue of devolution as a means of satisfying the needs of "the several countries, nations and regions of the United Kingdom" and accepts that there is considerable public dissatisfaction with the remoteness and insensitivity of central government. Differing schemes for legislative devolution, *via* the grant of limited powers to provincial assemblies, are proposed for Scotland and Wales in both the majority and the minority reports; the devolution of certain central government functions to eight English regions is also proposed. Both reports are primarily concerned with the machinery of government rather than an examination and definition of principles.

Within the limitations of the space available, and the general plan of the volume, it is possible only in this report to point to some of the characteristic institutions and features of law and the legal systems within the United Kingdom.

I. CONSTITUTIONAL SYSTEM

1. Nationality

The British Nationality Acts, 1948–1965, and Regulations made thereunder, govern the most important aspects of the acquisition, enjoyment and loss of British nationality.[5] In terms of political and legal status people within the United Kingdom are either British subjects (or Commonwealth citizens), or British protected persons, or aliens.

a. All *British subjects* possess citizenship of either the United Kingdom and Colonies or of another Commonwealth country. The British Nationality Act of 1948 seeks to ensure, by means of a "common clause", that no citizen of one Commonwealth country is to be classed as an alien by another Commonwealth country. This clause has not been enacted uniformly by all Commonwealth countries, but the principle of complete unity of status through common citizenship has been very widely accepted.

Citizenship of the United Kingdom and Colonies may be *acquired* by birth, descent, in consequence of an adoption order, registration, naturalisation, or by incorporation of territory. Under the Act of 1948, with certain minor exceptions, anyone born within the United Kingdom or Colonies, or in a United Kingdom registered ship or aircraft, acquires citizenship of the United Kingdom and Colonies whatever the nationality of his or her parents. Citizenship may be acquired by descent by anyone wherever born whose father is, at the date of his or of her birth, a citizen of the United Kingdom and Colonies, or, subject to certain conditions, whose paternal grandfather or more remote paternal ancestor in the male line was such a citizen. Where adoption orders are made in respect of infants who are not citizens of the United Kingdom and Colonies, then, if the adopter, or in the case of a joint adoption the male adopter, is a citizen of the United Kingdom and Colonies, the infant becomes a citizen of the United Kingdom and Colonies as from the date of the order. Citizens of member countries of the Commonwealth, or of the Republic of Ireland, and women married to citizens of the United Kingdom and Colonies, may apply to the Secretary of State for the Home Department for citizenship by registration. Most Commonwealth and Irish citizens settled in Britain by 1 Jan. 1973, have the right to be registered after completing five years' ordinary residence. Aliens and British protected persons may apply for a certificate of naturalisation; the requirements for the grant of such a certificate include five years residence in the United Kingdom or Colonies (or five years Crown service), good character, a sufficient knowledge of the English language, and an intention to reside in the United Kingdom or a colony, or to continue in the service of the Crown. Citizenship by incorporation of territory is acquired when a new territory becomes part of the United Kingdom and Colonies and the Crown provides, through an Order in Council, that persons within that territory shall enjoy, for the future, such citizenship.

Citizenship of the United Kingdom and Colo-

[4] Royal Commission on the Constitution 1969–1973 (I Report, II Memorandum of Dissent) (Cmnd. 5460 and 5460–I) (1973).

[5] British Nationality Acts, 1948 (11 & 12 Geo. 6, c. 56); 1958 (6 & 7 Eliz. 2, c. 10); 1964 (c. 22) and 1965 (c. 34).

nies may be *lost* through renunciation or deprivation. Citizenship may be renounced by means of a declaration of renunciation which becomes operative when registered by authority of the Secretary of State; renunciation is open to citizens who possess or have acquired the nationality or citizenship of another country. Deprivation of citizenship only occurs in very exceptional circumstances, as, for example, where it is discovered that citizenship by registration or naturalisation has been obtained by fraud. Even then the Secretary of State must be satisfied that it is not in the public interest that the person or persons concerned should continue to enjoy the status of citizenship.

Citizenship of the United Kingdom and Colonies is not forfeited by reason of the acquisition of the nationality or citizenship of another country. A woman who is a citizen of the United Kingdom and Colonies does not lose her citizenship by marriage to an alien but retains the citizenship unless and until she chooses to renounce it.

Under the Immigration Act, 1971 (c. 77) persons who enjoy the "right of abode" in the United Kingdom include (1) citizens of the United Kingdom and Colonies who have such citizenship by birth, adoption, naturalisation or registration; (2) citizens of the United Kingdom and Colonies, born to or legally adopted by a parent who had that citizenship at the time of the birth or adoption; (3) citizens of the United Kingdom and Colonies, who have at any time been settled in the United Kingdom or the British Islands and have at that time (and while such a citizen) been ordinarily resident there for the last five years or more; and (4) Commonwealth citizens born to or legally adopted by a parent who, at the time of the birth or adoption, had citizenship of the United Kingdom or Colonies by his birth in the United Kingdom or in any of the British Islands.

b. *British protected persons* are persons so designated by Orders in Council because of their birth or residence in a territory that is either a British protectorate, protected state, or a mandated or trust territory (see report on United Kingdom Dependent Territories).

c. Persons who are not British subjects nor British protected persons are classed as *aliens*. Aliens are subject to some legal incapacities (they may not, for example, serve in certain Crown or public offices, nor vote in elections) and restrictions as to immigration and employment.

Citizens of the Republic of Ireland enjoy a legal status within the United Kingdom and Colonies that is unique. They are not classed as aliens and they are not usually British subjects, although they may acquire citizenship of the United Kingdom and Colonies by registration. The Ireland Act, 1949 (see *supra* n. 3) declares that the Republic, although not part of H.M. Dominions, is *not* a foreign country and references in Acts of Parliament to foreigners, aliens, foreign countries, *etc.* must be construed accordingly.

2. Territorial Divisions

See *infra* 3 d.

3. State Organs

The constitutional principles, rules and practices of the United Kingdom have never been codified; they derive from statute law, from common law, and from conventions of the constitution, which are not laws at all, but political practices which have become considered as indispensible to the smooth working of the machinery of government. The monarchy, followed by the legislative, executive and judicial organs of government will be discussed in turn.

a. The *monarchy* is the most ancient secular institution in the United Kingdom, with a continuous history stretching back over a thousand years. The monarchy is hereditary and the present title to the Crown derives from provisions of the Act of Settlement of 1701 (12 & 13 Will. 3, c. 2) which secured the Protestant succession. This succession cannot now be altered, under a provision of the Statute of Westminster, 1931 (22 & 23 Geo. 5, c. 4), except by common consensus of the member states of the Commonwealth which owe allegiance to the Crown.

Queen Elizabeth II, who succeeded to the throne in 1952, is, in addition to being an integral part of the legislature, the head of the judiciary, the commander-in-chief of the armed forces of the Crown and the temporal head of the established Church of England.

The monarchy in the United Kingdom has evolved over the centuries from absolute personal authority to the present constitutional form by which the Queen reigns but does not rule. Her Majesty's government governs in the name of the Queen who must act on the advice of her ministers. The Queen summons, prorogues (dismisses at the end of a session) and dissolves Parliament; she usually opens new sessions of Parliament with a speech from the throne in which the major governmental policies are outlined. These acts form part of the Royal Prerogative, defined by *Dicey* as "the residue of discretionary or arbitrary authority, which at any given time is left in the

hands of the Crown".[6] Prerogative rights are of legislative, executive and judicial character. The Monarch must give the Royal Assent before a Bill which has passed all its stages in both Houses of Parliament can become a legal enactment (Act of Parliament). The Monarch's consent and approval is required before a Cabinet (see *infra* c) can be formed or a minister take up office. As Head of State the Monarch has the power to sign international agreements, to cede or receive territory, and to declare war or make peace. The Monarch confers honours and makes appointments to all important offices of state, including judges, officers in the armed services, diplomats and the leading positions in the Established Church. As the "fountain of justice", it is only the Monarch who is able to remit all or part of the penalties imposed upon persons convicted of crimes through the exercise of the prerogative of mercy on the advice of the appropriate minister.

At the present time the Monarch, although exercising residual authority by consent of Parliament and according to the advice of the government of the day, is regularly informed and consulted on many aspects of public affairs. The Privy Council is the body on whose advice and through which the Monarch exercises most statutory and many prerogative powers. There are about 330 members of the Privy Council, which, however, only meets as a full body on the death of the Monarch. It conducts much of its business in committees at which the Monarch may not constitutionally be present. All Cabinet ministers are members; other members are appointed by the Monarch on the recommendation of the Prime Minister.

b. *Legislature.* – Parliament is the legislative organ and is constitutionally composed of the Monarch, the House of Lords, and the House of Commons. The Queen in Parliament represents the supreme authority within the United Kingdom.

(1) The *Parliament at Westminster* legislates for the United Kingdom, for any one of the constituent countries, or for any combination of them. It may legislate on certain "excepted" and "reserved" matters for Northern Ireland (see *infra* (2)), subject to the provisions of the Northern Ireland Constitution Act, 1973 (c. 36). It may also legislate for the Channel Islands and the Isle of Man, under certain conditions, although these islands possess their own ancient legislatures. The Parliament Act, 1911 (1 & 2 Geo. 5, c. 13) s. 7 provides that the life of one Parliament may not exceed five years.

Parliament consists of two Houses: the House of Lords and the House of Commons.

The *House of Lords* is for the most part still a hereditary body. It consists of the Lords Temporal and the Lords Spiritual. The Lords Temporal include hereditary peers and peeresses who have not disclaimed their peerages under the Peerage Act, 1963 (c. 48); life peers and peeresses created by the Crown under the Life Peerages Act, 1958 (6 & 7 Eliz. 2, c. 21) in recognition of public service; and the Lords of Appeal in Ordinary (see *infra* 4 a (4)). The House of Lords is presided over by the Lord Chancellor who is *ex officio* chairman of the House. The Lords Spiritual include the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and the 21 most senior diocesan bishops of the Church of England.

The *House of Commons* is an elected and representative body; members (at present 635) are elected by almost universal adult suffrage to represent constituencies in England (516), Scotland (71), Wales (36) and Northern Ireland (12). The law relating to Parliamentary elections is contained in substance in the Representation of the People Act, 1949[7], as amended.[7a] Any British subject aged 21 or over, not otherwise disqualified (as for example, members of the House of Lords, certain clergy, undischarged bankrupts, civil servants, holders of judicial office, members of the regular armed services and the police forces) may be elected a Member of Parliament (M.P.). Members are paid a salary and an allowance for secretarial and office expenses; after a Parliament is dissolved all seats are subject to a General Election. By-elections take place when a vacancy occurs during the life of a Parliament, as when a member dies, is elevated to the House of Lords or accepts an "office of profit" under the Crown.

The *Speaker of the House of Commons* is elected by the members from the members to preside over the House immediately after each new Parliament is formed. He is an impartial arbiter over Parliamentary procedure and the traditional guardian of the rights and privileges of the House of Commons.

The *supremacy*, or *sovereignty*, of the United Kingdom Parliament is probably the most basic principle of British constitutional law. Parliament

[6] *Dicey*, Introduction to the Study of the Law of the Constitution (ed. 9, 1941) 424, 526; see the approval of this definition by the House of Lords in *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.).

[7] 12, 13 & 14 Geo. 6, c. 68.

[7a] Representation of the People Act, 1969 (c. 15) and 1974 (c. 10 and 13).

has of its own will settled the duration of the life of a Parliament, acts in such a way as not to bind its successors in the manner or form of their legislation, and, in the Parliament Acts of 1911 and 1949[8] has provided that in certain circumstances a Bill may become law without the concurrence of all the component parts of Parliament. These two Acts have clarified the supremacy of the House of Commons over the House of Lords, which can only delay the passage of Public Bills for a maximum period of one year and cannot delay at all the passage of Money Bills (financial measures).

The European Communities Act, 1972 (c. 68), which made legislative changes in order to enable the United Kingdom to comply with the obligations entailed by membership of the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community, from 1 Jan. 1973, (a) gives the force of law in the United Kingdom to existing and future Community law which under the Community treaties is directly enforceable in member states, and (b) provides for subordinate legislation in connection with the implementation of obligations or the exercise of rights derived from the Community Treaties.

(2) The *Parliament of Northern Ireland* established by the Government of Ireland Act, 1920, was abolished and replaced by the Assembly elected under the provisions of the Northern Ireland Assembly Act, 1973 (*supra* Introduction preceding I). The first Northern Ireland Executive agreed upon by this Assembly took office in November 1973, but collapsed in May 1974. Direct rule by the Parliament at Westminster has been reimposed, under the provisions of the Northern Ireland Constitution Act, 1973, in consequence.

c. *Executive.* – The government consists of the ministers appointed by the Crown on the recommendation of the Prime Minister, who is appointed directly by the Crown and is the leader of the political party which for the time being has a majority of seats in the House of Commons. The office of Prime Minister dates from the eighteenth century and is the subject of a number of constitutional conventions. The Prime Minister is the head of the government and presides over meetings of the Cabinet; by convention he is always a Member of the House of Commons. He consults and advises the Monarch on government business, supervises and to some extent co-ordinates the work of the various ministries and departments and is the principal spokesman for the government in the House of Commons. He also makes recommendations to the Monarch on many important public appointments, including the Lord Chief Justice, Lords of Appeal in Ordinary, and Lords Justices of Appeal (see *infra* 4b).

The Cabinet is the nucleus of government; its members consist of a small group of the most important ministers who are selected by the Prime Minister. The size of the Cabinet is today about 23 and its principal function, much of the work being carried out in Committee, is to determine, control and integrate the policies of the government for submission to Parliament. The Cabinet meets in private and its deliberations are secret; no vote is taken, and, by the principle of "Cabinet unanimity", collective responsibility is assumed for all decisions taken.

The central government ministries and departments give effect to government policies and have powers and duties conferred on them by legislation, and, sometimes, under the Royal Prerogative. Each is headed by a minister who is in most cases a member of either the House of Lords or the House of Commons. There are over 100 ministers of the Crown at the present time; they include departmental ministers (*e.g.*, the Secretary of State for Foreign and Commonwealth Affairs; Chancellor of the Exchequer (Treasury); Secretary of State for Social Services); non-departmental ministers (*e.g.*, Lord President of the (Privy) Council, Paymaster-General, Ministers without Portfolio); ministers of state (additional ministers in departments whose work is heavy); and junior ministers (usually known as Parliamentary Secretary or Parliamentary Under-Secretary) in all ministries and departments.

The Lord Chancellor and the Law Officers of the Crown deserve special mention at this point. The Lord High Chancellor of Great Britain presides over the House of Lords both in its legislative capacity (*supra* b (1)) and as a final court of appeal (see *infra* 4 a (4)); he is a member of the Cabinet and also has departmental responsibilities in connection with the appointment of certain judges (see *infra* 4b). He advises on, and frequently initiates, law reform programmes with the aid of the Law Commissions, the Law Reform Committee and *ad hoc* committees. The four Law Officers of the Crown include, for England and Wales, the Attorney-General and the Solicitor-General; for Scotland, the Lord Advocate and the Solicitor-General for Scotland. The English Law Officers are usually members of the House of Commons and the Scottish Law Officers may be. They repre-

[8] 1 & 2 Geo. 5, c. 13; 12, 13 & 14 Geo. 6, c. 103.

sent the Crown in civil litigation, prosecute in certain exceptionally important criminal cases, and advise government on points of law. They may appear in proceedings before the International Court of Justice, the European Commission of Human Rights and Court of Human Rights. They may also intervene generally in litigation in the United Kingdom as representatives of the public interest.

The United Kingdom has no Ministry of Justice. Responsibility for the administration of the judicial system in England and Wales is divided between the courts themselves, the Lord Chancellor, and the Home Secretary. The Lord Chancellor is concerned with the composition of the courts, with civil law, parts of criminal procedure and law reform in general; the Home Secretary is concerned with the prevention of criminal offences, the apprehension, trial and treatment of offenders, and with the prison service.

The Parliamentary Commissioner for Administration, whose office was created in 1967,[9] is an officer of the House of Commons who is independent of the Executive. His function, derived from that of the *ombudsman* in Scandinavian countries, is to investigate complaints of maladministration by government departments and certain public authorities. Complaints are brought to his notice by Members of Parliament on behalf of their constituents. He has no power to enforce his decisions but must report to the Members of Parliament and the Government Department; he may also report to Parliament itself.

In Scotland the Lord Advocate and the Solicitor-General (*supra*) are the two principal official legal advisers to the Crown and assist the Secretary of State for Scotland in the conduct of government business. They represent the Crown in civil cases and the Lord Advocate is the head of the system of public prosecution, with full power over and complete discretion in the prosecution of crimes in any court in Scotland. The Lord Advocate is closely concerned with questions of legal policy and administration and is assisted by the Lord Advocate's Department and the Scottish Courts Administration. The Scottish Courts Administration has general responsibility to the Secretary of State for the organization, administration and staffing of the courts and court offices. It is responsible to the Lord Advocate for the programme of the Scottish Law Commission, the jurisdiction and procedure of the Scottish courts, enforcement of judgements and proposals for law reform.

d. *Local government.* – Local government has been a characteristic feature of the administrative system of the United Kingdom for many centuries. Its modern form and structure, which derived in large measure from reforms of the nineteenth century, has recently been completely re-examined by Royal Commissions. As a result a new local government structure has been created for England and Wales, with effect from 1 April, 1974, by the Local Government Act, 1972 (c. 70); a broadly similar reorganization will take effect in Scotland in May 1975.

In England and Wales, under the new system, there is a three-tier system of local authorities, respectively counties, districts and parishes. The 53 large county authorities contain within them 369 smaller district authorities. Six of the counties are designated as metropolitan counties because of the concentration of population and industry within them; the district authorities within the metropolitan counties have larger powers than the non-metropolitan district authorities. County authorities will normally provide the large-scale local government services and district authorities will provide the more local services; district authorities within the metropolitan counties will, however, also have responsibility for the provision of certain large-scale services. Populations within the metropolitan counties range from 1.2 to 1.8 million and in the non-metropolitan counties from 280000 to 1.4 million. Populations within the district authorities will range from 75000 to 100000, although in the case of district authorities within the metropolitan counties the populations will range from 175000 to 1.1 million. The existing parish councils (in Wales – community councils) have very limited powers of local interest.

In Scotland until 1975, the present division between counties, (four) counties of cities, large and small burghs, and districts – 432 authorities in all – will be retained. It will be replaced in 1975 by a division of the country into nine regional authorities, which will have within them 49 district authorities. There will also be three general purpose authorities for the Orkney Islands, Shetland Islands and the Western Isles. Local community councils will be formed in addition.

In Northern Ireland 26 new district councils were established and will have responsibility for local environmental services; area boards, directly responsible to the central government departments, administer other services at the local level.

Local government in the *Greater London* area was reorganized by the London Government Act, 1963 (c. 33). Greater London consists of the City

[9] Parliamentary Commission Act, 1967 (c. 13).

of London, 32 London boroughs (and the Inner and Middle Temple); this area is administered by the Greater London Council, the most powerful local authority in the United Kingdom, and by 32 borough councils.

The machinery of local government is separate from that of national government but the powers and duties of local authorities are defined by Acts of Parliament and supervised by the central government. Each local authority must provide and administer such services as Acts of Parliament require it to provide and administer. Responsibilities vary with the different types of local authority; amongst the services provided are protective services (fire and police services), personal services (health, education, housing, entertainment), and environment services (social welfare services, town and country planning, bridge and highway construction and maintenance, street lighting, drainage, sewerage and refuse collection, *etc.*). Local authority councils are made up of unpaid elected councillors, presided over by a chairman who in many of the district councils has the title of Mayor (or Lord Mayor if the authority has a Royal Charter). In Scottish burghs he is the Lord Provost or Provost, and in Scottish counties, the Convener.

Procedure at local government elections in Great Britain is principally governed by the rules of the Representation of the People Acts, 1949, 1969 and 1974 (*supra* b (1)) and in the Local Government Act, 1972 (c. 70). Since 1949 the franchise for local government elections has, with the exception of Northern Ireland, been practically equated with that for Parliamentary elections. In elections in Great Britain all British subjects or citizens of the Republic of Ireland may vote if (1) they are 18 years of age or over on the qualifying date (the franchise was extended to persons of the age of 18 or over as from 1970), (2) are not subject to any legal incapacity, and (3) are resident in the council area on the qualifying date, or, if not so resident occupy as owners or tenants any rateable land or premises in the area of a yearly value of not less than £ 10 (US $ 24). The normal term of office of members of the newly formed local authorities is four years and most candidates for election stand as representatives of a national political party, or of local residents or rate payers' associations, or as independents. In Northern Ireland the Electoral Law Acts (Northern Ireland), 1962–1971[10] have recently been modified by the Electoral Law (Northern Ireland) Orders, 1972 and 1973[11] and local government elections are now held on a basis of proportional representation.

4. Courts, Judiciary, Legal Profession and Prosecution

a. *The courts.* – The courts of civil jurisdiction, the criminal courts, special courts, the House of Lords and the Judicial Committee of the Privy Council will be mentioned in turn.

(1) In England and Wales the *courts of civil jurisdiction* include Magistrates' Courts, Crown Courts, County Courts, the High Court of Justice and the Court of Appeal (Civil Division).

Magistrates' Courts have limited civil jurisdiction, principally in domestic proceedings, and exercise administrative functions in connection with such matters as the licensing laws. Magistrates' Courts, which are courts of summary jurisdiction dating from the fourteenth century, consist usually of from two to seven unpaid lay magistrates who are known as Justices of the Peace. They are advised on points of law by the Clerk of the Court who is a professionally qualified solicitor or barrister.

The Crown Court has only minor civil jurisdiction, in contrast with its important criminal jurisdiction (*infra* (2)). This civil jurisdiction includes certain appeals from Magistrates' Courts.

The County Courts are the principal tribunals concerned with minor civil disputes; England and Wales are divided into a number of "circuits" and in each one the county court or courts are located according to population needs. There are 337 such courts. The judges in County Courts are called Circuit judges and almost always sit alone; under the Courts Act, 1971 (c. 23) each County Court has one or more Circuit judges assigned to it by the Lord Chancellor. The jurisdiction of the County Courts is derived exclusively from statute and is limited according to the financial value of the property, estate or sum of money in issue; it includes actions in contract and tort, equity, property and probate. Cases outside the statutory financial limits may be heard by consent of the parties, or, otherwise, must be brought before the High Court.

The High Court of Justice is divided into the Queen's Bench Division, the Chancery Division and the Family Division. It is situated in London and staffed by, at the present time, over 70 puisne judges. The Lord Chancellor is in theory the President of the High Court but does not in practice sit in any division; the Lord Chief Justice presides over the Queens' Bench Division and a President presides over the Family Division. The High Court's civil jurisdiction is both original and appellate; cases at first instance are usually heard by a judge sitting alone and appellate jurisdiction

[10] 1962, c. 14; 1968, c. 20; 1969, c. 26; 1971, c. 4.

[11] S.I. no. 1264 (N.I. 13) and S.I. no. 740 (N.I. 11).

is usually exercised in Divisional Courts of three (sometimes two) judges. Each division has a separate area of jurisdiction and almost all civil proceedings are covered.

The Court of Appeal (Civil Division) is in practice presided over by the Master of the Rolls and staffed by 14 Lords Justices of Appeal. It hears most of the important civil appeals from all three Divisions of the High Court and from County Courts. Appeals may go from this Court to the House of Lords, with leave of the Court of Appeal or of the House of Lords.

In Scotland the principal courts of civil jurisdiction are the Sheriff Courts (broadly comparable to the County Courts in England and Wales) and the Court of Session. Certain very minor civil matters may be heard by a Justice of the Peace but in Scotland the justices have not enjoyed the jurisdiction or influence that has been, and is still, such a feature of the English legal system. Scotland is divided into 12 sheriffdoms, each of which has a number of sheriff court districts. Sheriff Courts have wide civil jurisdiction at first instance and may also act as courts of appeal, in that cases heard by a sheriff-substitute (usually an experienced qualified lawyer residing in one of the principal towns of the sheriffdom) may go on appeal to the sheriff-principal (a senior member of the Bar who has administrative responsibilities as well as a judicial function). The Court of Session is also both a court of first instance and a court of appeal; as it is in theory a collegiate court all its judges have the same rank. The Court of Session is divided into the Outer House, staffed by a number of junior Lords of Session, and the Inner House, itself divided into a First and a Second Division (the Lord President and three Lords of Session comprise the First Division, and the Lord Justice-Clerk and three Lords of Session make up the Second Division). The two Divisions are of equal authority and the Inner House may sit as a whole in cases of especial difficulty; usually appeal lies from the Outer to the Inner House. The Outer House is exclusively a court of first instance; the Inner House is principally a court of appeal.

The final appellate court for Scots civil cases is the House of Lords, to which an appeal may lie from a decision of the Inner House.

(2) In England and Wales the *courts of criminal jurisdiction* include Magistrates' Courts, Crown Courts (including the Central Criminal Court, the "Old Bailey"), the High Court of Justice, and the Court of Appeal (Criminal Division).

The jurisdiction of Magistrates' Courts extends to the trial of less serious offences and to the holding of preliminary enquiries into more serious crimes. In a number of the major urban areas there are full-time paid ("stipendiary") magistrates who are appointed from amongst solicitors or barristers of a certain professional seniority. Stipendiary Magistrates may, and very often do, sit alone on the bench. In Inner London there is an integrated system of Magistrates' Courts, in which either a Metropolitan Stipendiary Magistrate or lay Justices of the Peace may sit. Magistrates' Courts sit as Juvenile Courts when trying persons under 17; specially qualified magistrates sit then in a separate place (and at a different time) from the ordinary sessions. The parents of the young offender are present and the public is excluded.

Crown Courts, under the provisions of the Courts Act, 1971 (c. 23), were established to provide for a modernised system of the trial of the more serious criminal offences (and to hear appeals in both civil and criminal matters from magistrates' courts) with jurisdiction throughout England and Wales. There are some 90 centres at which sittings of the Crown Courts are held. Crown Courts are presided over by High Court judges, Circuit judges or Recorders – the last named being barristers or solicitors appointed to serve in a part-time capacity. Appeals from conviction lie to the Criminal Division of the Court of Appeal (*infra*). The Central Criminal Court in the City of London ("the Old Bailey") is the Crown Court for the area.

The Queen's Bench Division of the High Court of Justice has for practical purposes today only appellate criminal jurisdiction; it hears appeals on points of law by way of a procedure called "case stated", from Magistrates' Courts; in hearing these appeals the judges, who are puisne judges (of first instance), sit as a "Divisional Court".

In the Criminal Division of the Court of Appeal the judges, who include Lord Justices of Appeal and puisne judges of the Queen's Bench Division and are presided over by the Lord Chief Justice, will hear appeals against conviction as of right on questions of law alone, and by their leave, on questions of fact, or of mixed law and fact. They hear appeals against sentence by their leave. A further appeal from the Court of Appeal to the House of Lords (*infra*) is possible if the Court certifies that a point of law of general public importance is concerned and it appears to the Court, or to the House of Lords, that the latter should consider the matter. The Criminal Appeal Act, 1966 (c. 31)[12] transferred powers to the new Criminal

[12] Procedure on appeal to the Court of Appeal (Criminal Division) is now consolidated in the Criminal Appeal Act, 1968 (c. 19) and the Criminal Appeal Rules, 1968.

Division of the Court of Appeal that had been exercised earlier by the Court of Criminal Appeal, established in 1907.

In Scotland the courts of criminal jurisdiction are the Burgh (or Police) Courts (until 1975) the judges being town councillors who serve (or have served) as magistrates of the burgh; Justice of the Peace Courts, in counties (and counties of cities) where the judges are Justices of the Peace for the counties (or counties of cities); Sheriff Courts, for each district of a sheriffdom, which will consist of a county or group of counties; and the High Court of Justiciary, situated in Edinburgh, but with a circuit system which allows the judges to preside at trials through the country. There is no appeal from the High Court of Justiciary to the House of Lords in criminal matters.

(3) *Special courts and tribunals.* – Special courts are in effect courts of special jurisdiction. Coroners' Courts in England and Wales are common law courts now regulated by statute, which hold inquests on cases of violent, unnatural, sudden or unexplained death or deaths in prison; the coroner, who often sits with a jury, may be a barrister, solicitor or medical practitioner and also has jurisdiction in his locality, for historical reasons, over quite different matters, such as holding an inquest into the finding of "treasure trove". The office of coroner does not exist in Scotland, where the Procurator Fiscal enquires into all sudden and suspicious deaths in his district. Other courts of special jurisdiction include Ecclesiastical Courts (with corrective jurisdiction over the clergy and the power to grant "faculties" for making alterations in, or additions to, churches and consecrated places), Courts-Martial (with jurisdiction over serving members of the armed forces (and, in certain circumstances, their dependents and civilians outside the United Kingdom)). This jurisdiction is limited to criminal offences other than treason, murder, manslaughter or rape when committed in the United Kingdom; civil offences committed within the United Kingdom by members of the armed forces are dealt with usually in the ordinary courts.

The Restrictive Practices Court was set up under the terms of the Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2, c. 68); it is composed of a presiding High Court Judge and two lay members and its task is to investigate whether or not registered restrictive trading agreements affecting the supply or processing of goods for the United Kingdom market are contrary to the public interest.

The Industrial Court was established by the Industrial Courts Act, 1919 (9 & 10 Geo. 5, c. 69); it is composed of a President and other members representing employers' and employees' interests. It is a permanent tribunal but exercises jurisdiction over industrial disputes submitted to it by the Minister of Employment with the consent of the parties concerned.

The Industrial Relations Act, 1971 (c. 72) provided an entirely new legal framework for much of the field of industrial relations and established a National Industrial Relations Court with jurisdiction over various types of complaints over unfair industrial practices and industrial action. This measure, and the implementation of it by the Court, was highly controversial and unpopular generally with the Trade Union movement. This Court was abolished by the Trade Unions and Labour Relations Act, 1974 (c. 52), s. 1 (3). In September 1974 the Secretary of State for Employment set up an independent Industrial Conciliation and Arbitration Service.

In addition, there are a large number of administrative tribunals set up under Acts of Parliament or under powers conferred by statute which have quasi-judicial and/or administrative responsibilities (*e.g.*, Lands Tribunal, local tribunals under the National Insurance Acts, Pensions Appeal Tribunals, Rent Tribunals). The Tribunals and Inquiries Act, 1958 (6 & 7 Eliz. 2, c. 66) provided for the establishment of a Council of Tribunals with the duty of supervising the constitution and working of many of these tribunals; the same Act provided for a right of appeal to the High Court on a point of law from certain tribunals.

(4) *The House of Lords.* – The House of Lords, when sitting as a judicial tribunal, is the highest court in the United Kingdom. It is composed of the Lord Chancellor (who presides), ex Lord Chancellors, peers who have held high judicial office, and a number of Lords of Appeal in Ordinary, who are life peers; by convention "lay" peers do not attend. It is the final appellate tribunal in both civil and criminal cases from England and Wales; it hears appeals from both the civil and criminal side of the Court of Appeal, and from Scotland and Northern Ireland. It also hears appeals from the Courts-Martial Appeals Court.

(5) *The Judicial Committee of the Privy Council.* – Reference has been made above to the role of the Privy Council in government (see *supra* I 3); the Judicial Committee of the Privy Council is composed of Privy Councillors (including the Lords of Appeal in Ordinary (see *supra* (4)) who hold, or have held, high judicial office in the United Kingdom or in Commonwealth countries. It serves as the final court of appeal from the courts of those independent member countries of the Commonwealth which have not abolished this procedure, and from the courts of British territories. It also

hears appeals from the Prize Court, from the courts of the Channel Isles and the Isle of Man, from Ecclesiastical Courts, and from the decisions of certain professional disciplinary bodies.

b. *Judges.* – The highest judicial appointments (*e.g.*, the Lords of Appeal in Ordinary, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division of the High Court of Justice, and the Lords Justices of Appeal) are made by the Monarch on the recommendation of the Prime Minister. The Lord Chancellor advises the Monarch on the appointment of the puisne judges, county court judges, Circuit judges and Recorders, and the metropolitan and other stipendiary magistrates. The Lord Chancellor himself appoints, on behalf of the Crown, the Justices of the Peace, and is advised by local advisory committees in the regions. – In Scotland the Prime Minister makes recommendations to the Monarch in respect of the appointment of the Lord Justice General, the Lord President and the Lord Justice Clerk; the Secretary of State for Scotland recommends other judicial appointments and is responsible for the appointment and removal of Justices of the Peace. – In Northern Ireland the administration of the superior courts is one of the matters reserved to the United Kingdom Parliament.

In England and Wales the judges of the superior courts are appointed from amongst the body of practising barristers ("the Bar") and they hold office for life or until they reach a statutory age of retirement. There is in theory a power of removal only by the Monarch after an address (or petition) has been presented by both Houses of Parliament. In practice neither the training nor the career of a judge of a superior court is subject to state interference. Judges of the inferior courts may be removed in certain circumstances by action of the Lord Chancellor. – In Scotland there is a statutory procedure for the removal, through action by the Secretary of State, of a sheriff-principal from office; the Secretary of State may also remove a sheriff from office. No statutory provision exists for the removal of judges of the Court of Session or the High Court of Justiciary.

c. *The legal profession.* – In England and Wales the profession is divided into two branches – barristers and solicitors.

A barrister must be a member of one of the four Inns of Court in London (Gray's Inn, Lincoln's Inn, the Middle Temple or the Inner Temple) and have passed, before he can be admitted to the Bar, the legal examinations conducted by the Council of Legal Education. A period of pupillage with a practising barrister must then be served before the young barrister is allowed to practise. A successful barrister may apply in time to the Lord Chancellor for the patent appointing him Queen's Counsel (Q.C.); this will entitle him to special privileges in the type of work he may undertake and the remuneration he may receive. Most senior judicial appointments are made from amongst eminent Queen's Counsel.

Only members of the Bar have the right of audience in the superior courts; barristers only come into contact with their clients through solicitors and normally must be instructed by solicitors before undertaking a case. Barristers conduct their practices from chambers (offices) where they work in adjoining rooms and share the services of a clerk and secretaries; many barristers do not practise regularly in the London courts but instead join a circuit bar. The professional conduct of barristers is subject to the supervision of the General Council of the Bar and disciplinary powers are vested in the Senate of the Inns of Court.

A solicitor in England and Wales will become a member of the Law Society (the professional organization of solicitors) after serving a period of "articles of clerkship" with a practising solicitor and having passed the examinations prescribed by the Society. Solicitors, in addition to acting as intermediaries between barrister and client, have a right of audience in certain inferior courts and in fact conduct most of the advocacy in Magistrates' Courts and County Courts. They are principally concerned with the transfer of property (conveyancing), the drafting of wills, the administration of trusts, and with the prepraration and formal filing of documents involved in litigation. Unlike barristers, solicitors may practise in partnership; they are "Officers of the Supreme Court" and breaches of conduct and etiquette come before a disciplinary committee of the law Society which is nominated by the Master of the Rolls.

In Scotland and Northern Ireland the professional organizations of solicitors are The Law Society of Scotland and the Incorporated Law Society of Northern Ireland. Solicitors in Scotland were formerly known as writers or law agents; the Crown Agent is the chief permanent official of the system of criminal administration.

d. *The prosecution.* – Since crimes are considered as public wrongs, or offences against the state, the Crown is in theory, although not always in practice, responsible for the conduct of prosecutions. Proceedings are conducted in the name of the Queen, hence indictments are headed *R.* ("*Regina*") *v. Jones.* In cases where an appeal is

taken from the Court of Appeal to the House of Lords (see *supra* 4a (4)) then the name of the Director of Public Prosecutions or other official conducting the appeal on behalf of the Crown will appear in the title. The Director of Public Prosecutions in only responsible for a small minority of all prosecutions instituted but has particular responsibility for the conduct of prosecutions in cases of murder, in cases referred to him by a government department in which he considers that criminal proceedings should be instituted, in any case which appears to him to be of importance or difficulty, or which for any other reason requires his intervention, and in cases where, by statute, his consent is required before a prosecution can be undertaken. He also considers reports on complaints against the police sent to him by chief officers of police and reports on proceedings in indictable cases which have been instituted and then either not proceeded with or withdrawn. Prosecutions for certain other offences require the permission (*fiat*) of the Attorney-General or a judge of the High Court in chambers.

Many of the less serious criminal offences can be prosecuted by private persons; in summary proceedings, therefore, the case may appear as *Smith v. Jones*, where *Smith* might be a private individual, the representative of a government department or local authority, or a police officer. The individual is still, in theory, the representative of the Crown.

In Scotland private prosecutions are in general not possible and criminal proceedings are conducted, again in the name of the Crown, by a public official, the Procurator-Fiscal in each sheriffdom, subject to the control of the Crown Office and the general direction of the Lord Advocate who has ultimate responsibility for the system of public prosecution. Government departments do not prosecute, but, where necessary, the Lord Advocate will act on their behalf. Similarly, the police do not prosecute, as in England and Wales, but send information to the Procurator-Fiscal with a view to prosecution being undertaken by him.

II. SOURCES OF LAW

English law has retained, by reason of its continuous historical development and the absence of substantial reshaping through codification, certain fundamental characteristics relating to its sources and structure. It is in essence an (unwritten) judge-made law, and (written) enacted law, although always supreme, has only within the last 150 years become a normal means of law-making.

The principal sources of law in the United Kingdom are (1) legislation, (2) judicial decisions, (3) custom, and (4) legal writing.

1. Legislation

Legislation, or statute law, includes Acts of Parliament and delegated or subordinate legislation[13] made under powers conferred by Parliament. All legislative authority is vested in Parliament, and where exercised by other bodies, is derived from the authority of Parliament. Legislation takes precedence over all other sources of law and is binding upon the courts; it is, however, subject to interpretation by the judges and here the influence of the judiciary upon the development of enacted law may be considerable. The rules of statutory interpretation are judge-made rules; restrictive or literal interpretation is the fundamental rule. In consequence the judges attempt to interpret and apply the intention of the legislature by construing the words of the statute according to their ordinary, plain and natural meaning, unless such a construction would result in absurdity or would render the statute inconsistent. The judges consider themselves precluded from examining Parliamentary debates and discussions prior to the passing of the statute but will take into consideration the *ratio legis* through an interpretation of the end or purpose of the measure.

The Controller of Her Majesty's Stationery Office (H.M.S.O.) is the Queen's Printer of Acts of Parliament which are issued monthly and in bound annual volumes. They are generally cited by reference to their "short title" and dates. The principal annual collections include (1) Public General Acts and Church Assembly Measures (HMSO), (2) Statutory Instruments (HMSO),

[13] Delegated legislation is created by, *e.g.*, government departments, local authorities or other bodies or individuals under statutory authority; the term subordinate legislation also includes law-making under the authority of the Royal Prerogative.

and (3) Table of Government Orders... Covering the General Instruments (HMSO). Chronological Tables and Indices to the statutes, local and personal acts, *etc.* are also published annually (HMSO). Citations of the regnal year and chapter number (the practice generally adopted in this report) allow for convenient reference to individual statutes in the periodic volumes.[14] A number of private series of statutes have been, and are being, printed.

2. Judicial Decisions

Judicial decisions or precedents (case law) enjoy an authority throughout the United Kingdom which is quite unlike that which they enjoy in legal systems belonging to the Romano-Germanic family of law. Precedents formed by earlier decided cases both define and apply the law; the authority attached to them reflects a need for reliance upon cumulative experience and wisdom, a search for certainty and uniformity in legal rules, and an underlying confidence in the ability and independence of the judiciary. The so-called "doctrine" of precedent (*infra*), although built up in England, is closely reflected in the practice of the courts in Scotland and Northern Ireland.

Judicial precedents arise only from decisions of the superior courts. The judge will apply principles arising from past case law to the case before him; amongst the reasons he will give in support of his own judgement will be found the *ratio decidendi*, the general principle governing the decision, as well as, probably, a number of *obiter dicta*, observations on points of law not directly relevant to the legal basis of the decision. The doctrine of the binding force of precedents (the "doctrine of precedent" or *stare decisis*) became firmly established in England in the nineteenth century. This relates the authority of earlier precedents to the hierarchy of the courts, and may be expressed in this way:

(1) The decisions of the House of Lords are binding upon all other courts called upon to determine similar issues. Until recently the House of Lords regarded its own earlier decisions as binding upon itself; thus a decision of the House of Lords could only be upset by legislative intervention. In 1966, however, the Lord Chancellor announced that, although the House should continue normally to follow its own rulings it should in the future permit itself "to depart from a previous decision when it appears right to do so".[15]

(2) The decisions of the Court of Appeal bind courts inferior to it when they are called upon to determine similar issues; the Court of Appeal is usually bound by its own earlier decisions, unless, of course, they conflict with decisions of the House of Lords or were given *per incuriam*.[16]

(3) Decisions of the divisions of the High Court of Justice bind inferior courts when they are called on to determine similar issues. These decisions are not binding as between the divisions of the High Court but are usually considered as of high persuasive authority.

The "doctrine of precedent" is at the present day an essential characteristic of the English common law system; although frequently criticised as tending to haphazard development and inflexibility it is certainly not mechanical in operation. The limits of judical discretion in the use and application of precedents are self-imposed, but wide; guided by previous decisions the judge will apply a "technically trained sense of right" to the case before him. He is "bound" by an earlier decision only insofar as he himself considers the precedent cited to him as analogous to the circumstances in issue; he may "distinguish" an earlier authority, and not apply it, in cases where he finds the precedent unhelpful. He will frequently have to decide a case of first impression, where there is little or no prior authority.

Case law depends upon the publication of judicial decisions. There has been a continuous history of law reporting in England since the mediaeval reports known as the Year Books (*circa* 1283–1535); a period of "private" law reporting followed and a semi-official General Council of Law Reporting was set up in 1865. At the present day there is still no official series of Law Reports but the Reports produced by the Incorporated Council of Law Reporting are revised by the judges and enjoy especial authority. The principal series, known as The Law Reports, appears in monthly issues, and is divided into volumes for each Division of the High Court, including appeals from that Division to the Court of Appeal. This series also contains separate volumes for the re-

[14] Since 1963 (in consequence of the Acts of Parliament Numbering and Citation Act, 1962) all Acts have been numbered serially in each calendar year. The citation therefore is now, *e.g.*, Consolidated Fund Act, 1963 (1963, c. 1). The use of the word "chapter" (c.) arises from the fact that in earlier times all the Acts passed in a parliamentary session were considered to be part of a continuous statute; each session had but one statute and the individual Acts of that session were its constituent chapters.

[15] Note, [1966] 3 All E.R. 77.

[16] *Young v. Bristol Aeroplane Company*, [1944] K.B. 718 (C.A.).

ports of cases decided by the House of Lords. The Weekly Law Reports are issued in two parts, one containing cases of secondary importance not likely to be of permanent interest and not reprinted later, the other containing cases which are reprinted, when revised, in The Law Reports. There are also privately printed general and specialist series of reports (see Bibliography *infra* X).

Although Scottish appeals to the House of Lords of general interest are published in The Law Reports (*supra*) the Series of Session Cases, published since 1821 in Edinburgh (now by The Scottish Council of Law Reporting) includes other cases in the House of Lords, as well as decisions of the Court of Session and the High Court of Justiciary, *etc.* In Northern Ireland, the Northern Ireland Law Reports have been published since 1925 in Belfast by the Incorporated Council of Law Reporting for Northern Ireland and appear quarterly.

3. Custom

Custom, as a source of law, is traditionally divided into general custom (the "general immemorial custom of the realm") and local custom. General custom has now for the most part become absorbed into rules of law, either enacted (*e.g.*, in the field of commercial or mercantile law) or judicially declared, or has fallen into disuse. An exception is the important area of constitutional custom known as "conventions of the constitution" (see *supra* I 3); these rules drawn from political practice are not law and cannot mature into law. Local customs, those followed by particular groups of people living in particular localities, when proved before a court by satisfactory evidence to exist and to be regularly observed, may be declared to be operative law for the group and the locality, and thus an exception to the general common law. Such local customs must satisfy certain tests; they must be proved to have existed "from time immemorial", they must not be unreasonable, they must constitute an exception to the general common law but may not conflict with a fundamental principle of it, and they must be certain. These are, in effect, judicial tests which go to the root of the evidence for or against an alleged custom; the requirement that customs must have existed "from time immemorial" implies that they must have existed at the date of the Coronation of *Richard I* in 1189, since this *terminus a quo* is prescribed by a Statute of 1275, which is still in force.[17]

4. Legal Writing

Legal writing is, like custom, a minor source of legal authority in the United Kingdom outside Scotland. The tradition of the common law as essentially a judge-made law has led in the past to the treatment of juristic writings as evidentiary rather than as source materials. The role of legal writing has changed in recent years; today the works of recent, and living, authors are much more frequently cited in the courts as a subsidiary source of authority in the presentation of arguments and in the pronouncement of judgements.

In Scotland much of the common law, derived from Canon and Civil law sources, was incorporated into institutional treatises in the seventeenth, eighteenth and nineteenth centuries by jurists whose works must certainly be regarded as essential sources of Scots law; examples are the Jus Feudale of *Sir Thomas Craig* (1655), the Institutes of the Law of Scotland by *Viscount Stair* (1681), the Institutes of *John Erskine* (1773), and the Commentaries of the Law of Scotland in Matters Criminal of *Baron Hume* (1797). The principles enunciated by these writers were subsequently elaborated and developed in case law.

III. HISTORICAL SURVEY

The common law can boast of a continuous historical evolution since the reign of *Henry II* (1154–1189) and has its roots in the customs of the people of mediaeval England. Before that time the native Anglo-Saxon laws had been administered locally by the sheriffs; these laws were tribal in origin and varied widely from district to district. After the Norman conquest (1066) the administration of the law became more and more efficient and to an increasing extent "centralised" in the person and the court of the Monarch. Anglo-Saxon customary law was gradually replaced with common legal forms and a common machinery of justice; one common customary law of England can be

[17] Statute of Westminster I (3 Edw. 1, c. 3).

seen emerging in the earliest reports of cases decided in the courts (the Year Books, *circa* 1283–1535). The first royal common law courts – King's Bench and Common Pleas – appeared in the earlier thirteenth century, marking the separation of law from administration.

The professional literature of the common law in England can be traced back to the writings of *Glanvill* and *Bracton* in the twelfth and thirteenth centuries. Subsequent turning points in the history of English law were marked by the appearance of books and treatises which acquired outstanding prestige and authority; examples are the De Legibus of *Ranulf de Glanvill* (*circa* 1187), the De Legibus et Consuetudinibus Angliae of *Bracton* (mid thirteenth century), the Tenures of *Littleton* (mid fifteenth century), the Institutes (1628–1641) of *Sir Edward Coke* and the Commentaries of *William Blackstone* (1765).

Although the common law was never codified the reign of *Edward I* saw a remarkable surge of reforming legislation to deal with particular grievances or emergencies (*e.g.*, the Statute of Westminster I (1275), in certain respects a supplement to Magna Carta (1215); the Statute of Gloucester (1278); the Statute of Westminster II (1285); the Statute of Merchants (1285); and the Statute of Quia Emptores (1290)).[18] This legislation resolved some of the worst abuses of the feudal system of land-holding, introduced by the Normans, and settled the future path of the common law for some time to come. Rights under the common law could usually only be enforced through the issuance, out of the Royal Courts, of *writs* to deal with specific situations where a remedy was available, *e.g.*, the writs of debt, detinue, and trespass (personal actions) and the writs of right (proprietorial actions). If no appropriate writ could be found, the subject had to apply by way of petition to the Monarch. The available writs were slowly enlarged and developed, especially through the use of the provision, in the Statute of Westminster II (13 Edw. I, c. 24), that writs *in consimili casu* could be issued to deal with situations closely allied to those in which remedies were already available; nonetheless, the forms of action, which underlay most litigation until as late as the nineteenth century, prevented the common law from developing broad general concepts and made common lawyers more generally interested in procedure than in principle. The common law was in its origins a law of land, and the middle ages saw growing rigidity in many common law rights and procedures, with the result that petitions to the Monarch increased, and were frequently dealt with by his Chancellor in the exercise of his office as the principal adviser and "keeper of the King's conscience". From the Chancellor's originally personal and informal treatment of such petitions, as a delegate of the Council, there gradually emerged, by the fifteenth century, a Chancery Court asserting a jurisdiction – in equity – quite separate from, but complementary to, the jurisdiction of the common law courts. During the next four centuries the rules of common law and of equity were applied in different courts and developed independently of each other. In the Tudor period the common law was able to resist the movement which had led many countries of continental Europe to receive the classical Roman law because of a fortuitous combination of circumstances. The common law was exclusively taught by and for the practitioners in their Inns of Court, and had become a tough, inward-looking system. Roman law was associated with monarchical prerogative and the common lawyers became increasingly opponents of the personal power of the Monarch and allies of the independently minded members of the House of Commons. At the end of the sixteenth century the supremacy of the common law in England remained unchallenged; "... it stood impregnable on the foundations laid by Henry II".[19] In Scotland, however, the reception of Roman law was substantially accomplished and it did not decline as a living source of Scots law until the late eighteenth century.

Rivalry between the courts of common law and the Court of Chancery came to a head in the early seventeenth century when the common lawyers, led by *Sir Edward Coke*, attempted unsuccessfully to destroy the independence of Chancery. Later in the century the supremacy of the common law was itself at stake in the conflict between Crown and Parliament. The alliance between the common lawyers and the House of Commons finally prevailed and the period of the Restoration (1660–1689) was remarkable for many important reforms in the field of public law, notably the Habeas Corpus Act of 1679 (31 Car. 2, c. 2) which is still of fundamental importance in the protection of the individual from unlawful interference with his personal liberty. In the eighteenth century, however, private law could not adapt itself with

[18] 3 Edw. I; 17 John; 6 Edw. I; 13 Edw. I, and 18 Edw. I.

[19] A classic assessment of the place of *Henry II* in English legal history is given by *Bishop Stubbs*, Selected Charters and Other Illustrations of English Constitutional History (ed. 9, 1913) § 147.

the speed required by the demands of society in the age of the industrial revolution, and both the systems of common law and equity fell into considerable disrepute by reason of their inflexibility and inefficiency in the administration of justice. During this century the law of land developed with immense elaboration but other forms of wealth and other legal interests were demanding protection. *Lord Mansfield*, Chief Justice of the King's Bench in 1756, examined and restated the principles of an expanding commercial law and attempted to rationalise and liberalise other branches of the common law, notably the law of contract. On the other hand, his great contemporary, *Sir William Blackstone*, in his Commentaries on the Laws of England (1765), a book which greatly influenced the development of the common law in America, and was based upon the first regular series of lectures upon the common law given in the University of Oxford, was able to expound a coherent body of law with little sense of the urgent need for reform.

The nineteenth century saw long overdue reforms of substantive and procedural law gather momentum after the end of the Napoleonic wars. The climax of the movement was reached in the far-reaching reforms of the judicial system undertaken in the Judicature Acts, 1873–1875[20] by which the old central courts were abolished and replaced by a Supreme Court of Judicature, consisting of a High Court and a Court of Appeal. These Acts also brought about the fusion of the administration of the system of common law and equity; henceforward the principles and rules of either system could be applied in any court, and in cases of conflict between them the rules of equity were to prevail. During this century more use was made of legislation to carry out reforms in, for example, civil procedure, criminal law, and the law of property, than had been the case since the thirteenth century. Yet the approach to law-making was still piecemeal and the growth and method of enforcement of much of the basic common law remained firmly in the hands of the judges and the courts.

In the present century, change and reform, achieved primarily through the uncertain interaction of spasmodic legislative intervention with the gradual process of the accretion of case law, has come more and more to be regarded as unsatisfactory and lacking in direction. The English common law system still demonstrates a strength derived from a continuous and organic growth since mediaeval times, and an innate inventiveness and flexibility derived from the development of principles and rules through their application to actual cases. It has, as the result of the conquest and settlement of overseas territories, lent its tradition and technique to form the basis of the legal systems of many parts of the modern Commonwealth. At the present time many areas of the common law in the United Kingdom are being subjected to a more searching re-examination than ever before; the role, content and condition of the law is under review in the light of the profound social changes of the last hundred years. That much of the law is unwieldy, archaic and difficult of access, is now generally accepted; its clarification and simplification is seen to be an urgent necessity. However, the machinery of law reform is changing, and with that change the need for, and feasibility of, a progressive codification of English common law is becoming more widely appreciated.

The Law Reform Committee and the Criminal Law Revision Committee are important standing committees, composed of judges and practitioners, and appointed respectively by the Lord Chancellor and the Home Secretary, which examine such aspects of civil and criminal law as are referred to them for review by the appropriate minister. The Lord Chancellor appoints the members of the Law Commission for England and Wales, first established in 1965, which is a permanent body with the function of keeping "... under review all the law... with a view to a systematic development and reform, including in particular the codification of such law, the elimination of anomalies (and) the repeal of unnecessary enactments".[21] The Commission, which has already substantial achievements to its credit, is composed of a Chairman (at present a High Court Judge) and four Commissioners drawn from the profession and the Universities. A Law Commission for Scotland was also set up, with similar functions, in 1965; its five members (a Senator of the College of Justice and four Commissioners at present) are appointed by the Lord Advocate and the Secretary of State for Scotland. In Northern Ireland the former Parliament at Stormont set up a Directorate of Law Reform which functioned prior to the reimposition of direct rule from Westminster. Both the English and Scottish Law Commissions take into consideration the principles and rules of foreign legal systems in their research and investigations.

The Scottish legal system, although considerably influenced by the early penetration of Anglo-

[20] 36 & 37 Vict., c. 66; 38 & 39 Vict., c. 77.

[21] Law Commission Act, 1965 (c. 22) s. 3.

Saxon and Norman ideas from the South, was shaped by the system of feudalism and of central government introduced by *King David I* (1124–1153) and consolidated by *King Alexander III* (1249–1286). Sheriff Courts were established during the reign of *David I* and the Court of Session was established as the College of Justice in Scotland, with a permanent professional judiciary, in 1532. Many commentators refer to the period from the mid-fourteenth century to the mid-seventeenth century as the "Dark Age" of Scottish legal development. The lengthy intermittent wars with England not only led to a gradual decline of central authority but also to a marked revival of interest in Roman civil law, which came to full fruition in the seventeenth and eighteenth centuries when many generations of Scottish students studied law in the universities of Continental Europe. Roman law was never "received" in Scotland, as in Germany, but was in many areas – notably in the law of movable property, contract, quasi-contract, delict, securities, servitudes, and the law of tutorship and curatorship – assimilated into the body of the native law.

After the union of the Scottish and English Parliaments in 1707 (*supra* Introduction) and the creation of the new unitary State of Great Britain, the independence of the Court of Session and of the High Court of Justiciary was protected and many statutes of fundamental importance to the Scottish legal tradition date from this period. The great institutional writers of the seventeenth and eighteenth centuries, especially *Viscount Stair* (1619–1695), enhanced and illuminated "the Roman phase" of Scots law but the influence of Roman law inevitably declined, as, in consequence of the Union, English legal ideas were progressively introduced, both intentionally and accidentally, through legislation and through the citation of English decisions, sometimes indiscriminately and out of context. There was much statutory modification of common law doctrines in Scotland in the nineteenth century (as in England) particularly in the fields of property and commercial law. There is at the present time a strongly growing awareness of the need to preserve the best elements of the separate Scottish legal tradition as an integral part of her independent life and culture.

IV. PRIVATE LAW

The absence of a code has the effect that there is no scientific classification and no "authoritative arrangement" of English law. The distinction, fundamental in the Romano-Germanic system, between public and private law does not exist as such; no distinction between public and private law jurisdictions has existed since the Court of Star Chamber was abolished in 1641. Similarly a clear-cut distinction between civil and commercial law does not exist, although, following the plan of the volume, commercial law will be accorded a separate treatment (*infra* V). Certain areas of law, notably contract, torts, property, trusts and succession, generally regarded in most systems as within the realm of private law, will be mentioned in turn in this chapter. At the outset, however, it is necessary to emphasise the importance in English law of the distinction between common law and equity.

Despite the fusion of the administration of common law and of equity that was brought about by the Judicature Acts, 1873–1875 (*supra* III), the principles and rules of each of these branches of case law remain separate and independent. Equity is traditionally concerned with justice and with conscience, and rules of equity are essentially complementary and supplementary to rules of common law. "Equity follows the law" is a well-known maxim; equitable rules do not contradict common law rules, but add to them in cases and situations where the strict observance of common law rules (such as those relating to the literal enforcement of mortgage obligations) would lead to hardship and injustice.[22] The trust, often considered as the finest creation of equity, is an illustration of this (see *infra* 4). The concept of the trust arose from interventions by the Court of Chancery in situations (in the law of property) where the application of strict common law rules led to an outcome that was contrary to conscience. Equity always acts *in personam*, through orders which must be obeyed by the person to whom they are addressed, whatever his or her position at common law, on pain of coercion. Equitable

[22] See *Plucknett*, A Concise History of the Common Law (ed. 5, 1956) Part V.

remedies (*e.g.*, the injunction) are discretionary and only open to the plaintiff who comes to court "with clean hands" and without delay. There is no general theory of equity – it is possible only to list the heads of equity jurisdiction. These include (1) the granting of remedies that are supplementary (*e.g.*, injunctions, orders of specific performance) to the common law remedy of damages, (2) the rescission or modification of obligations that would be valid at common law (*e.g.*, for fraud, misrepresentation or mistake), (3) equitable obligations which regulate the exercise of common law rights (*e.g.*, the trust), and (4) rules which attempt to avoid "the arbitrariness" of common law technicalities in dealings with property. In all of these areas equity supplements the common law and modifies the position of the parties in the interests of justice generally.

The distinction drawn in English law between common law and equity has never existed in Scots law as far as separate principles and separate courts are concerned. Nevertheless many doctrines derived from the idea of equity, from reason, fairness or natural justice, find their place in Scots law, which is a single body of rules of strict law and of such equitable principles. The Court of Session has always been a court, in this sense, of both law and equity.

1. Contract

The two principal branches of the "law of obligations", as it is usually called in other systems of law, *contract* and *torts*, are regarded as distinct in English law. There is no general theory of obligations, although the historical origins of both the law of contract and the law of torts are to be found in the mediaeval forms of action. A general law of contract emerged in the early seventeenth century;[23] although the law of contract does have a general part it has very little in the way of a special part.

Four elements are usually said to be necessary in the formation of a binding contract; these are (1) offer, (2) acceptance, (3) consideration, and (4) an intention to create legal relations. There must be a correspondence between the offer and the acceptance and this correspondence will be tested objectively from outside, not subjectively according to the state of mind of the parties. Consideration is commonly regarded as the most strikingly characteristic doctrine in the English law of contract; it is not the same as *causa* in Roman law, or *cause* in the modern Civil law, although it serves a not dissimilar purpose.[24] Consideration, often seen as "the price of a promise", must be present in *all* contracts, written or unwritten, if they are to be legally valid, except those (relatively few) which are made under seal whose validity is derived from the special form of a unilateral written document. Contracts under seal are called specialties; all others, with which we are now concerned, are called simple contracts. The requirement of consideration means that English law is concerned with the enforceability of bargains rather than with the enforceability of promises. The principal rules of consideration are old-established rules of case law, and they are frequently criticised as out of touch with modern commercial conditions (*e.g.*, consideration must be real but need not be adequate; consideration must move from the promisee; past consideration is no consideration). The requirement that there must be an intention to create legal relations, distinguishes contracts from social or family arrangements; sometimes the absence of such an intention invalidates what would otherwise appear to be a legally binding contract.[25]

The terms of a contract (the obligations contained within it) have traditionally been classified as either conditions or warranties. Conditions are of greater importance, and a breach of condition by one party will give the other party, at his option, the right to refuse to perform his part of the contract (unless it is executed, when the condition becomes an *ex post facto* warranty) and to make a claim for damages, *i.e.*, compensation in money for the loss suffered. A breach of warranty will give rise only to a claim for damages. In the last 50 years exclusion clauses (clauses which attempt to relieve a party to a contract from his legal obligations and responsibilities) have been developed to such an extent that the concept of a "fundamental term" or obligation in the contract is beginning to emerge.[26] It is felt that whether or not a contract may be terminated by an innocent party ought not to be determined by the classification of the contractual obligations, but by the magnitude of the breach involved.

Void contracts confer no rights and are treated

[23] *Slade's* case (1602), 4 Co. Rep. 92a, 76 E.R. 1072.

[24] The classic definition of consideration was given in the case of *Currie v. Misa* (1875), L.R. 10 Ex. 153.

[25] *Coward v. Motor Insurers' Bureau*, [1963] 1 Q.B. 259 (C.A.).

[26] See *Hong Kong Fir Shipping Co., Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, [1962] 2 Q.B. 26 (C.A.) and *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 (H.L.).

as nullities. Voidable contracts are contracts with flaws which may be treated as ineffective by one of the parties in given circumstances. Unenforceable contracts are good in substance but have a technical defect which means that one or more of the parties cannot sue on them. Illegal contracts are forbidden by law.

A mistake of the parties which prevents any objective agreement ("consensus") between the offer and the acceptance will make the contract void for mistake. If the mistake goes only to the nature or quality of the subject matter of the contract then it will be voidable. There is probably no independent doctrine of mistake in English law.[27] Contracts entered into as a result of the exercise of duress or undue influence may be voidable at the option of the party affected. In some circumstances fraudulent misrepresentation may make a contract void (*e.g.*, where it induces an operative mistake), and in others merely voidable. Innocent misrepresentation, where there is a material misrepresentation but no fraud, may also lead to the avoidance or voidability of a contract and to rescission or damages in lieu (see Misrepresentation Act, 1967, c. 7).

The doctrine of privity of contract has for long been regarded as of fundamental importance; in general only the parties to a contract may incur obligations under it or have rights conferred upon them by it.[28] Many of the implications of this doctrine, which may work in a manner contrary to the intentions of the parties, are being questioned at the present day, and there are statutory exceptions to it. However, English law does not in principle admit of contracts for the benefit of a third party. Rights (and liabilities) may pass to persons other than the original parties to a contract through common law or equitable assignments, or under statute. The special class of assignable contracts known as negotiable instruments is dealt with separately (*infra* V).

Contracts are usually discharged by performance, by mutual agreement of the parties, by breach, or by supervening impossibility of performance or the frustration of the parties' intentions through the occurrence of circumstances which may be construed as releasing them from their original obligations.[29] The normal remedies for breach of contract are damages (a common law remedy), claims upon a *quantum meruit* for unremunerated services, decrees for the specific performance of the contract, or injunctions to restrain its breach (equitable remedies). Damages for breach of contract are recoverable if they arise "naturally" (or "according to the usual course of things") from the breach, and if they are not too remote from the breach (*i.e.*, they "may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach").[30] The degree of foresight required of the parties is somewhat less than that required in the law of torts.

In Scots law the rules relating to contractual obligations have evolved in a different manner and many take a very different form from the English rules. Scots law does not know the doctrine of consideration – "pledged faith is the basis of voluntary obligation".[31] Stipulations in a mutual agreement are binding whether or not they are made in favour of the other contracting party or some third party. The doctrine of "good faith" is of fundamental importance, since obligation rests upon will and good faith. The distinction between condition and warranties is not known. The primary remedies for breach of obligation are liquidated damages or specific implement (*i.e.*, the party in default is required by judicial decree to carry out his undertaking). General principles relating to contractual obligations, dealing with such matters as capacity, form, error, fraud, illegality, *etc.*, rest on case law; in addition special rules, sometimes derived from statute, apply to specific contracts such as banking contracts, cautionry and guarantee, custody, deposit, employment or service, insurance, pledge and sale of goods. Formal writing is required for certain contracts, such as those concerning land, and other types of contract which are unusual (outside the main recognised named contracts) or which involve a gratuitous obligation, must be proved by writing. It is important to stress that Scots law attempts to give full effect to the voluntary incurring of obligation. Thus unilateral promises (*pollicitatio*) as well as bilateral contractual agreements are recognised.

[27] *Bell v. Lever Bros.*, [1932] A.C. 161 (H.L.); *cf.*, *Couturier v. Hastie* (1856), V H.L.C. 672, 10 E.R. 1065, and *Rose v. Pim*, [1953] 2 Q.B. 450 (C.A.).

[28] *Dunlop v. Selfridge*, [1915] A.C. 847 (H.L.); *cf.*, however, *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] A.C. 446 (H.L.); *Hardy v. Motor Insurers' Bureau*, [1964] 2 Q.B. 745; *Beswick v. Beswick*, [1968] A.C. 58 (H.L.).

[29] The doctrine of frustration stems from *Taylor v. Caldwell* (1863), 122 E.R. 309 (Q.B.).

[30] *Hadley v. Baxendale* (1854), 156 E.R. 145 (Ex.).

[31] See *T. B. Smith*, British Justice. The Scottish Contribution (1961) 174, at 175.

2. Torts

Torts in English law are private civil wrongs; it is possible for the same acts to constitute both a tort and a crime, or both a tort and a breach of contract.[32] Tortious liability arises from the breach of a duty imposed by the law upon persons generally, and the commission of a tort will lead to an action for damages against the wrongdoer (the tortfeasor), or for some other remedy (such as an injunction), which may be more appropriate in the interests of the injured person. There is not yet a general principle of responsibility for damage caused by fault nor it is generally true to say that there is no liability without fault. English law still allows situations of "damage without injury" (*damnum sine injuria*) to exist. For historical reasons the law is fragmented and exhibits a variety of different types of tortious liability, each with its characteristic rules derived substantially from case law. Examples are: trespass (direct or forcible injury to the person, to goods or to land), negligence (the breach, resulting in damage, of a legal duty to take reasonable care in dealing with the person or property of one who is a "neighbour" in law),[33] nuisance (the unlawful interference with another's enjoyment of his or her property), conversion (the denial of, or interference with, the title to goods of another person), detinue (the wrongful retention of the possession of goods), defamation (bringing the reputation of another, by way of libel or slander, into hatred, ridicule or contempt),[34] false imprisonment (the unlawful restriction of the physical freedom of another – technical "imprisonment" is not an essential element), malicious falsehood (the making of damaging imputations which cause damage to another person in respect of some interest other than his or her reputation – *e.g.*, slander of title or goods), and the so-called *strict liability torts* (where tortious liability is imposed on a person irrespective of fault or negligence – *e.g.*, for the escape, causing damage, of a mischievous thing in consequence of the non-natural user of land).[35] There is a growing tendency to move toward a general principle of liability for fault and a corresponding tendency to interpret restrictively those rules which impose liability without fault. The existing varieties of tortious liability are neither rigid in themselves nor closed in number; in comparatively recent years, for example, torts of unlawful interference with contractual relations, and conspiracy have taken shape, and the concept of the duty of care in negligence has undergone a considerable evolution, notably in its application to responsibility for negligent misstatement.[36] However, at the present day, negligence remains the most important single criterion of tortious liability.

Damages for tortious wrong are essentially compensatory but "aggravated" or "exemplary" damages may be awarded in certain circumstances and damages for loss of amenity or loss of expectation of life are well established. Rules as to the remoteness of damage have recently been subjected to considerable judicial re-examination in the two *Wagon Mound* cases (1961 and 1967).[37] It was hitherto thought that the test of remoteness was one of the direct consequences of the tortious wrong; now, however, the test of foreseeability has been introduced, and the defendant may, in some circumstances, be expected to have foreseen the consequences of his tortious act though they were less than probable.

In Scotland the law of delict or reparation exhibits many principles which are analogous to the English law of torts but rests upon two principles of liability which are derived from Roman law. These are (1) liability for fault (*culpa*) caused by the deliberate infliction of harm or the failure to take reasonable care, and (2) liability, derived from the principle of the *actio injuriarum*, to make compensation for injury to feelings both in cases of real injury and verbal injury. There are many important distinctions between the two systems. Some examples are that the English distinction between *libel* and *slander* is not followed; the English rule of strict liability in *Rylands v. Fletcher* (*supra* n. 35) does not apply – the Scottish rule in cases of the non-natural user of land is that there is no liability without *culpa* or negligence on the

[32] Where an act is both a tort and a crime there are separate procedures; where an act is both a tort and a breach of contract this does not lead to double damages.

[33] *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.); *cf.*, *Home Office v. Dorset Yacht Co., Ltd.*, [1970] A.C. 1004 (H.L.).

[34] A *libel* is something published in a permanent form, such as a book; *slander* is something published (*i.e.* communicated) in an impermanent form, such as by word of mouth.

[35] *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; *Read v. J. Lyons & Co., Ltd.*, [1947] A.C. 156 (H.L.).

[36] *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*, [1964] A.C. 465 (H.L.).

[37] *Wagon Mound, The* (*Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd.*), [1961] A.C. 388 (P.C.); *Wagon Mound (No. 2), The* (*Overseas Tankship (U.K.), Ltd. v. Miller Steamship Co. Pty.*), [1967] A.C. 617 (P.C.); *cf.* the statement of the "direct consequence" rule in *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560 (C.A.).

part of the defender; and in Scotland the doctrine of "abuse of rights" implies that in certain circumstances, a right may become a wrong if exercised from improper motives. As in England a number of specific delicts are recognised but the list is not closed. The principal specific delicts include assault, damage to property, defamation, fraud, negligently causing personal injury or death, infringement of copyright or patent, nuisance, and trespass.

3. Property

The complexities and technicalities of the English law of property cannot be appreciated or understood without continual reference to the evolution of English legal history since the Norman conquest. This holds true even though much of the modern law of land was recast in five important statutes in 1925 (Law of Property Act, Settled Land Act, Administration of Estates Act, Land Charges Act and Land RegistrationAct).[38] These statutes had the objects of (1) assimilating as far as possible the law of land with that relating to other forms of property, and (2) simplifying the law of land so as to make conveyancing (the transfer of estates and interests in land) easier and more efficient.

The Norman Conquest imposed upon England a feudal system of land holding; in consequence, in strict legal theory since that time all land is owned by the Crown and private persons may only own an estate in the land, not the land itself. The doctrine of estates is, therefore, a dominant characteristic of the system. Since the legislation of 1925 only the fee simple absolute in possession (an unqualified estate of inheritance – in practice equivalent to "ownership" of land) and the leasehold (a tenancy for a term of years) may exist as estates in law; all others exist in equity (*i.e.*, through a trust – see *infra* 4).[39] A parallel system of legal and equitable interests in property is also a striking feature of the system; this has made conveyancing difficult but it has allowed real property (*infra*) especially to be subjected to a very flexible network of actual and potential interests, of positive and negative interests, and has allowed protection to weaker interests against their domination by stronger interests.

Leasehold interests in land were not recognised as part of the feudal system of tenure and for very many years the leasehold was regarded as essentially a matter of contract between lessor and lessee. Eventually the lessee came to obtain protection both against the lessor and against third parties, but the historical division between real property (realty) and personal property (personalty) takes account of the special position of the lease. Real property includes all immovables, with the exception of leaseholds, and personal property includes almost all movables, with the addition of leaseholds. There is thus in the English law of property no division as such between movables and immovables.

Personal property includes those things which in the old law did not descend on death to the heir but were vested in the personal representative (*i.e.*, the administrator or executor) of the deceased. Since personal property was not comprehended within the feudal system, it is capable of ownership in theory as well as in fact. Personal property is traditionally divided into (1) tenancies of land and certain other interests which are known as chattels real (things which historically did not descend to the heir on intestacy but which in other respects were assimilable to real property), (2) tangible movable goods, (3) intangible interests, not connected with land, which are actionable (*e.g.*, debts, stocks and shares, negotiable instruments, patents, copyright – on these rights see *infra* V and VII).

In Scotland the land law has been described as "...perhaps the most feudal in the world".[40] A distinction is drawn between heritable and movable property, which corresponds in general, but not exactly, with the English distinction between real and personal property. A distinction between corporeal and incorporeal property also applies, and a further distinction between *jura in re propria* (rights exercisable by an individual over, or in regard to, his own corporeal or incorporeal property) and *jura in re aliena* (rights exercisable over, or in regard to, the corporeal or incorporeal property of another) is of importance. In some circumstances movables may be treated as heritable (affixed to the heritage), and claims to heritable property may be changed in law to claims to movable property and *vice versa*. The four principal branches of the Scots law of property concern (1) corporeal heritable property (*e.g.*, land, buildings, timber, crops), (2) incorporeal heritable property (*e.g.*, leases, servitudes), (3) corporeal movable property (*e.g.*, furniture, animals, machinery), and (4) incorporeal movable property (*e.g.*, debts, patents, shares).[41]

[38] 15 Geo. 5, c. 20; 15 Geo. 5, c. 18; 15 Geo. 5, c. 23; 15 Geo. 5, c. 22; and 15 Geo. 5, c. 21.

[39] Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20) s. 1.

[40] See *Smith* (*supra* n. 31) 182.

[41] See *Walker*, The Scottish Legal System (ed. 3, 1969) 107–111; *Coull and Merry*, Principles and Practice of Scots Law (1971) 137–163.

4. Trusts

The trust in English law is mediaeval in origin and the institution evolved from the practice, in the thirteenth and fourteenth centuries, of conveying property to someone *to the use of* (*ad opus*) a third person or of the donor himself. This practice had the advantage of circumventing the common law prohibition of leaving property by will and could be used to avoid feudal dues on the death of the heir by ensuring that there was always a tenant of the property (*e.g.*, by transferring the property to two or more persons jointly, and replacing immediately donees who died). The common law did not recognise the use but the Court of Chancery from an early date began to ensure that the donee (later called the trustee) acted in good faith according to the terms of the grant and in the interests of the third parties (later called the beneficiaries). Gradually the beneficiaries came to enjoy an equitable interest in the property which at common law was in the ownership of the trustee.[42] A trust in the modern law is therefore an equitable obligation which binds the trustee to deal with the trust property, over which he has control, for the benefit of the beneficiaries, who may enforce this obligation against him. Originally the beneficiaries' rights were *in personam* against the trustee but in the course of time they have come to approximate to rights *in rem*; in that they are good against anyone with whom the trustee deals, except *bona fide* purchasers for value of the legal estate without notice of the trust.

The trust today is a highly flexible institution. Any form of property may be held in trust, and, as a trust is not a contract, the agreement of the beneficiary is not required. Trusts are used for a multitude of purposes. *Private trusts* are usually expressly created but may arise from the presumed intention of the donor (when they are called "resulting trusts") or through the operation of rules of law or of equity (when they are called "constructive trusts"). They should exhibit certainty of words, of subject-matter, and of objects. They are frequently used to make provision for the future (*e.g.*, on marriage, or after death) and to protect the interests of children during minority. *Charitable trusts* include trusts for the relief of poverty, for the advancement of education or religion, and other purposes of benefit to the community.[43] As charities are in general tax exempt there has been much litigation over the boundaries of this category of trusts and special rules relating to the operation and regulation of charitable trusts have been developed.[44]

Much of the law governing the duties of a trustee is now statutory.[45] A trustee must show honesty and efficiency in his dealings with the trust property and impartiality as between the beneficiaries. He will personally be liable for loss arising from a breach of trust and has no right to remuneration unless such is authorised by the trust. Under statute, and in consequence of the inherent jurisdiction it asserts, the court will supervise very closely the operation of a trust and may, for example, nominate a trustee so that a trust cannot fail for want of a trustee. In general, however, the court cannot order a variation of the beneficial interests under a trust.

The law of trusts in Scotland has evolved separately from the English law, although since the beginning of the nineteenth century the influence of English trust doctrines has been very strong. In Scotland the trust does not rest upon a fundamental division between legal and equitable property, as in England, but is derived from principles of the Roman contracts of mandate (*mandatum*) and deposit (*depositum*), and from the *fideicommissum* which provided for the substitution of a series of heirs, if there was an attempt to alienate property by an heir in possession. In Scots private law trusts are classified as private or public. They are private if the property is held for the benefit of individuals, and public if the property is held for charitable, educational or other public purposes.[46] The "judicial factor" in Scotland is a special kind of trustee, appointed *ad hoc* by the court to deal with property on behalf of someone legally incapable of so doing.

5. Succession

In English law testate succession occurs where there is a valid will and intestate succession where there is no will or a will has failed to take effect. Wills may be made by anyone except infants or persons of unsound mind (see *infra* 6) and must be made in accordance with the formalities prescribed

[42] The greatest English legal historian, *Maitland*, described the trust as the "largest and most important of all the exploits of Equity" (Selected Essays (1936) 141 ss.).

[43] *Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.).

[44] Charities Act, 1960 (8 & 9 Eliz. 2, c. 58).

[45] Trustee Act, 1925 (15 Geo. 5, c. 19); *cf.* Trustee Investments Act, 1961 (c. 62).

[46] The statutory powers of the trustee are contained in the Trusts (Scotland) Acts, 1921 (11 & 12 Geo. 5, c. 58) and 1961 (9 & 10 Eliz. 2, c. 57).

by the Wills Act, 1837,[47] which specify that there must be a written document, signed by the testator, or by someone else in his presence or at his direction, with the signature (appearing at the foot of the will) "attested" by at least two witnesses who must sign the will in the presence of the testator. Informal wills are permitted for soldiers, sailors and airmen on actual military service, and for seamen at sea; in these circumstances the testator must be over fourteen years of age and even an oral declaration of intention may suffice. Wills may be revoked either expressly or by implication.

Intestate succession is now substantially governed by the Administration of Estates Act, 1925, as amended by various statutes including the Intestates' Estates Act, 1952, and the Administration of Estates Act, 1971.[48] The estate of the deceased rests in his personal representative (an executor or administrator) upon trust for sale. When the assets are realised and the debts paid the personal representative is responsible for distributing the estate according to the statuory rules amongst certain classes of near relations, for whom it is assumed the deceased, had he made a will, would have made provision. These classes of relations include (1) a surviving husband or wife, (2) surviving children, (3) surviving parents, (4) surviving relations of remoter degree. If a person dies intestate and leaves no relations within the prescribed categories then the estate will pass to the Crown as *bona vacantia*; the Crown may, however, make provision for dependents.

The Inheritance (Family Provision) Act, 1938, as amended by the Inheritance (Family Provision) Act, 1966,[49] allows certain dependents to make application to the court for maintenance from the estate if they would otherwise not be provided for. Since 1952 such application has been possible both in cases of testacy and intestacy. Reasonable maintenance may be awarded, at the discretion of the Court, to surviving husbands or wives, unmarried daughters, infant sons, sons or daughters incapable of maintaining themselves, and divorced former spouses not remarried at the time of the death. In consequence of the Family Law Reform Act, 1969 (c. 46) *all* children are now included, whether legitimate by birth, legitimated, adopted or illegitimate.

In Scotland "legal rights" are enjoyed by certain relatives of a deceased person, including the surviving spouse and children, against portions of the deceased's estate irrespective of the wishes or intention of the testator. Until recently the succession to heritable property on intestacy depended upon feudal rules giving preference to males and to primogeniture whilst the succession to movables on intestacy followed quite different rules. As a result of much criticism a common set of rules, for both movable and heritable property, was introduced in 1964; there are still, however, a few special cases which fall outside these common rules.[50]

6. Persons

There is no codification of the law of persons in English law and the principal factors which affect status and capacity, such as nationality, domicile, minority, marriage and divorce, and unsoundness of mind are usually treated in specific fields of law.

Minors in law are persons under the age of 18, who suffer certain incapacities but are accorded some special privileges. In contract the common law rule that infants' contracts were voidable at their option was supplemented by the Infants Relief Act, 1874 which provided that contracts made by infants "for money lent or to be lent, or for goods supplied ... and all accounts stated with infants" shall be absolutely void.[51] Contracts made during minority may not be ratified by a minor when he attains the age of majority. However, minors are liable to pay a reasonable price for necessaries (goods appropriate to the purchaser's standard of living), may be bound by contracts of apprenticeship or service considered as beneficial to them, and if they enter certain enduring contracts (such as for the lease of property) may be bound by obligations incurred unless the contract is repudiated within a reasonable time after the age of majority is attained. In the law of torts minors have full capacity to sue (through an adult acting as "next friend") or to be sued (through a guardian *ad litem*) but their contractual privileges cannot be evaded through the framing of an action in tort against them. A minor is only liable for a wrong independent of contract.[52] As far as the law of property is concerned minors may not hold a legal estate in land but may enjoy an equitable interest in land, or in property which comes

[47] 7 Will. 4, and 1 Vict., c. 26.

[48] 15 Geo. 5, c. 23; 15 & 16 Geo. 6 and 1 Eliz. 2, c. 64; and 1971, c. 25. Before 1 Jan. 1926, freehold land descended on intestacy according to the primogeniture; leaseholds and personal property descended to the next of kin.

[49] 1 & 2 Geo. 6, c. 45; 1952, c. 64; 1966, c. 35.

[50] See Succession (Scotland) Act, 1964 (c. 41).

[51] 37 & 38 Vict., c. 62, s. 1.; see, however, *Valentini v. Canali* (1889), 24 Q.B.D. 166.

[52] *R. Leslie, Ltd. v. Sheill*, [1914] 3 K.B. 607 (C.A.).

to them on the death of another person (and which may be held on their behalf by a trustee or personal representative until the age of majority). At the present time minors and persons of unsound mind do not enjoy testamentary capacity.

Married women lost many of their former incapacities as a result of the enactment of the Law Reform (Married Women and Tortfeasors) Act, 1935.[53] They may sue and be sued independently of their husbands in contract and in tort, hold property and be made bankrupt; other important recent reforms with respect to the property rights of a married woman are contained in the Married Womens Property Act, 1964 (c. 19) and the Matrimonial Homes Act, 1967 (c. 75) as amended.

Persons of unsound mind suffer from legal incapacity but are afforded various types of protection by the law. If they are incapable of managing their own property and contractual affairs they may be placed under the supervisory control of the "Court of Protection" (an administrative body) and a receiver may make contracts on their behalf; the Crown Courts, and, under certain conditions, Magistrates' Courts may make "hospital orders" or "guardianship orders" instead of sentencing them when they are accused of criminal acts. Apart from this their contracts may, within limitations, be voidable at their option, but, like infants, they must pay a reasonable price for necessaries. The Mental Health Act, 1959 (7 & 8 Eliz. 2, c. 72) introduced wide-ranging provisions dealing with the care and treatment of mentally disordered persons and the protection of their property, including compulsory admission to hospital and compulsory guardianship.

In Scotland, it may be noted that pupils, children below the age of puberty (12 in the case of girls and 14 in the case of boys) have no legal capacity and a guardian or "tutor" acts for them in all legal matters. Minors, children between the ages of puberty and majority (18), may, however, enjoy substantial legal capacity even if, for example, they have a curator to advise them, or concur in, their affairs.[54] Although possessing such capacity during minority, minors enjoy a "right of reduction" in respect of certain transactions, entered into to their prejudice, which may be repudiated in the *quadriennium utile*, the period of four years after the attainment of majority.[55] Minors may make a valid will of their movable estate and they may marry without parental consent after they reach the age of 16. Generally orders relating to custody and control of minors over the age of 16 are not made in Scotland, except in cases where care and protection, or delinquency, are involved.

7. Family Relations

a. *Marriage and divorce.* – Marriage is regarded in English law as a civil contract. Marriages are void if they are not solemnised according to the prescribed formalities.[56] Under the Nullity of Marriage Act, 1971 (c. 44) marriages may be void (1) if the parties are within the prohibited degrees of relationship, (2) if either party is under the age of sixteen, (3) if the requirements as to the formation of marriage have not been observed (*supra*), (4) if at the time of the marriage either party was already lawfully married, or (5) if the parties are not respectively male and female. A marriage may be voidable if (1) there is non-consummation of the marriage because of the wilful refusal of a party, (2) if there is non-consummation owing to the incapacity of either party, (3) if either party did not consent to the marriage (*e.g.*, in consequence of duress, mistake, unsoundness of mind *etc.*), (4) if, at the time of the marriage, either party, although capable of giving a valid consent, was suffering from mental disorder of such a kind or such an extent as to be unfitted for marriage, (5) if one of the parties was, at the time of the marriage, suffering from communicable venereal disease, or (6) if the wife was, at the time of the marriage, pregnant by another person.

Marriages may be dissolved under the provisions of the Matrimonial Causes Act, 1965 (10 & 11 Eliz. 2, c. 72), as amended by the Divorce Reform Act, 1969 (c. 55).[57] The sole ground on which a petition for divorce may now be presented is that the marriage has broken down irretrievably. This may be evidenced by the petitioner showing (1) adultery on the part of the respondent, (2) that the respondent has behaved in

[53] 25 & 26 Geo. 5, c. 53; the Married Womens Property Act, 1882 (45 & 46 Vict., c. 75) had led the way toward this emancipation.

[54] The *curator ad litem* is a guardian appointed by the courts to protect the interests of a pupil or a minor who is involved, directly or indirectly, in court proceedings. The *curator bonis* may be appointed to take over the administration of the estate of a child or a person of unsound mind.

[55] *Hill v. City of Glasgow Bank* (1879), 7 R. 68, 74–75 (Ct. of Session).

[56] Marriage Acts, 1949–1970 (12, 13, 14 Geo. 6, c. 16; c. 34).

[57] The 1969 Act does not provide a complete code of divorce law and must be read in conjunction with the earlier legislation, especially the Matrimonial Causes Act, 1965 (c. 72) and the Matrimonial Proceedings and Property Act, 1970 (c. 45).

such a way that the petitioner cannot reasonably be expected to live with him (her), (3) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the petition, (4) that the parties have lived apart for a continuous period of two years preceding the petition *and* that the respondent consents to the divorce (this is now the most usual form of divorce, by mutual consent), or (5) that the parties have lived apart for a continuous period of five years preceding the petition – the consent of the respondent is not required but the Act contains certain safeguards. No petition for divorce may be brought within the first three years of marriage. After the *decree absolute* of divorce is pronounced by the court (three months after an interim *decree nisi* is pronounced) incidental orders concerning the property of the parties, the maintenance of the wife, the custody and education of the children *etc.*, may be made. Judicial separation must be distinguished from divorce; an order requiring the parties to a marriage to live apart may now be obtained on the same grounds as divorce except that there is no necessity to show proof of an irretrievable breakdown of the marriage.

Marriage in Scotland was traditionally regarded as a contract completed by the mutual consent of the parties. Regular marriages were those celebrated by a Minister of Religion, or, after 1939, before an authorised Registrar. Irregular marriages were often constituted by consent followed by prolonged co-habitation and the holding of the parties as "married" in the general repute of the neighbourhood. Two other common law forms of irregular marriage (by declaration *de praesenti* and by promise *subsequente copula*) were abolished as recently as 1939 when civil marriage was introduced by the Marriage (Scotland) Act, 1939 (2 & 3 Geo. 6, c. 34).[58]

Judicial divorce was known in Scotland for almost three centuries before it was first recognised in England in 1857. The principal grounds of divorce were adultery and desertion; to these were added, by the Divorce (Scotland) Act, 1938 (1 & 2 Geo. 6, c. 29), cruelty, incurable insanity, sodomy and bestiality. The 1938 Act also introduced a new remedy (s. 5) in the form of a petition for dissolution of marriage on the ground of presumed death. The grounds for judicial separation are adultery and cruelty (the latter including habitual drunkenness). With the exception of incurable insanity, divorce in Scotland continues to be based upon the commission of a "matrimonial offence" (as in England before 1969); important changes in the requirements of such offences and in the defences against their establishment were made by the Divorce (Scotland) Act, 1964 (c. 91). Three Scottish divorce bills, in general similar in effect to the provisions of the English Divorce Reform Act of 1969 (*supra*) have been introduced in Parliament without success since 1969.[59]

b. *Adoption.* – Adoption has been a recognised institution in English law since the passing of the Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29) and the law is now governed by the Adoption Acts, 1958–1964,[60] as amended by the Adoption Act, 1968 (c. 53). Adoption is only possible through an order of the court (Magistrates' Courts and the Chancery Division of the High Court exercise jurisdiction in this field) and adoptions are usually arranged through registered adoption societies or by local authorites. The consent of the infant's parent or guardian is normally required and adoption vests parental rights and duties in the adopter, who must himself or herself be 25, or a relative of the infant and 21, or the father or mother of the infant (where it is illegitimate). Normally only one person may adopt but in certain circumstances joint adoption is permitted by husband and wife. The infant (here a person under 18 and unmarried) must have been continuously in the care and protection of the adopter for at least three months prior to the adoption and local authorities are given supervisory authority. Once the adoption order has been made the child becomes in all legal respects the child of the adopter.

In Scotland adoption was recognised in 1930 although an informal method of adoption had existed before that date. The law is contained in the Adoption of Children (Scotland) Acts, 1930–1949[61] and the Adoption Act, 1958 (7 & 8 Eliz 2, c. 72) also applies with modifications. The Succession (Scotland) Act, 1964 (c. 41) gave the adopted child the same rights of succession as a child born to the adopter in wedlock but deprived him of any rights in the estates of his natural parents.

[58] The best modern treatise is by *Clive and Wilson*, The Law of Husband and Wife in Scotland (1974).

[59] See in general the criticisms of the existing law contained in the Report of the Kilbrandon Committee on the Marriage Law of Scotland 1969 (Cmnd. 4011) and *Clive and Wilson* (*supra* n. 58) 1–18, 440–445.

[60] 7 & 8 Eliz. 2, c. 5; 8 & 9 Eliz. 2, c. 59; and 1964, c. 57.

[61] 20 & 21 Geo. 5, c. 37; 12, 13 & 14 Geo. 6, c. 98.

c. *Guardianship.* – The English law relating to guardianship is now substantially regulated by the Guardianship of Minors Act, 1971 (c. 3). Guardianship involves the rights and duties of exercising control and care over the person of a minor and of supervising his or her maintenance, education or welfare. Either parent may be a guardian; usually if a minor has his or her father living, he or she will be subject to the father's legal guardianship. On the father's death the mother will usually succeed to the guardianship, although either the father or the mother may be deprived of their rights by the court for sufficient reason. Either or both parents may appoint a "testamentary" guardian or guardians to act after their death. Alternatively, a guardian may be appointed by the court when there is no other guardian, or in substitution for, or together with, an existing guardian. The minor may become a "ward of court", restraining him or her, for example, from leaving the jurisdiction or marrying without permission, if an order under the Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100) is made.

In Scots law (see *supra* 6) a tutor is the guardian of a pupil and must act within the terms of the Judicial Factors Acts and the Trusts (Scotland) Acts, 1921.[62] The *curator ad litem* and the *curator bonis* (see *supra* n. 54) also have important functions in the law of guardianship. *Pro tutors* and *pro curators* may assume similar responsibilities as tutors or curators without legal authority but may still be bound by the obligations of properly appointed guardians. An award of custody does not affect tutory or curatory.

The father is the natural guardian of his child during minority and is said to be the administrator-in-law of the child. The mother will become guardian of a pupil child on the death of the father.[63] The 1925 Act allows the Court to intervene in cases where there is a dispute over a nominated guardian and local authorities may assume the rights and powers of parents where a child has no parent or guardian.[64]

d. *Legitimacy, legitimation and illegitimacy.* – In English law a child whose parents are lawfully married at the time it is conceived or born, or at any time between those two events, is legitimate. Children of voidable marriages born during the continuance of the marriage are legitimate, and, in certain circumstances, the children of void marriages may also be legitimate.[65] Any child not born under the preceding conditions is *prima facie* illegitimate but may be legitimated *per subsequens matrimonium.*

The rights of illegitimate children to succession of property were greatly improved by the Family Law Reform Act, 1969 (c. 46) but are still in many respects dissimilar from those of legitimate children. Although at common law the father of an illegitimate child has no duty to maintain the child, under certain conditions an "affiliation" order may be made by a Magistrates' Court ordering the father to pay for the maintenance of the child until it reaches the age of sixteen, and under recent social security legislation[66] the liability of one spouse to maintain the other and their "children" includes illegitimate children.

In Scots law the child born of a married woman during the subsistence of a marriage is presumed to be legitimate but the presumption may be overcome in certain circumstances. An illegitimate child may be legitimated by the subsequent marriage of the parents; the Legitimation (Scotland) Act, 1968 (c. 22) removed the earlier qualification that the parents should have been free to marry at the time of conception. Many previous disabilities of illegitimate children have been progressively removed by statute in recent years. Nevertheless, illegitimate children still suffer disadvantages in respect of the existing Scots law as to intestacy, custody, guardianship and aliment (the obligation of the father, mother or other paternal or maternal ascendant relatives to support a child).

V. COMMERCIAL LAW

1. Introductory

Commercial (or mercantile) law is regarded in England as essentially part of the general law of the land and not as a self-contained or distinct branch of law. For reasons of convenience it is often treated or presented separately but its boundaries are difficult to define and there is consider-

[62] Under the Trusts (Scotland) Act, 1921 (11 & 12 Geo. 5, c. 58) s. 2, a trustee by definition includes a "tutor, curator and judicial factor".

[63] Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 46) s. 4 (1).

[64] Children Act, 1948 (11 & 12 Geo. 6, c. 43).

[65] Legitimacy Act, 1959 (7 & 8 Eliz. 2, c. 73).

[66] *E.g.*, Ministry of Social Security Act, 1966 (c. 20)

able disagreement over the divisions of the subject. For the purposes of this report the following important topics will be mentioned briefly (*infra*): Sale of goods, hire-purchase and credit sale, agency, partnership, companies, insurance, negotiable instruments, commercial securities, contracts of carriage, maritime law and bankruptcy. Patents for invention, industrial designs and copyright are, following the plan of the volume, accorded a separate chapter (*infra* VII) to themselves.

Until the early part of the seventeenth century commercial law in England was the law of a class of persons, the merchants engaged in foreign trade. The "law merchant" was made up of the practices and usages developed through international commercial intercourse by these merchants and applied within the jurisdiction of the Court of Admiralty. The Admiralty jurisdiction was eventually crippled, principally through the attacks made upon it by *Sir Edward Coke* after he became Chief Justice of the Common Pleas in 1606. The common law courts then slowly assumed an increasing commercial jurisdiction, viewing the law from the standpoint of custom and applying each mercantile custom when that custom was proved before them. By the early eighteenth century commercial customs of all kinds became freely admitted and began to be applied to all persons engaged in commercial transactions. It is usual to ascribe to the genius of *Lord Mansfield* (Chief Justice of the King's Bench, 1756–1788) the coherent restatement of these rules in judicial decisions and their integration into the body of the common law as a whole. It is certain that *Mansfield*'s work laid the foundation upon which modern English commercial law rests, although, by this period, the Court of Chancery was also making a noteworthy contribution in certain areas, especially in company law, and in partnership and bankruptcy law.

In the nineteenth century much of English commercial law was rationalised and recast in a remarkable series of codifying statutes, reference to some of which is made below. There is still, however, no general commercial code. The law is generally administered by the common law courts, although certain special topics fall within the province of the Court of Chancery. Since 1894 a specific "Commercial Court" has been in existence; this is a division of Queen's Bench to which cases on the "commercial list" are assigned. Much of the work of this court, which has often not been sufficiently used, is concerned with shipping cases, marine insurance, and litigation over c.i.f. (cost, insurance, freight) and f.o.b. (free on board) contracts. The work of this court is now substantially regulated by the Administration of Justice Act, 1970, which also transferred the jurisdiction formerly exercised by the admiralty side of the old Probate, Divorce and Admiralty Division to the Queen's Bench Division.

Many of the present-day difficulties in the path of the further development of commercial law in England arise from the fact that, by reason of its historical origins, that law is concerned with the application of principles and rules of the law of contract (see *supra* IV 1) to the special and varying circumstances and requirements of modern merchandising, banking, insurance and transport business.

2. Sale of Goods

The Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), which codified the law in this field, rests upon principles of free trade and freedom of contract; it reflects the nineteenth century belief that in the absence of fraud or wrongdoing the law should not unnecessarily interfere in a bargain. It contains certain limited exceptions to the general rule that the purchaser must make his own bargain. For example s. 14(2) provides that where goods are bought of a description which it is in the seller's course of business to supply they must be of "merchantable quality" (although this condition will not be implied where the purchaser has examined the goods and the defect complained of is one which the examination should have revealed). Further s. 14(1) provides that where the purchaser makes known to the seller, either expressly or by implication, the purpose for which the goods are required, and thus shows that he relies on the seller's skill and judgement, there is an implied condition that the goods shall be reasonably fit for such purpose. S. 15 lists implied conditions in the case of contracts for sale by sample and s. 13 provides that in contracts for sale by description there is an implied condition that the goods shall correspond with the description (or, where the sale is by sample and description that the bulk shall correspond with sample and description). Such safeguards as these have not, however, prevented serious problems arising in recent years through the growing use of "exemption clauses" seeking to relieve dealers of liability for supplying defective, or even dangerous, goods. The Supply of Goods (Implied Terms) Act, 1973 (c. 13) has recently amended a number of these provisions as to the terms to be implied in contracts for the sale of goods, in hire-purchase agreements, with respect to the exchange of goods for trading stamps and to the terms of certain conditional sale agreements.

Certain distinctive features of English sales law may be summarised. Intention, and not delivery, passes property. Thus s. 17(1) provides that property passes (and an "agreement to sell" becomes a "sale") when it is intended to pass, and s. 18 provides rules for the ascertainment of the intention of the parties where it is unclear. The most important of these rules lays down that in unconditional contracts for the sale of specific goods in a deliverable state, the property in the goods passes when the contract is made. The risk of accidental destruction of the goods passes with the property, in the absence of contrary agreement (s. 20). It is a fundamental term in the contract that the seller shall transfer the property in the thing sold to the purchaser. The rule that a person cannot give a better title than he himself possesses (*nemo dat quod non habet*) is, however, subject to a number of exceptions which have the object of protecting the title of a *bona fide* purchaser; for example, a sale in market overt may convey a good title upon a buyer in good faith who has no notice of any defect in the title (s. 22). An agreement of the parties upon the price is not essential to the contract; if no agreement has been reached a reasonable price must be paid. Unpaid sellers have the right (called a "seller's lien") to retain possession of the goods against payment (s. 41) or of stopping delivery *in transitu* in certain circumstances (s. 45). The buyer's right to reject the goods is limited although he may claim damages for breach of warranty. The Act of 1893 lays down some *prima facie* rules on the measure of damages but in general the ordinary rules of the law of contract on damages apply.

The Act of 1893 applies in general to Scotland, but has given rise there to many problems for the Scottish courts, in their attempts to bring its provisions into accord with the distinctive civilian principles of Scottish law; these principles were, in many ways, better attuned to mercantile needs than the comparable English rules (see s. 13–15).

3. Hire-Purchase and Credit Sale

As a result of widespread dissatisfaction with the state of the law regarding consumer credit protection the *Crowther* Committee was set up in July 1968, to "inquire into the present law and practice governing the provision of credit to individuals for financing goods and services for personal consumption..." and "to consider the advantages and disadvantages of existing and possible alternative arrangements for providing such credit, having regard to the interests of consumers, traders and suppliers of credit, including depositors". The report of this Committee, published in 1971, recommended widespread changes in the law.[67]

The Consumer Credit Act, 1974 (c. 39) replaced the existing enactments regulating money-lenders, pawn-brokers and hire-purchase traders. It established, under the administration of the Director General of Fair Trading (*infra* VI (c)), a system of licensing and other control of traders concerned with the provision of credit or the supply of goods on hire or hire-purchase, and linked transactions involving amounts up to £5000 (about US $12000). Certain credit agreements are exempt from the Act, for example, where the creditor is a local authority, or a building society.

The purpose of the Act is to protect consumers, and it provides, amongst other things, that it is an offence to issue misleading advertisements for credit; debtor-creditor agreements are prohibited off trade premises; also it is an offence to send circulars to minors inviting them to borrow or hire, or to give a credit-token, unless so requested.

Regulated agreements may be cancelled by the debtor or hirer if the antecedent negotiations included oral representations made by the negotiator in the presence of the hirer or debtor, unless the agreement is secured on land, or unless the unexecuted agreement is signed by the debtor or hirer at premises at which the creditor or owner carries on business. The debtor or hirer is allowed a "cooling-off" period in that he may serve notice of cancellation within five days of receiving a copy of the agreement, or at the end of the fourteenth day after signing an unexecuted agreement. On cancellation, money paid by the debtor or hirer can be recovered. Notice must be served on the debtor or hirer before the creditor or owner can become entitled to recover possession or terminate the agreement. He must allow the debtor or hirer at least seven days in which to remedy a breach. If the debtor has paid one third or more of the total price, and the property remains in the creditor, the creditor can only recover possession with a court order. If he contravenes this provision, then the debtor will be released from all liability under the agreement, and is entitled to recover all sums paid. Interest cannot be increased on default. The debtor has the right to complete payment ahead of time.

[67] Report of the Crowther Committee 1971 (Cmnd. 4596).

4. Agency

The law of agency has not been put into statutory form and it is common to find agency treated as an extension of the limits of a contract rather than as a separate legal topic. The extensive case law has developed characteristic rules governing (1) the duties and obligations owed between the principal and his agent, and (2) the legal effect of the contractual relationship established with the third party by the agent acting on behalf of the principal. As to the former the agency usually results from an express or an implied contract, but the agent is treated as being in a fiduciary position. Thus he may not delegate his duties without authority, must not place himself in a "conflict of interests" situation, and may not make any improper profit (as opposed to his rightful commission) from the position he holds. As to the latter, the principal may in certain circumstances be liable for the unauthorised acts of an agent if the acts were done within the apparent scope of a general authority. The agent may contract for and on behalf of either a disclosed or an undisclosed principal; in the latter case either the principal or the agent may sue or be sued upon the contract. The agent for an undisclosed principal in a commercial contract must have authority to act at the time the contract was made and the third party may, at his election, sue either the agent or the principal when the latter's identity is known. Where an agent contracts for a disclosed principal he usually does not incur liability himself under the contract. However, if the agent acts outside the scope of his authority, so that the principal is not bound, he may be sued for breach of warranty of authority (or fraud, if he acted dishonestly).

5. Partnership

The law is codified in the Partnership Act, 1890 (53 & 54 Vict., c. 39); s. 1 defines a partnership as a "...relation which subsists between persons carrying on a business in common with a view of profit". The formation and registration of limited partnerships was dealt with in the Limited Partnership Act, 1907 (7 Edw. 7, c. 24) but a more convenient form of registration (with the Department of Trade and Industry) has been provided for limited companies under the Companies Acts (see *infra* 6).

It is often claimed that the main principles of the English law of partnership form in reality a special branch of the law of agency. A partnership may be set up without formal agreement but will usually have "articles of partnership" which determine the business relationship between the partners. A partnership is not a legal person but a joint enterprise; each partner is treated as an agent for himself and each of the others when engaged on the business of the "firm". Partners are liable individually and personally for the debts of the partnership, and can sue and be sued in the name of the partnership. Partners are joint owners of the partnership property and a judgement against the firm can be executed against their personal property. Each partner owes to his fellow partners a duty to exercise the "utmost good faith" in his dealings; he must make full disclosure of profits and benefits, he must not compete with the business of the partnership or permit a conflict of interests to arise. Partnerships may be for a fixed period of time or may be dissolved at the will of any partner or by order of the court in given circumstances.

6. Company Law

Corporations with legal personality may be created by the Crown through royal charter (*e.g.*, a borough corporation), by statute,[68] or in accordance with statutory requirements. The great majority of trading companies are formed in this last manner by registration in accordance with the Companies Acts, 1948 (11 & 12 Geo. 6, c. 38) and 1967 (c. 81), which consolidated a long series of earlier enactments originating in the nineteenth century. The Companies Act, 1948 established a scheme of regulation and control designed to protect the public and shareholders in companies from fraud and misrepresentation; this Act, and the other legislation, must be read in conjunction here again with the case law.

Any seven or more persons (or any two or more persons in the case of private companies) may initiate the formation of a company by subscribing their names to a memorandum of association and to articles of association. A private company is one which by its articles of association limits the number of members to 50, restricts the right to transfer its shares, and prohibits any invitation to the public to subscribe for shares or debentures. The memorandum of association must set out the objects and business of the company, give the corporate name of the association and the situation of its registered office, the amount of nominal

[68] *E.g.*, B.O.A.C. and B.E.A. were established by the Air Corporations Act, 1949 (12, 13 & 14 Geo. 6, c. 91).

capital and its division into shares, the names, addresses and descriptions of the subscribers (and details of the shares they agree to take). An important clause in the memorandum deals with limitations of liability. Companies may be limited by shares, limited by guarantee, or they may be unlimited. If they are limited by shares (the commonest form) the liability of each shareholder will be limited to the nominal value of his or her shares to the extent of the money unpaid. Limitation by guarantee means that the member's liability is limited, in the event of any liquidation of the company, to the amount he has guaranteed (in the memorandum) to pay. Articles of association regulate matters relating to the internal management of the company and bind the company and its members each to the other. The articles will deal with such matters as the transfer of shares, alteration of capital, dividends, accounts, company meetings, duties of directors, *etc.*

A new company is registered (in England and Wales) by the Registrar of Joint Stock Companies, who, if he is satisfied with the documents presented to him will issue a Certificate of Incorporation. Thenceforward the company exists as a legal person and is a separate entity from its individual members. A trading certificate is, however, necessary before a public company can commence business and this will be issued only when the minimum share subscription has been obtained.

The control of the company, subject to the memorandum of association, is in law divided between the general meeting and the directors. The Companies Act, 1948 provides that once in each year every company must hold an annual general meeting; extraordinary meetings may be summoned by the directors or by a specified proportion of the shareholders. The directors are both officers and servants of the company, and, in a sense, trustees for the company although not for individual shareholders. Their powers are ascertainable by reference to the particular articles of association and to the statutory provisions and judicial precedents which affect such matters as the directors' legal position as against the company, their appointment to office, disqualification or removal from office, and the degree of care and business prudence they are required to exercise.

The share capital of a company may be defined as the total sum of money receivable by a company on the sale of all its shares. Nominal capital is the total amount of capital the company is authorised to issue. Issued capital is the nominal part of the capital actually issued to shareholders and paid-up capital is that part of the issued capital which has been paid to the company. Reserve capital is that part of the uncalled capital which the company has resolved not to call up save in the event of liquidation. Capital is frequently divided into preference, ordinary and deferred shares. Debenture holders are creditors who have advanced money to a company; their debenture is a document certifying the company's indebtedness and their security may be effected by means of a legal mortgage in the form of a "fixed charge" or a "floating charge". A "fixed charge" will attach to a particular part of the company's property but a "floating charge" will only "crystallise" when the security is enforced.

Companies may be "wound up" (dissolved) compulsorily, voluntarily or under supervision. A compulsory winding up is brought about by a petition to the court usually from an unpaid creditor, but sometimes from a contributory (*i.e.*, a person liable to contribute to the assets in the event of a winding-up), the Official Receiver, or the company itself. Once the petition for a compulsory winding-up is presented application may be made for the appointment of a provisional liquidator; if the petition is successful the Official Receiver will become the provisional liquidator with control and custody of the company property and assets. The court will appoint a permanent liquidator who must act under its direction in winding up the affairs of the company, realising and distributing its assets. If the company is insolvent a strict order of priority in the distribution of assets must be observed. A voluntary winding-up takes place by resolution of the company itself without recourse to the court. A liquidator is appointed by the company but the process of liquidation is not necessarily independent of the court, which may, in certain circumstances, make an order that the voluntary winding-up shall continue only under its supervision.

7. Contracts of Insurance

Contracts of marine, fire and life insurance are known as contracts *uberrimae fidei* and require the fullest disclosure of known material facts (*i.e.*, those facts which would influence a prudent insurer in determining whether to take the risk and in fixing the premium required). They may be avoided on the ground of non-disclosure even though *restitutio in integrum* is not possible. The insurer has the right of subrogation and may take over the rights of the assured when he pays the amount of the loss.

Common law rules on marine insurance are codified in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41) which includes provisions as to the form and writing of the policy, the ascertain-

ment of total or partial loss, average losses and salvage charges. Compulsory third party insurance is regulated for the users of motor vehicles by the Road Traffic Act, 1960 (8 & 9 Eliz, 2, c. 16).

Companies and other incorporated bodies which in the United Kingdom carry on life, fire, accident, employers' liability, bond investment, motor vehicle, marine, aviation or transit assurance business must comply with the provisions of the Insurance Companies Act, 1958 (6 & 7 Eliz. 2, c. 72) and with Part II of the Companies Act, 1967 (c. 81).

8. Negotiable Instruments

Bills of exchange, promissory notes and cheques are the most important negotiable instruments.

The Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), as amended, is the leading statute. S. 3 of the Act defines a bill of exchange as: "...an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed and determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer". Under s. 2 of the Act a holder is the payee or indorsee of the bill who is in possession of it, or the bearer in the case of a bearer bill. A holder for value is anyone who holds a bill for which at any time value has been given (s. 27(2)) and there is a presumption that every holder of a bill is a holder in due course (*i.e.*, a person taking a bill, complete and regular on the face of it, in good faith and for value, with no notice of dishonour or defect). A holder may sue on the bill in his own name, transfer it, and present the bill for acceptance and for payment. Bills may be discharged by payment in due course, by negotiation to the acceptor, by renunciation by the holder of his rights at maturity, by a written cancellation on the bill itself, or by a material alteration (as to, *e.g.*, the date, sum payable, or time and place of payment). Most bills are required by the Stamp Acts to be stamped with an impressed or adhesive stamp.

A promissory note is, according to the Bills of Exchange Act, 1882 s. 83 (1) "...an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or bearer". Unlike bills of exchange there is no drawer of a promissory note and therefore the rules relating to presentment for acceptance cannot apply. A promissory note is a convenient form of security for credit and may be negotiated. Bank notes are promissory notes in which the promise is made by the banker to pay the bearer on demand the sum named in the note. An I.O.U. is *not* a promissory note but is only evidence of a debt.

Cheques are defined by the Bills of Exchange Act, 1882 s. 73 as "bills of exchange drawn on a banker payable on demand" and many of the rules governing other bills are applicable to them. However, certain special rules should be noted. "Crossed" cheques, where two parallel lines are drawn across the face of the cheque, place the paying banker under a duty to pay to a bank and not to the named payee; a special crossing will add the effect of ensuring that payment is only made to a particular bank or banks. Very many cheques are marked "not negotiable"; they may still be transferred by the payee but their character as negotiable instruments is lost. The Cheques Act, 1957 (5 & 6 Eliz. 2, c. 36) has provided that the payee need not indorse the cheque unless he wishes to negotiate it (s. 1) and also (s. 4) protects bankers who in good faith and without negligence receive payment for a customer, or, having credited the customer, receive payment for themselves, and the customer has no title or only a defective title – in such circumstances the banker will incur no liability to the true owner of the cheque by reason only of having received such payment. In English law the banker and his customer not only have a creditor/debtor relationship; a special relationship exists from which duties owed by each to the other are derived.

9. Commercial Securities

Important commercial securities in English law are bills of sale, liens, contracts of guarantee or suretyship and company charges. Bills of Sale are governed principally by the Bills of Sale Acts of 1878 and 1882.[69] Bills of Sale are instruments by which a personal chattel is mortgaged by the owner (the transferor) to another person (the transferee), the property in the chattel passing to the transferee but the chattel remaining in the physical possession of the transferor. They are of two kinds, either absolute or by way of security for money, and they must be made according to the formalities prescribed by the Acts.

Liens are rights to retain property pending payment for it or for services rendered in respect of it. Commercial liens include possessory liens, where

[69] 41 & 42 Vict., c. 31; 45 & 46 Vict., c. 61.

the claimant has possession of the goods against which the lien is asserted (see *supra* 2) and maritime liens against ship, cargo or freight in respect of, for example, damage caused in a collision.

Contracts of guarantee or suretyship are strictly distinguished from contracts of indemnity. They are contracts in which one person undertakes, either personally or with his property, to be responsible for the debt or liability of another.

Companies (see *supra* 6) may, if expressly or impliedly empowered to do so by their articles of association, create charges over their property to secure the repayment of monies borrowed, by legal mortgage, by an equitable charge (*e.g.*, through deposit of title deeds), by a floating charge on the undertaking as a whole, by promissory note, or by debenture.

10. Contracts of Carriage

In English law a "common carrier" has historically special duties and responsibilities which derive partly from case law and partly from statute. A "common carrier" is one who holds himself out as being ready for hire to transport from place to place, either by land, sea or air, the goods of anyone wishing to employ him. He is an insurer of the safety of the goods carried, save for "excepted perils" and for any limitation of his liability by statute.[70] Whether a carrier is a "common carrier" or not will depend on the circumstances; private carriers have unlimited liability, subject to the terms of the individual contract, but may also rely on the "excepted perils" (*e.g.*, Act of God, fault of the consignor).

Since the British Railways Board is *not* a "common carrier" contracts of carriage by *rail* are in practice made according to the terms of the Board's Conditions of Carriage, which cover most kinds of traffic. Certain international traffic is carried under the CIM conditions[71] and special contracts are made from time to time with particular trades and industries.

Many contracts of carriage of goods by *road* are made according to the Conditions of Carriage of the Road Haulage Association and standard conditions for the carriage of goods by road between the signatories to the CMR Convention[72] are incorporated in the Carriage of Goods by Road Act, 1965 (c. 37).

Contracts for the carriage of goods by *sea* are usually called contracts of affreightment and the price of the carriage is called the freight. Contracts of affreightment may take the form of a charter-party or of a bill of lading. The general liability of shipowners is limited by the Merchant Shipping Acts, 1894–1958.[73] The Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22) incorporated the Hague Rules on Bills of Lading and applied to all bills of lading issued in connection with the carriage of goods by sea in ships *from* any port in Great Britain and Northern Ireland. This Act has recently been superseded by the Carriage of Goods by Sea Act, 1971 (c. 19) which gives effect to the Hague Rules as amended by the Brussels Protocol of 1968.

The law of carriage by *air* also reflects the influence upon municipal law of British participation in international conventions. The Carriage by Air Act, 1932 (22 & 23 Geo. 5, c. 36) gave statutory effect in the United Kingdom to the Warsaw Convention of 1929. When the Warsaw Convention was amended by the Hague Protocol of 1955, the amendment was enacted in the Carriage by Air Act, 1961 (9 & 10 Eliz. 2, c. 27) which came into force on 1 June 1967. The further amendments to the Warsaw Convention contained in the Guadalajara Convention of 1961 are given effect to by the Carriage by Air (Supplementary Provisions) Act, 1962 (10 & 11 Eliz. 2, c. 43). The most important non-Convention rules are contained in the Carriage by Air Acts (Application of Provisions) Order, 1967 (no. 480).

11. Maritime Law

As a matter of *ad hoc* classification "maritime law" is not an expression in general use today. However, two main groups of subjects fall within this field of law. These are (1) contracts relating to the carriage of goods by sea and contracts of marine insurance, and (2) litigation concerning collisions, salvage, towage and limitation of liability. The former fall within the jurisdiction of the Commercial Court and the latter within the jurisdiction of the Admiralty Court, in the Queen's Bench Division of the High Court.

12. Bankruptcy

Judicial proceedings in bankruptcy have been the subject of a long series of English statutes, the first of which was passed in the reign of *Henry VIII* in 1542. The modern law is substantially contained

[70] See, for example, the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68) as amended.

[71] International Convention Concerning the Carriage of Goods by Rail 1961 (Cmnd. 2187).

[72] Convention on the Contract for the International Carriage of Goods by Road.

[73] 57 & 58 Vict., c. 60; 6 & 7 Eliz. 2, c. 62.

in the Bankruptcy Act, 1914, the Bankruptcy (Amendment) Act, 1926, the statutory Bankruptcy Rules, and the Companies Act, 1947.[74] Any trader or individual may be made bankrupt; a company cannot be made bankrupt but may be wound up on insolvency (see *supra* 6). The insolvency of a debtor must be accompanied by one of the specific acts of bankruptcy listed in the Act of 1914, such as failing to comply with a bankruptcy notice following a judgement debt. A written bankruptcy petition is filed with the court by a creditor, or by the debtor himself; if the petition is accepted a receiving order is made and an Official Receiver (a public official acting on behalf of the court and the Department of Trade and Industry) is appointed to control the debtor's affairs. A meeting of creditors will decide whether or not to accept a partial payment of debt by way of composition; if this is not acceptable the public examination of the debtor, at which he must appear in person, will be followed by his being adjudicated bankrupt by order of the court. Upon adjudication the creditors will appoint a trustee in bankruptcy (usually one of themselves or the Official Receiver) and a committee of inspection. The effect of the adjudication is to vest title in the bankrupt's property in the trustee, who must then distribute the property among the creditors according to the statutory rules. Certain property is exempt, notably limited personal effects of the debtor and his family, but the trustee may reach back to property held or acquired at or after the commencement of the bankruptcy, and forward to property acquired up to the time of the bankrupt's official discharge. A bankrupt may apply to the court for an order for his discharge at any time after his public examination and an order of discharge may be granted unconditionally, conditionally or suspensively. There are a number of bankruptcy offences (such as obtaining credit for a sum exceeding £ 10 (about US $ 25) without disclosing bankruptcy) and bankrupts suffer from certain civil disabilities.

A Deed of Arrangement may be used to administer a debtor's estate without recourse to the law of bankruptcy. The Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47) applies and provides for the registration of such schemes within seven days of execution.

In Scotland a bankrupt is liable to the process of distribution known as "sequestration"; a "notour bankrupt" corresponds to a person who in England or Wales commits an act of bankruptcy. A trustee in bankruptcy administers the debtor's property and the debtor must assist in the realisation and distribution of his assets. Alternatively he may sign a trust deed which will transfer his property to a trustee who will use it for the benefit of the creditors. The modern Scots law of Bankruptcy was consolidated in the Bankruptcy Act, 1913 (3 & 4 Geo. 5, c. 20) and is closely interrelated with the law as to "diligence", the legal process by which a creditor attaches the property or person of his debtor with the object of forcing him to implement a judgement.[75]

VI. STATE AND ECONOMY

1. National Economic Policy and Planning[76]

This has in recent years often been shaped by the central government through the work of the Department of Employment and the Department of the Environment; other departments concerned with relationships between the government and trade and industry are: the Treasury (fiscal and monetary policy), the Department of Education and Science, the Ministry of Agriculture, Fisheries and Food, and, for most day to day purposes, the Departments of Trade and of Industry. Overall policy is designed to secure economic growth, rising productivity and a favourable balance of payments. In 1970 a Central Policy Review Staff was established within the Cabinet Office to work under the supervision of the Prime Minister on the formulation and review of the government's general economic strategy.

In 1962 a National Economic Development Council (NEDC) was set up, with the support of an independent National Economic Office. Regional economic planning councils and boards were established in 1965 for the eight regional planning areas of England (Northern, Yorkshire and Humberside, East Midlands, East Anglia,

[74] 4 & 5 Geo. 5, c. 59; 15 & 16 Geo. 5, c. 7; 10 & 11 Geo. 6, c. 47.

[75] A short account of this difficult subject, and of the working of the Bankruptcy (Scotland) Act, 1913 is given in *Coull and Merry* (*supra* n. 41) ch. 7.

[76] See generally, Britain 1974. An Official Handbook (1974) ch. 11, 12 and 13.

South-East, South-West, West Midlands, and North-West). Scotland has its own Economic Council and an Economic Planning Board, and there is a Welsh Council and a Welsh Planning Board. Northern Ireland also has an Economic Council. The NEDC and the regional bodies bring together representatives of government and both sides of industry; the NEDC also established a number of Economic Development Committees for particular industries.

Although personal, corporate, co-operative and public enterprises exist side by side in British industry, private enterprise, which accounts for most of the manufacturing industry and thus five-sixths of the country's export trade, is the characteristic feature of the system. Since the end of the Second World War, however, the range and depth of state participation in, and regulation of, industry and trade has steadily expanded. Some areas of state participation and regulation will be mentioned below under Home Industry, and Overseas Trade.

2. Home Industry

a. *Nationalisation* permits direct state participation in major industries and services through public corporations established by statute; these corporations are legal entities, as are other companies and corporations, and have effective practical independence in the day to day operation of the industry concerned, but they are usually accountable to an appropriate minister of the government and ultimately to Parliament. Amongst the principal public corporations of this type may be mentioned British Airways, British Broadcasting Corporation, Bank of England, Independent Television Authority, National Coal Board, British Steel Corporation, Electricity Council, Central Electricity Generating Board, Area Electricity Boards, North of Scotland Hydro-Electric Board, South of Scotland Electricity Board, Northern Ireland Joint Electricity Authority, Electricity Board of Northern Ireland, Gas Council, Area Gas Boards, British Railways Board, British Transport Docks Board, National Freight Corporation, National Bus Company, British Waterways Board, and the U.K. Atomic Energy Authority. The Post Office became a public corporation in October 1969 (it was formerly a government department), but the London Transport Executive (since 1962 a public corporation) was transferred to a new statutory transport authority under the control of the Greater London Council in 1969.

b. The central government *can influence* the course of the industrial life of the nation in many different ways. For example, through the Industrial Reorganisation Corporation, established in 1966, it can participate in schemes for the concentration, rationalisation and modernisation of industry, or, under the Industrial Expansion Act of 1968 (c. 32) give financial support to industrial projects calculated to improve efficiency, to create, sustain, or expand production capacity, or to promote or support technological improvements. Direct investment by the government in industry is common; in some cases, as in sectors of the shipping and petroleum industries, this may lead to a dominant state influence. The government has powers to give capital investment grants and a wide range of financial and other inducements in development areas and in selected industries in need of support for expansion. Development areas designated since 1966 include Northern Ireland, Merseyside, Cornwall and North Devon, and much of Scotland and Wales. They have since been extended to include industrial centres in west-central Scotland, north-east England and South Wales. Separate legislation provides various incentives designed to encourage the establishment of new industry in Northern Ireland.

c. Under legislation the central government *controls* restrictive trade practices, the enforcement of resale price maintenance, and monopolies and mergers. The Resale Prices Act, 1964 (c. 58) made minimum resale price maintenance unlawful, except for exempted agreements under the provisions of the Act. Once a claim for exemption has been registered with the Registrar of Restrictive Trading Agreements, the exemption is operative until a ruling of the Restrictive Practices Court has been given. Under the Monopolies and Restrictive Practices Act, 1948 (11 & 12 Geo. 6, c. 66) and the Monopolies and Mergers Act, 1965 (c. 50), a Monopolies Commission was established; the Department of Trade has authority to refer to this Commission monopolies and mergers for consideration of whether or not they are against the public interest. If an adverse report is received from the Commission the Department has wide powers to suppress or vary the actual or proposed arrangement. Under the Fair Trading Act, 1973 (c. 41) a Director-General of Fair Trading has supervisory responsibilities in respect of restrictive trading agreements, monopolies and mergers, and the protection of consumers.

d. There is very extensive *state control* of the safety, health and general welfare of the working population. Much of the employment, deployment and training of labour is centrally supervised

and regulated by the Department of Employment. This Department is also concerned with the mobility of labour, and with the issuing of employment permits to Commonwealth and foreign workers. The terms and conditions of employment (wages, working hours, *etc.*) are settled in the majority of industries and trades through collective agreements entered into by employers and trade unions, although statutory wage-regulating machinery exists in certain industries and women and children are afforded special statutory protection in the matter of wages, hours and conditions of work. Trade unions are unincorporated associations but possess many of the characteristics of legal personality; they may sue and be sued for breaches of contract and may bring actions in respect of torts which have no connection with their group property. They have since 1906, however, enjoyed the privilege of freedom of actions against them in respect of torts alleged to have been committed by them or on their behalf.[77] The future development of the law on industrial relations is currently the subject of much controversy. The National Industrial Relations Court, which was established by the Industrial Relations Act, 1971 (c. 72) was recently abolished (together with its parent Act) by the Trade Unions and Labour Relations Act, 1974 (c. 52; see s. 1(3)). Legislation shortly to be introduced by the present government will effect far-reaching changes in the law relating to the protection of employment, the rights of members of trade unions to engage in industrial action, and the capacity of central government and its agencies to intervene directly in the control and direction of industry.[78]

3. Overseas Trade

By far the greater part of both the export and import trade is in the hands of private enterprise. Two types of state regulatory activity may be mentioned here: Customs duties and tariffs, and controls on trade and payments.

a. *Customs duties and tariffs.* – The United Kingdom is an active member of a number of international organizations which are concerned in various ways with removing tariff barriers and with the general liberalisation of international trade. These include the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), the Organization for Economic Co-Operation and Development (OECD) and the United Nations Conference on Trade and Development. Tariffs on trade in industrial products between the United Kingdom and the other member countries of the European Economic Community (EEC) are being progressively eliminated in stages over the transitional period ending on 1 July 1977. By the same date industrial tariff barriers between the EEC and the remaining member countries of the European Free Trade Association (EFTA), to which the United Kingdom belonged between 1960 and 1972, will also have been dismantled.

Reciprocal preferential tariff treatment for trade between the United Kingdom and certain Commonwealth countries, introduced in 1932, has been affected by British membership in the EEC. A number of Commonwealth countries are in consequence now negotiating with the EEC with the object of securing association or trading agreements to take effect after 31 Jan. 1975 (the date of expiry of the second Yaoundé Association Convention), at which time the United Kingdom will be obliged to apply the Common External Tariff of the EEC in trading relations with them.[79]

Customs duties on imports into the United Kingdom are either revenue duties or protective duties. Protective duties have been progressively relaxed in recent years (in particular as a result of the so-called "Kennedy Round" negotiations (1964–1967) within the framework of GATT). A new series of negotiations, the "Nixon Round", began in 1973.

b. *Controls on trade and payments.* – The Department of Trade has been granted statutory authority to prohibit or regulate the import or export of goods. Import licensing (usually in conjunction with quota restrictions) is still required for a small range of goods and there are health restrictions on some others. There is a temporary general import restriction on the import of goods from Rhodesia. Export controls are imposed on goods of material and strategic importance, goods in very short supply, on some animals (for humane reasons), on works of art, and on some other goods by way of support for exchange control restrictions. These last restrictions are of great practical significance; they are administered by the Bank of England (and the commercial banks) acting on behalf of the Treasury. Their purpose is to control

[77] Trades Disputes Act, 1906 (6 Edw. 7, c. 47) s. 4.

[78] See *Perrins*, Labour Relations Law Now (1975) p. XIII and 157 ss.

[79] See *Simmonds* (ed.), Encyclopedia of European Community Law (1974) II Part B (Annotation to Protocol 22 of the Act of Accession).

investments abroad outside the sterling area and to regulate the movement of capital from the United Kingdom to non-sterling countries. Control is exercised both over exports and over imports by way of these restrictions; exports must usually be paid for within six months in a foreign currency or in sterling from an external account, and payment for imports is supervised in order to ensure that only currency authorised for this purpose is utilised.

VII. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT

In this chapter (1) industrial property, including patents for inventions, industrial designs, and trade marks, and (2) copyright will be mentioned briefly.

1. Industrial Property

a. *Patents for inventions.* – The English patent system is almost 350 years old; an early landmark was the Statute of Monopolies of 1623 (21 Ja.1, c. 3). Most of the law developed in decided cases and since 1884 reports of patent cases have regularly been published separately in the series of Reports of Patent, Design, Trade Mark and Other Cases (London, Patent Office). The law has recently been partially codified in the Patents Act, 1949 (12, 13 & 14 Geo. 6, c. 87) which must be read subject to later amending statutes and to the rules known as the Patents Rules.

Patents are granted by "Letters Patent" (open letters) in which the Monarch vests a subject (the "inventor") with special rights and privileges to make, use and sell an "invention" for a limited period of time. In this period a monopoly is given formal protection. The inventor is either the creator of something new or a person who introduces into the country an invention by authority of its creator. The assignee of an invention may apply for a patent under his own name. The invention is protected for a period of 16 years, which may, in certain circumstances, be extended. The protection extends to the whole of the United Kingdom. The invention may be either a new article of manufacture or "any new method or process of testing applicable to the improvement or control of manufacture" (s. 101 (1)).

Applications for patents are made to the Comptroller-General of Patents, Designs and Trade Marks at the Patent Office in London. It is common for first a "provisional" then later a "complete" specification of the invention to be filed by a patent agent on behalf of the inventor. These specifications must contain exact explanations of the nature of the invention, its novelty, and the proposed method of its manufacture. The specifications are examined in the Patent Office, and, if accepted, the complete specification is published. The grant, or sealing, of the patent will follow unless there is opposition on any of the permitted grounds (*e.g.*, that the invention was not that of the applicant, or that the specification was inadequate). Even after sealing it is possible, in certain circumstances, for a patent to be revoked (*e.g.*, if the grantee is shown not to be the true and first inventor, or the patent was obtained in fraud of the rights of another person). Appeals from decisions of the Comptroller-General may be made to the Patents Appeal Tribunal (s. 85 (1)). Patent rights are often protected by the grantee through the use of injunctions to restrain further infringement, coupled with claims for damages and/or enquiries into profits arising from past infringement.

b. *Industrial designs.* – The protection of industrial designs is now regulated by the Registered Designs Act, 1949 (12, 13 & 14 Geo. 6, c. 88) as amended. "Design" is defined by s. 1(3) as comprehending: "...features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or feature of shape and configuration which are dictated solely by the function which the article to be made... has to perform". Again much of the detailed law is still to be found in decided cases. Certain categories of design may be protected by their registration. This procedure gives the "owner" of the design (who need not necessarily be its author) an exclusive right to make, import, sell or hire any article in respect of which the design has been registered and to which it has been applied. This right extends for five years in the first instance but ownership may be renewed up to a total of fifteen years.

Applications for registration are made to the Comptroller-General of Patents, Designs and Trade Marks, who is for this purpose known as the "Registrar" of Designs. All designs must be registered in respect of a particular commodity

and "literary" and "artistic" designs are usually not registrable, although they may be subject to copyright. Appeals against decisions of the Registrar are similar to appeals in the case of patent applications.

c. *Trade marks.* – The law relating to the registration of trade marks is contained in the Trade Marks Act, 1938 (1 & 2 Geo. 6, c. 22) which replaces, re-enacts, and extends earlier legislation. Reference must also be made to the rules made under authority of this statute, which are known as the Trade Mark Rules, and to the extensive case law. A trade mark is a mark used in connection with goods by a manufacturer or trader in order to signify that they are his or are associated with him. A mark may include a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination of these.

Applications for the registration of trade marks are made to the Comptroller-General of Patents, Designs, and Trade Marks, who is for this purpose known as the "Registrar" of trade marks. To be registrable it need not have any meaning but must be "distinctive" in relation to the goods in respect of which it is registered. The Registrar maintains a Register of Trade Marks which is divided into two parts, Part A and Part B. The registration of a mark in Part A of the Register will be accepted if the mark is easily distinguishable from all other registered marks, and is inherently distinctive or is already clearly identified in the public mind with the goods concerned. Registration in Part B of the Register is permitted to marks which are capable of distinguishing goods in the above manner in the course of time. Registration under Part A confers exclusive rights upon the owner; registration under Part B is merely *prima facie* evidence of such rights. Trade marks "likely to deceive" are not registrable, nor are those in concurrent use by three or more independent parties. A number of particulars are not permitted by the Act or the Rules to appear as, or as part of, a registrable trade mark. Registration is valid for a period of seven years but may be renewed for successive periods of fourteen years. Appeals against refusals to register a mark may be made by the applicant either to the Department of Trade or to the High Court.

Trade names, used by a trader to signify himself, his firm, or his goods, are not registrable. A trader may be able to protect his interests in this case by the tortious action of "passing off", which is also open to the owner of a registered trade mark.

The Merchandise Marks Act, 1887–1953, created a number of criminal offences to cover cases of the adoption of false trade marks. These Acts have been superseded by the Trade Descriptions Act, 1968 (c. 29) which makes it a criminal offence to apply false trade descriptions to goods (or to make false or misleading indications as to price, services, *etc.*) in the course of trade or business.

d. The United Kingdom is a party to the 1883 Paris Convention, as revised by the 1967 Stockholm Convention on the Protection of Industrial Property.

2. Copyright

The modern law is substantially governed by the Copyright Act, 1956 (4 & 5 Eliz. 2, c. 74) but again, as in the preceding topics relating to rights in industrial property, reference must be made to the various Rules and Orders in Council made under the authority of the Act and to the substantial body of case law on the subject. The Copyright Act, 1956 s. 1(1) defines copyright in relation to a work as "...exclusive right... to do, and to authorise other persons to do, certain acts in relation to that work" and then proceeds to define "certain acts" as those acts which are designated in subsequent provisions as restricted by the copyright in a work. "Works" comprehended within the meaning of the Act include literary, dramatic and musical works, works of art, sound recordings, cinematograph films, television and sound broadcasts, and published editions of literary, dramatic or musical works.

Copyright protection is afforded under the Act to the original expression of ideas against the plagiarism of that expression through the copying of the protected material. The owner or the maker of the work concerned (sometimes the employer if the work is that of an employee under a contract of service and is made in the course of employment) acquires copyright when the work is made or created; copyright protection does not depend upon registration. The owner or maker acquires an exclusive right to do, or to authorise others to do, acts that would otherwise be restricted as in infringement of the copyright. This right is not perpetual, but will endure for a specific period of time. In published literary, dramatic or musical works copyright subsists for 50 years from the end of the year of the author's death. In unpublished works of this kind copyright subsists until their publication (or performance, recording or broadcasting) and thereafter for a period of 50 years. In published editions (*i.e.*, typographical reproductions of an original work issued to the public) copyright subsists for a period

of 25 years from publication. Under the 1956 Act copyright subsists in an original work if either it was first published in the United Kingdom, or the author or maker is a "qualified" person (*i.e.*, either a British subject or a person domiciled or resident in the United Kingdom).

The infringement of copyright arises from the carrying out of acts restricted by the copyright. These acts vary according to the nature of the work protected; they include, in relation to literary, dramatic or musical works, the unauthorised reproduction of the work in any material form, the unauthorised public performance of the work, or the sale or exposing of such a work for sale or hire knowing it to have been made in breach of copyright. An allegation of infringement of copyright may be met with a defence of fair dealing, *i.e.*, that the material had been used for the purposes of private study, research or criticism, or was the subject of a report or review of current events in a newspaper or periodical, or in a film or broadcast, and had been accorded reasonable acknowledgement.

Civil remedies for the infringement of copyright include an action for damages, probably accompanied by a claim for an account of the profits, and, if a repetition of the infringement is anticipated, an action for an injunction. The copyright in sound recordings, films, and sound and television broadcasts is the subject of special provisions in the 1956 Act, which also set up the Performing Right Tribunal, with power to adjudicate upon disputes between persons who wish to perform certain works protected by copyright and the various "licensing bodies" which may authorise the performance of such works. These "licensing bodies" include the Performing Right Society, the B.B.C. and the Independent Television Authority.

The United Kingdom was an original signatory of the Berne Convention on International Copyright of 1886 and at present adheres to the version of the Convention as revised in the Brussels Convention of 1948; the United Kingdom did not ratify the substantive provisions of the Stockholm Convention Protocol, 1967, and has not yet ratified the further revision of the Berne Convention agreed upon at the Paris Conference 1971–1973.

VIII. JUDICIAL PROCEDURE IN CIVIL AND COMMERCIAL CASES

1. In General

In the discussion of the sources of English law (see *supra* II) reference was made to the fact that the law has been greatly influenced by the requirements and practices of the profession; indeed until the nineteenth century it was, in important essentials, a formalist system. A concern for, and a keen interest in, rules of procedure (especially procedure before a jury) has remained a characteristic of the system in spite of the fact that during the last hundred years a most conspicuous development has been the virtual disappearance of the jury as the normal method of trying civil actions. English procedure has been much simplified during that time. Nevertheless, it continues to revolve around the "Day in Court", the strict concentration upon one oral hearing in open court which will lead to a solution of the dispute. Its accusatorial (in criminal cases) and adversary (in civil cases) character allows the parties, rather than the court, to take the initiative, and is in marked contrast to the inquisitorial approach of Continental Civil law systems. Its orality, the need to prove everything on oath and subject to cross-examination in the presence of the court, shapes the nature and the form of the preliminary written pleadings in an action, which must be drafted accurately and concisely in order to define, in reasonable time before the hearing, the exact issues between the parties which the court is to be asked to decide. In the English view, a fair trial within the bounds of a precise and careful procedure ought to lead to a just solution; the administration of justice may well be of more importance than justice itself.

2. England

The sources of the law of civil procedure as it affects proceedings in the Supreme Court are to be found in the code of Rules of the Supreme Court (R.S.C.), which was first drawn up in 1883, under authority of the Judicature Acts, 1873–1875 (*supra* n. 20). These rules are set out in The Supreme Court Practice (The "White Book") and they are amended from time to time by a "Rule Committee" headed by the Lord Chancellor. The rules of procedure applied in the County Courts are to be found in the County Court Practice; they allow in certain respects for less formality and more flexibility.

The Rules of the Supreme Court vary as between proceedings in the Queen's Bench Division,

the Chancery Division, and the Family Division of the High Court. An outline of the principal stages in proceedings in an action before Queen's Bench may serve as an illustration.[80] The proceedings are initiated directly by the aggrieved person and there is no preliminary enquiry. The legal representative of the plaintiff will obtain a writ of summons which must be issued, *i.e.*, taken to the appropriate officer of the court to be stamped and filed. This writ is in fact a written command in the Queen's name ordering the defendant to "enter an appearance" within eight days or suffer judgement by default. It provides a brief statement of the cause of action and is intended to give formal notification to the defendant of the claim against him. If the defendant wishes to contest the claim he "enters an appearance" by completing a form and taking it to an officer of the court. The next stage sees the preparation and delivery of the written pleadings. These pleadings are often prepared by counsel and seek to define the issues to be tried. They will probably include the plaintiff's Statement of Claim, the defendant's Defence (which may be accompanied by a Counter-Claim), a Reply from the plaintiff and a Rejoinder from the defendant. If at any time a party does not make his meaning clear in his pleadings, the other party may be able to demand Particulars which amplify and explain that meaning. When the pleadings are completed the plaintiff must take out a Summons for Directions before a Master of the Supreme Court. The Masters are officials of the court, whose task is to adjudicate upon "interlocutory" matters which are preliminary and incidental to the trial. It is at this point that orders for the mutual discovery (disclosure) of documents may be made or interrogatories, written questions relevant to the issues, be required to be answered. If the plaintiff has good reason to believe that the defendant has no answer to his claim, he may choose to adopt the summary procedure provided by Order 14 R.S.C. This allows the Master in Chambers to enter judgement for the plaintiff without sending the case for trial unless the defendant can satisfy him that he has a reasonable defence to offer.

The importance of the role and function of the Master in Chambers in the English law of procedure must be emphasised; only after he is satisfied at a hearing of the Summons for Directions will instructions be given for the trial of the action to be listed. Up to this time civil proceedings may (except for divorce proceedings) be abandoned or compromised without leave of the court; in fact the great majority of disputes are settled by agreement between parties before trial.

The trial in the High Court is usually before a judge sitting without a jury, except for cases involving, *e.g.*, claims for defamation, false imprisonment, unlawful arrest, and, in certain circumstances, cases of fraud. If a jury is present it will have the responsibility of deciding questions of fact and the amount of damages to be awarded. The parties will nearly always be represented by counsel at the trial but they may appear in person if they so wish. Counsel for the plaintiff will open with an outline of his case, then proceed to call his witnesses for their examination in chief. The witnesses are subject to cross-examination by counsel for the defendant and to re-examination by counsel for the plaintiff; the parties themselves may be witnesses. After the witnesses for the plaintiff have been heard the case for the defendant will be opened and witnesses for the defence called and examined in the same way. The object of cross-examination is to test the accuracy of the evidence given in chief by the witness; re-examination attempts to re-establish evidence that has been placed in doubt by the cross-examination. Counsel for the plaintiff and the defendant will then address the court in turn. If there is a jury the judge will sum up the evidence for them and give them directions as to the law applicable. If the judge is sitting alone he will give, or reserve until a later date, his judgement.

3. Scotland

Civil proceedings in the Court of Session were originally based on Romano-Canonical styles similar to those used in France. Following statutory changes first introduced in the nineteenth century they have been greatly simplified in recent years through the Consolidating Act of Sederunt of 1913, the Rules of Court of 1936, and, most recently, the Rules of Court of 1965, on which the law now rests.[81] Proceedings are initiated with a writ or summons (sometimes a petition or other form of application) prepared by the legal representatives of the pursuer. The writ or summons runs in the name of the Queen and sets out the elements of the pursuer's case. These include conclusions (brief statements of the remedies claimed), a condescendence (a statement in

[80] A most useful short outline of civil and criminal proceedings in the English courts is given in *James*, Introduction to English Law (ed. 8, 1972) 67–73.

[81] An excellent short account of civil proceedings in Scotland is given in *Walker* (*supra* n. 41) 392 ss.; the account in the text is largely derived from this source.

numbered paragraphs of the facts upon which the pursuer relies) and pleas-in-law (propositions of law upon which the pursuer rests his case). The writ or summons is signeted at the offices of the court and the citation of the defender is effected by the proper service of the writ or summons upon him. The next step is the calling of the summons, the publication of the action in the Rolls of Court. At the same time the documents in the case, which are called the process, are lodged with the court.

If the summons is uncontested the pursuer may take a decree in absence against the defender. If the defender wishes to contest the action he must enter an appearance and lodge defences which should answer the pursuer's allegations of fact and include his own pleas-in-law, and, if appropriate, his counter-claim. An open record is then prepared. In this the condescendence of the pursuer will be followed by that of the defender, and the pleas-in-law of the pursuer by those of the defender. A process of adjustment follows; this allows counsel for each party to adjust the record by making additions or alterations to their pleadings with a view to overcoming contraventions and clarifying the issues. As in English procedure, the careful drafting of written pleadings is essential before proof (trial by a judge alone) or jury trial. When the adjustment of pleadings is complete the Lord Ordinary will pronounce an interlocutor (an order disposing of the whole or part of a case) closing the record and appointing the hearing, or further procedure. A closed record is then prepared.

It is common in Scotland to find legal debates in court prior to the proof which are concerned with the competency or relevancy of the written pleadings; "pleas to the relevancy" are similar in purpose to that served formerly by the demurrer in English procedure. Procedure in the action in court, the debate, will vary dependent on whether the parties are in dispute as to law, or fact, or both law and fact. If the parties are in dispute as to the law, or law and fact, the pleas in law may be argued before proof. This argument may turn on such questions as the jurisdiction of the court, the competency of the remedy sought by the plaintiff, or the relevancy (*i.e.*, the sufficiency in law) of the allegations made by either party in justification of their claims. After argument the judge will issue an interlocutor giving a ruling on the law. If the dispute is on law alone the pursuer may be granted his decree or the action be dismissed. If the dispute is on both law and fact, and the action is not dismissed on a ground of law, the judge will then order either a proof or a jury trial (or a proof before answer if he wishes to reserve points of law for later argument after more facts are presented). Trial by jury is more common in civil cases in Scotland than it is in England and Wales, and is in fact the usual form of procedure in actions for personal damages.

At the trial before a judge sitting alone there is no opening speech by counsel. Witnesses are examined, cross-examined and, if necessary, re-examined by counsel for the pursuer and the defender. After witnesses have been heard counsel make their submissions. The judge gives in his judgement an interlocutor, sustaining or rejecting pleas in law, and a decree, determining the outcome of the action and disposing of the remedy sought; he may wish to reserve his judgement for a later occasion, in which event he is said to make *avizandum*.

In jury trials[82] (when a jury of 12 persons is used) counsel for the pursuer and the defender seek to focus the attention of the jury upon issues and counter-issues respectively. These are precisely formulated questions of fact. There are opening statements by counsel, the presentation and examination of evidence by witnesses, and concluding addresses by counsel to the jury. The judge then charges the jury as to their responsibility, directs them as to the law, and sums up the main points in the evidence. The jury brings in, either unanimously or by a majority, a general verdict or, less frequently, a special verdict (one which gives answers to specific questions of fact put to them by the judge). If the jury cannot agree upon a verdict within a time limit it will be discharged and the case be re-tried.

4. Arbitration

The resolution of a dispute by reference to arbitration may in certain circumstances be made by an order of the High Court, is provided for in various Acts of Parliament, or may be agreed upon by the parties. The Arbitration Act, 1950 (14 Geo. 6, c. 27) applies to written agreements where the parties agree to submit present or future differences to arbitration, whether an arbitrator is named or not. The award of the arbitrator is final but may in some cases be set aside by order of the High Court or remitted in whole or in part for reconsideration by the arbitrator or arbitrators. An arbitrator has power to state his award in the form of a special case for the opinion of the court and can be compelled to do so by the court under s. 21 of the 1950 Act.

[82] *Ibidem* 400–402.

IX. PRIVATE INTERNATIONAL LAW AND INTERNATIONAL LAW OF PROCEDURE

1. Introductory

In the English legal system the terms "private international law" and "conflict of laws", although each is open to objection, are used to all intents and purposes as if they were synonymous in scope and content. English conflict of laws rules are concerned with the limits of the jurisdiction to be exercised by an English court, and with the choice of the law to be applied, in the determination of issues brought before them which contain, or may contain, a foreign element. They include rules relating to the recognition and enforcement of foreign decrees and judgements in English courts; they do not include the law as to nationality or the minimum standards of treatment of foreign nationals. English conflict of laws rules regard the rules of all legal systems other than that of England and Wales as foreign for this purpose; thus Scots law and the law of Northern Ireland is as "foreign" as the law of France or Italy.

Case law is the most important source of the law in this field and the principal rules are of eighteenth and nineteenth century origin. These doctrines have been developed empirically and piecemeal by the judges; they have been shaped and conditioned by considerations of justice, comity and convenience. English conflict of laws rules have been well described as resting on a basis of judicial justice, which is both pragmatic and ethical.[83] In the United Kingdom and the Commonwealth many of the rules have gone some way toward unification through the decisions of the House of Lords and the Judicial Committee of the Privy Council (see *supra* I 4 a (4) and (5)). In recent years the United Kingdom has taken an increasing part in the work of the Hague Conference of Private International Law, and has ratified certain of the conventions drafted by the Conference.

The "choice of jurisdiction" and "choice of law" questions are the ones most frequently encountered in the cases; these questions are mutually independent and in very many issues both questions require to be answered.

It is possible here only to mention in the briefest manner some of the distinguishing concepts and characteristics of the English conflict of laws rules.

2. Choice of Law

The problem of *classification or characterisation*, thrown up by frequent divergencies between the various systems of conflict of laws rules, has provoked much controversy.[84] Once the legal relationship in issue has been settled, then one or more of a number of "connecting factors" may be called in aid in order to provide a key to the legal system to be applied to that relationship. These connecting factors may include domicile, residence, ordinary residence, the *locus contractus*, the *locus solutionis*, the *lex fori*, the intention of parties, the place of incorporation of a company, the place where property is situated, or the place where a transaction is concluded. Apart from the practice of determining domicile in accordance with the *lex fori* and of determining the nature of proprietary interests in things according to the *lex situs*, the English courts have not yet arrived at a consistent theory of characterisation.

The English doctrine of *renvoi* is unlike the Continental doctrine and is known as *double renvoi* or the "foreign court theory".[85] This doctrine is of particular importance in cases of succession to movable and immovable property. Under it the English judge seised of a conflicts situation must apply the foreign law as if notionally he were the foreign judge. The doctrine has been criticised as working not because of, but rather despite, itself, and as leading the English judge on occasion to decide questions of foreign law which the foreign courts may not themselves have decided.[86]

Civil status is decided according to the law of the domicile; as there is no law of nationality as a single system which is applicable to all British subjects, matters such as the age of majority or minority, marriage, succession (testate or intestate) thus are governed by the law of the domicile of the person concerned. In Anglo-

[83] See *Graveson*, The Conflict of Laws (ed. 7, 1974) ch. 1, for a good general exposition of the nature, origins and development of the English rules; *Anton*, Private International Law. A Treatise From the Standpoint of Scots Law (1967) is also extremely helpful.

[84] *Cf.*, *Huntington v. Attrill*, [1893] A.C. 150 (P.C.); *Re Hoyles*, [1911] 1 Ch. 179 (C.A.); *Re Berchtold (Berchtold v. Capron)*, [1923] 1 Ch. 192; *In the Estate of Maldonado (State of Spain v. Treasury Solicitor)*, [1954] P. 223.

[85] *Re Ross (Ross v. Waterfield)*, [1930] 1 Ch. 377.

[86] *Re Duke of Wellington*, [1947] Ch. 506.

American legal theory it is the concept of domicile which links an individual with the law of a given territory and which provides what *Wolff* has called "his legal centre of gravity".[87] In the English view the concept of domicile serves to identify the "permanent home" of an individual as either where he makes such a home or where the law, by construction, makes it for him. Domicile, which has reference to a territory over which a single system of law operates, requires an interpretation of the conduct of the *propositus*, and in particular of his *animus manendi*, that often gives rise to difficulty. It has been said that the use of the concept of domicile produces usually an appropriate, but often an unpredictable, choice of law.[88]

In determining the nature and the extent of obligations in *contract*, English courts will apply the "proper law of the contract", reached through the interpretation of rules which are designed to ascertain the intention of the parties. An intention expressed by the parties will determine the proper law of commercial contracts; if such an intention is not evident then the English courts will apply certain "presumptions" to the facts and circumstances of the case in order to infer that intention. These "presumptions", indicative of the "proper law", may have reference to the *lex loci contractus*, the *lex loci solutionis*, the *lex situs*, the law of the flag state of a vessel, *etc. etc. Graveson* has expressed these considerations in the following way: "It would seem a fair synthesis of English decisions to say that the proper law depends on the intention of the parties ascertained objectively and judicially."[89] The validity or invalidity of the contract will be determined in accordance with English law if the application of foreign law would be contrary to the provisions of an Act of Parliament or to the public policy of English law, or to English rules of procedure.

The conditions governing the actionability of *foreign torts* in England are the subject of much debate. For almost two hundred years English courts have accepted jurisdiction over private wrongs committed abroad, even though both parties were foreigners, but they have developed highly idiosyncratic rules as to the classification of the foreign wrong. Whether or not the wrong is one for which an action can be brought in England will depend upon the combined effect of the law of the country where the act is done (the *lex loci delicti commissi*) and the law of England (*lex fori*).[90] The wrong must be actionable as a tort according to the *lex fori* and not justifiable according to the *lex loci*. The need for a new basis of liability, in which the *lex loci* would no longer play a decisive part, has been persuasively argued in recent years, especially by those who would prefer to see the emergence in English law of a "proper law" of the tort.[91]

3. Procedure

While matters of substance are governed by the law to which the court is directed through its choice of law rules (*lex causae*), matters of procedure are within the exclusive competence of the law of the forum (*lex fori*). The historical evolution of the distinction between matters of procedure and matters of substance has, however, caused difficulties in defining "procedure". It is generally understood that "procedure" may include the following matters: actionability and the limitation of actions; the nature of the plaintiff's remedy and the method of enforcing it; all matters relating to evidence; the determination of the proper parties to an action; priorities as between co-defendents; damages; set-offs and counterclaims; rights of appeal.

The recognition and enforcement in England of *foreign judgements* has raised questions of comity, of vested rights, and of the duty of the court to do justice according to its own views. Foreign judgements are not immediately and directly enforceable by execution but may, if they fulfil certain requirements, (1) be enforceable by action or counterclaim at common law, (2) be enforceable under statute, (3) be recognised as providing a defence to an action, or (4) operate as an assignment of property.[92] Modern statutory provisions providing for the enforcement of foreign judgements by registration stem from the Judgements Extension Act, 1868 (31 & 32 Vict., c. 54) the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81) and the Foreign Judgements (Recip-

[87] *Cf., Udny v. Udny* (1867), 1 H.L. Sc. 441; *Winans v. Attorney-General*, [1904] A.C. 287 (H.L.); and *Ramsay (or Bowie) v. Liverpool Royal Infirmary*, [1930] A.C. 588 (H.L.).

[88] *Cheshire*, Private International Law (ed. 7, 1965) 143 ss.

[89] *Graveson* (*supra* n. 83) ch. 12, 431.

[90] *Cf., The "Halley"* (1868), 2 P.C. 193; *Phillips v. Eyre* (1870), 6 Q.B. 1 (Ex.); *The Mary Moxham* (1876), 1 P.D. 107 (C.A.); *Machado v. Fontes*, [1897] 2 Q.B. 231 (C.A.); *McMillan v. Canadian Northern Railway*, [1923] A.C. 120 (P.C.).

[91] See the criticism in *Dicey and Morris*, Conflict of Laws (ed. 9, 1973) Part 6 ch. 33.

[92] *Idem* Part 7 ch. 34.

rocal Enforcement) Act, 1933 (23 & 24 Geo. 5, c. 4). Judgements of the European Court of Justice (and decisions of the Council or the Commission of the European Communities which impose a pecuniary obligation) are enforceable in the courts of the United Kingdom after registration in accordance with the European Communities (Enforcement of Community Judgements) Order, 1972 (S.I. 1972 no. 1590).

The enforcement of *foreign arbitral awards* is subject to the general conditions set out in the Arbitration Act, 1950 (14 Geo. 6, c. 27), which includes in its Schedules the 1923 Protocol on Arbitration Clauses signed under the auspices of the League of Nations, and the 1927 Convention on the Execution of Foreign Arbitral Awards signed at Geneva. The provisions of the Arbitration Act, 1975 (c. 3) permit the United Kingdom to accede to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1968 (the New York Convention). This Act is not in force at the time of writing and awaits an order of the Secretary of State.[93] Provisions relating to arbitration over international investment disputes are contained in the Schedule to the Arbitration (International Investment Disputes) Act, 1966 (c. 41).

4. Scotland

For the purposes of Scots private international law, England is, apart from statute (and sometimes specifically because of the requirements of a statute), in the position of a foreign country. Rules of English private international law must be proved, where necessary, by evidence in Scottish courts, and *vice versa*. Scottish rules relating to the conflict of laws are, however, markedly similar on many subjects to those of the English system and leading case decisions from either jurisdiction are usually treated with respect in the other. For all practical purposes decisions of the House of Lords in this area, whether on appeal from Scotland or from England, will be treated as of equal authority in both countries.

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2. Periodicals

Current Law Year Book (since 1947) = Current Law (in monthly parts); Current Legal Problems (since 1948, yearly); Journal of the Society of Public Teachers of Law (since 1924, quarterly); Law Quarterly Review (since 1885); Modern Law Review (since 1937, 6 times yearly); Cambridge Law Journal (since 1921, twice yearly); Journal of Business Law (since 1957, quarterly); Public Law (since 1956, quarterly); Juridical Review (1889–1955, thrice yearly, N.S. since 1956); International and Comparative Law Quarterly (since 1952); Journal of Comparative Legislation and International Law (1896–1951); British Year Book of International Law (since 1920/1921).