MACCABAEAN LECTURE IN JURISPRUDENCE

THE SEARCH FOR PRINCIPLE

By ROBERT GOFF

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In the late afternoon of Tuesday, 29 May 1453, the twenty-one-year old Ottoman Turkish Sultan Mehmet II, later to be called the Conqueror, entered the City of Byzantium. He rode across the square from the Church of the Holy Wisdom, which he had ordered to be transformed forthwith into a mosque, and, dismounting, made his way into the old Sacred Palace of the Emperors. As he wandered through the hall of the palace, already ravaged by his plundering armies, that cruel but cultivated prince is said to have murmured the words of a now unidentifiable Persian poet: 'The spider weaves the curtains in the palace of the Caesars; the owl calls the watches in Afrasieb's towers.'[1]

Indeed, nothing is permanent. All things must change. Change need not be, and often is not, as devastating as the fall of Constantinople. In our country, protected by the sea from a foreign invader for over 900 years, and inhabited by a people temperamentally inclined, perhaps climatically conditioned, to a philosophy of gradualism, change is less dramatic, sometimes even imperceptible, in its impact. But even here, change there must be; even here, nothing can be regarded as permanent. It is perhaps more apt on this occasion to invoke the authority of an English chief justice for this proposition, than of a Persian poet or an Ottoman sultan; and there are available to me the celebrated words of Sir Ranulfe Crewe in delivering the opinion of the judges in the Oxford peerage case on 22 March 1625: 'Time hath his revolutions. There must be a period and an end of all temporal things, finis rerum, an end of names and dignities and whatsoever is terrene.'[2] Sir Ranulfe went on to lament the passing of the names of Bohun, Mowbray, Mortimer, and Plantagenet in words since described as one of the few passages of really fine prose to be found in the Law Reports.

[1] Sir Steven Runciman, *The Fall of Constantinople* (CUP, 1965), p. 149.

[2] Collins, *Proceedings, etc.*, pp. 176–7; Gibbs, *The Complete Peerage*, x (London, 1910), 256–57.

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Yet laws were once thought to be immutable. It seemed obvious that, if law had an origin which was divine, no mere man, however powerful, could change the law. This view has, of course, long since been abandoned. Every statute will in the fullness of time be amended or repealed. Every statement of legal principle by judge or jurist will sooner or later be qualified or rejected. We should, unlike Pio Nono after the First Vatican Council of 1870, proclaim not a doctrine of infallibility of popes, but a doctrine of fallibility of judges and legislators. Indeed we witness today a very different attitude to that which prevailed long ago. New laws are made and old laws are repealed or amended by legislators with an enthusiasm which is, to some of us, a little frightening. A government which does not propose or a legislature which does not enact a substantial corpus of legislation is regarded as impotent. Reformers of our society abound. Reform is identified with improvement; and changes are made in our laws which in the outcome prove on balance to be sometimes beneficent, sometimes harmful, and sometimes merely ineffective.

It is in such a world as this that judges and jurists strive to fulfil their respective functions today. Of course, their roles are not the same. Certainly, the primary function of judges is not the formulation of legal principles. Their main task, more workaday, more humdrum, is to try cases: in civil cases, to adjudicate upon disputes between litigants, and in criminal cases, to secure a fair trial of the accused by jury. But in the exercise of their functions, judges have from time to time to expound the law. For obvious reasons, this duty falls primarily upon appellate courts. But it is one which, occasionally, even puisne judges have to undertake. It is a curious fact that, in the very first case which I was called upon to try, it fell to me to expound the law on a topic on which there was absolutely no authority at all. The tablet of wax was virgin; and I try to persuade myself that the principles which I then boldly inscribed with my stilus survived the scrutiny of the appellate courts, though there were some little local differences between myself and the House of Lords (who were by no means agreed among themselves) on the application of those principles to the particular facts of the case. I speak of the *Primero Congreso del Partido*[1]—the case taking its name from the new ship which was intended to sail proudly into the harbour of Havana on the occasion of the First Party Congress of the Communist Party of Cuba, but which was prevented from doing so by the act of the Chilean government in arresting her in a builders' yard in this

[1] [1978] QB 500; [1980] 1 Lloyd's Rep. 28; [1983] AC 244.

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country. At all events, I can at least boast that my judgment was translated into Spanish on the personal order of President Fidel Castro. No such compliment was, I understand, paid to the speeches delivered in the House of Lords.

For jurists, on the other hand, the formulation of legal principles is one of their main functions. Another is, of course, to instruct; and few academic lawyers are content with their lot unless they possess a vocation to teach. Judge and jurist, conditioned by their experience, adopt a very different attitude to their work. For the one, the overwhelming influence is the facts of the particular case; for the other, it is the idea—often received, but sometimes an original brainchild. That is one of my principal themes tonight. Another is that, different though judge and jurist may be, their work is complementary; and that today it is the fusion of their work which begets the tough, adaptable system which is called the common law.

This was not always so. For hundreds of years it was the judges alone who expounded the principles of the common law. Sir William Blackstone is a possible exception; but he too was in later life appointed to the Bench. Though the Vinerian Chair, of which he was the first and perhaps the most distinguished occupant, was founded in 1758, it was not until the late nineteenth century that recognizable faculties of law, responsible for the instruction of students in the common law, began to emerge in our universities: even then, there was an emphasis on Roman Law, Jurisprudence, and International Law. But when our first professors of the common law began to deliver lectures and to publish treatises on their subject, they lacked any respectable academic tradition. The abridgements, the manuals on pleading and on practical subjects, even Serjeant Williams's notes to Saunders's Reports, provided no source of systematic learning. We can scarcely be surprised that these jurists turned their eyes overseas in their search for inspiration: Maitland to the German historical tradition, Anson and Pollock to Germany and France—not always with the happiest consequences, a point which I shall illustrate in a moment. But they also studied the judgments of the English courts, which from time to time contained remarkable statements of principle. Even today I find myself reading these statements with profound respect, indeed often with admiration. Men are perhaps too ready—through nostalgia or flattery or ignorance—to bestow the accolade of greatness upon other men. Dr. Johnson considered the reciprocal civility of authors to be one of the more risible scenes in the farce of life; and it is not only authors who

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provoke this comment. Even so, and at a respectable distance in time, we can now perceive that in the past some judges have been not merely competent, but truly creative, lawyers whose work has stood the test of time. I was reared on the story that the most powerful court ever to have sat in this country sat in York in the third century AD and consisted of Paul, Ulpian, and Papinian, no less. This fable finds its origin in the facts that the Emperor Septimus Severus died in York in (I believe) AD 220, that Papinian was the Emperor's Praetorian Prefect, and that Paul and Ulpian were at one time assessors to Papinian. Romantic sentiment inclines me to confer upon that legend more credence than perhaps it deserves. But even if it were to be true, the Roman jurisconsults would have to compete with, and possibly yield precedence to, some of our Victorian judges—Sir James Shaw Willes, Sir George Jessel, Sir Colin Blackburn, and many others—whose statements of principle, precise, economical, and profound, still influence, where they do not control, much of our common law and equity over a century later. Their lucidity of expression may be attributed to their classical education; their opportunity may have been given to them by the economic strength of Victorian England; and their self-confidence too may have been the product of their age. But their powers of analysis were their own, even though the latent fire was sparked into life by the circumstances in which they lived and worked.

It was judges such as these who were responsible for some of the most remarkable developments in the common law. As a general rule, principles of law gradually evolve; and a significant statement of principle is not the work of one man only, but is the culmination of a period of development to which nowadays both judge and jurist contribute in their different ways. For the greater part of the nineteenth century, however, the development of the common law was the work of the judges alone; and an admirable example of this type of development is to be found in the law of sale of goods, as the common law judges evolved a systematic corpus of law which was founded upon explicit or implicit agreement and so was well suited to a commercial age. If we thumb our way through the law reports of the last century, we can watch the principles developing—through *Nichol* v. *Godts*[1] and *Jones* v. *Just*[2] to *Mody* v. *Gregson*[3] and *Drummond* v. *Van Ingen*.[4] Then came the Sale of Goods Act 1893, and we can see the effect of codification. Codification is sometimes necessary: but it should only be undertaken where the

[1] (1854) 10 Ex. 191.
[2] (1868) LR 3 QB 197.
[3] (1868) LR 4 Ex. 49.
[4] (1887) 12 App. Cas. 284.

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good it may do is perceived to outweigh the harm it must do, and that is, generally speaking, only likely to be the case where substantial reforms are both necessary and urgent. Where the intention is merely to restate the existing law in a codified form, the code is like a photograph: it records the law as it has developed at a particular point in time. Moreover, it is not possible for any code to provide an absolutely accurate, still less a complete, statement of the law on any topic. The camera will, as usual, lie. Sir Mackenzie Chalmers probably did as much as is humanly possible to overcome these difficulties; not only by the deployment of profound scholarship and precise draftsmanship, but also by the shrewd omission of most (though not all) general principles of the law of contract, even though germane to the law of sale of goods, and by making no provision for any of the specific types of commercial sale contract. But, with the passage of time, we have seen some of the inevitable defects revealed. An example is to be found in section 6 of the Act, which provides that a contract for the sale of specific goods, which without the knowledge of the seller have perished at the time when the contract was made, is void. That section (a reflection of the influences then at work upon jurists) presupposes a Romanist doctrine of mistake which, since the brilliant analysis of Sir Owen Dixon and Sir Wilfred Fullagar in *McRae* v. *Commonwealth Disposals Commission*,[1] rationalizing the so-called doctrine of mistake in terms of objective agreement, we have all been able to abandon. Again, in 1973 a number of changes were introduced on the recommendation of the Law Commission, though some of these were proposed as a result of changed attitudes rather than of developments in legal principle; even before then it had been found necessary to amend sections 11 and 35 of the Act to correct undesirable features.[2] But of all the examples perhaps the most striking to the modern eye is Chalmers's wholehearted adoption of the late nineteenth-century fallacy of segregating all contractual terms into two categories—conditions, breach of which will always (unless waived) give the other party the right to terminate, and warranties, breach of which will sound only in damages. Just as there are philosophical theories which, though plainly wrong, are irrefutable, so there are historical theories which, though probably right, cannot be proved. I have long entertained the view, though I cannot substantiate it, that this error found its origin in the fact that Sir Frederick Pollock, in his influential treatise on the law of contract, concerned himself only with the formation of contracts; and so did

[1] (1951) 84 CLR 377. [2] Misrepresentation Act 1967, s. 4.

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not refer to a number of mid-nineteenth-century cases in which it had been held that a breach of warranty, if sufficiently serious in its effect, might give rise to a right to terminate. But, whatever the source of the error, it was perpetuated in the Sale of Goods Act, though the nature of contracts of sale is such that in them the point is of far less moment than in continuing contracts such as contracts of services. It was not until 1961 that Lord Diplock, in one of his most admired judgments, exposed the error and, with his brethren in the Court of Appeal, redirected the law back along its legitimate path. I refer of course to the case of the *Hong Kong Fir*.[1]

It is matters such as these, together with my experience of working with continental lawyers on points of foreign law, that lead me to be sceptical of the value of codes. We are always assured (though I am myself no competent judge) that the good done by the property legislation of 1925 outdid the harm; but I am very dubious whether this is true of the Marine Insurance Act 1906. To me, the best code is one which is not binding in law. The articles which preface each section in such admirable works as Dicey and Morris on the *Conflict of Laws*, or Bowstead on *Agency* (in the excellent editions of Francis Reynolds and Brian Davenport), for which perhaps Stephen's *Digest of the Law of Evidence* provided an earlier model, constitute excellent and useful epitomes which have the advantage that they need not aspire to completeness; that they may be expressed to be subject to doubt; that they may be changed without legislation; and that judges are at liberty to depart from them if persuaded that it is right to do so. Let codification then be the work of jurists, rather than of legislators.

This digression on codification prompts me to draw attention to certain other pitfalls which lie in the path of those who seek to state legal principles. The first I call the temptation of elegance. This is a temptation which can attract us all, simply because a solution, if elegant, automatically carries a degree of credibility; and yet the law has to reflect life in all its untidy complexity, and we have constantly to be on our guard against stating principles in terms which do not allow for the possibility of qualifications or exceptions as yet unperceived. The second is the fallacy of the instant, complete solution. It is understandable that judges and jurists should from time to time believe that they see the complete answer to a particular problem; indeed, without a measure of self-confidence, no judge is competent to perform his duties. But it must never be forgotten, not only that all law is in a continuous state of development, but also that too strong a conviction of the

[1] *Hongkong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha* [1962] 2 QB 26.

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correctness of one's own analysis may blind one to its imperfections. Humility is perhaps too much to ask of judges; but a reasonable degree of modesty, or at least of diffidence, should be part of the judicial job specification. The production of immediate perfection is hard enough in literature, though it can be achieved. Henry Austen wrote of his sister Jane that: 'Every thing came finished from her pen; for on all subjects she had ideas as clear as her expressions were well chosen.'[1] How rare is that combination of gifts! But if immediate perfection is hard to achieve in literature, it is harder still in law. Law is not only difficult, but extremely complex; and our vision of the law is constantly changing. Time is the only competent judge of the quality of appellate judgments. For this reason may I be allowed to express, with all respect, my unhappiness about the current fashion for single judgments in the House of Lords. Of course, it is not always necessary to have five long speeches; and sometimes a single judgment is desirable. But the pendulum appears to me to have swung too far since the days of Lord Reid, with whose views on this subject I find myself in sympathy. It is not only that the exposure of our thoughts to the discipline of the pen both eliminates error and stimulates creativity. The point is more fundamental. Because the law is so difficult, so complex, it is perhaps more conducive to its healthy development if Lords of Appeal express their separate views in their different ways; for that purpose it is better to have a feast of contrasting courses, festering with ideas, than a single hygienic package wrapped in polythene, insulated not merely from dissent but from differences in analysis and on points of detail which may later prove to be important.

The third pitfall is the danger of the unhistorical approach to earlier authority. It is easy to read, interpret, and even criticize a past opinion without taking account of the historical context in which it was expressed. I yield to the temptation of taking my example not from law, but from literature. Lord David Cecil has chided poor Dr Johnson on the perversity of his views concerning the winter habits of swallows.[2] I have to confess that they are, at first sight, a little bizarre. I quote:

> Swallows certainly sleep all winter. A number of them conglobulate together, by flying round and round, and then all in a heap throw themselves under water and lie in the bed of a river.

[1] A Biographical Notice of the Author, by Henry Austen, 13 Dec. 1817: *The Works of Jane Austen*, v (OUP, 1926), 8.

[2] Lord David Cecil, *Library Looking Glass* (Constable, 1975), p. 141.

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What perverse line of thought, comments Lord David, could have led him to assert that this preposterous flight of fancy was a certainty! Yet, as I lovingly turn the pages of my *Natural History of Selborne*, not only do I find numerous references to the problem of migration of swallows (reflecting the still current debate on migration versus hibernation), and discussion too of the winter habitat of swallows which do not migrate. I also find this passage (in the twelfth letter of Gilbert White to Thomas Pennant, dated 4 November 1767). Again I quote:

> About ten years ago I used to spend some weeks yearly at Sunbury, which is one of those pleasant villages lying on the Thames, near Hampton Court. In the autumn, I could not help being much amused with those myriads of the swallow kind which assemble in those parts. But what struck me most was, that, from the time they began to congregate, forsaking the chimneys and houses, they roosted every night in the osier-beds of the aits of the river. Now this resorting towards that element, at that season of the year, seems to give some countenance to the northern opinion (strange as it is) of their retiring under water. A Swedish naturalist is so much persuaded of that fact, that he talks, in his calendar of Flora, as familiarly of the swallow's going under water in the beginning of September, as he would of his poultry going to roost a little before sunset.

I may add that only sixty years before it had been seriously suggested that swallows migrated to the moon. So perhaps Lord David was a little hard on the old sage of Fleet Street. But, reverting to my subject, we can see the same type of error displayed in the debate on the vexed question of how to distinguish law from fact and what is confusingly called mixed law and fact. It is sometimes suggested that, if a point was left to the decision of a jury in the old days, it should today be classified as a question of fact. But when I read, in *Bentsen* v. *Taylor*,[1] that Lord Justice Bowen was prepared to take the opinion of a jury on the question whether a term in a contract was to be classified as a condition rather than a warranty, I doubt the validity of that test. In truth, the whole question of the distinction between law and fact is riddled with confusion, not least because the drawing of the distinction may be necessary for more than one distinct purpose. This is demonstrated perhaps most clearly by the classification of questions of foreign law as questions of fact. It is of course reasonable that, since judges and advocates in this country are generally unfamiliar with foreign law, any point of foreign law raised in our courts should have to be proved by evidence. To that

[1] [1893] 2 QB 274.

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extent it is legitimate to classify questions of foreign law as questions of fact; but I do not understand why it should necessarily follow that such questions should therefore be classified as questions of fact for the purposes of appeal or judicial review. And what about payments made under a mistake of law? Is it to be said that a payment made under a mistake of domestic law is irrecoverable, but that a payment made under a mistake of foreign law can be recovered? That example, however, discloses yet another pitfall in the path of the lawyer, which I call the dogmatic fallacy—seeing law in terms of rules rather than in terms of principles. We owe the rule, that money paid under a mistake of law is irrecoverable, to the dogmatic statement of Lord Ellenborough over 175 years ago.[1] It is, however, still open to our courts to seek behind the rule for the principle, and the principle when identified can surely be formulated in such a manner as to avoid the worst injustices flowing from the rule.

Of course, legal principles do not always evolve gradually. They can be the subject of conscious change; usually of course by the legislature, but sometimes by judges, often following academic debate. Even in such cases, we may observe not only a period of gestation, but also a difficult birth. Two remarkable examples in recent years relate to sovereign immunity, and to the principle of *forum conveniens*; and it is interesting, and perhaps of significance, that in each case the change was effected in two stages—a tentative and (as we can now see) insufficient movement being followed shortly afterwards by a complete change in the relevant principle. This possibly reflects no more than habitual judicial conservatism and respect for precedent; though to me it also betrays a becoming diffidence. So, the movement from an absolute to a qualified principle of sovereign immunity was said at first (by the Privy Council in *The Phillippine Admiral*)[2] to be restricted to actions *in rem*. Lord Denning soon saw to that, just over a year later in the first of the *Trendtex*[3] cases; and indeed it has to be admitted that the proposed limitation was illogical, for an action *in rem* presupposes the existence of an action *in personam*. In the case of the principle of *forum conveniens*, the House of Lords at first (in *The Atlantic Star*)[4] was not prepared to accept fully the principle that a stay of proceedings in this country may be granted simply because there is another clearly more appropriate forum

[1] *Bilbie* v. *Lumley* (1802) 2 East 469.
[2] [1977] AC 373.
[3] *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* [1977] QB 529.
[4] [1974] AC 436.

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overseas, but persisted in the requirement that the continuance of proceedings in this country should be oppressive, though in a less rigorous sense of that word than had previously been adopted. Four years later, in *MacShannon*'s[1] case, the unfortunate judge of first instance loyally followed the House of Lords in *The Atlantic Star*, resisting the temptation of himself adopting the full principle of *forum conveniens* which, as leading counsel, he had urged upon the House of Lords in that case—only to find his decision reversed, and rightly reversed, by the House of Lords as they completed the development of the law to its full, logical extent. But it is pertinent to comment that, in each of my examples, it was the extreme nature of the facts of the cases which, so to speak, forced the hand of the appellate courts and persuaded them that the time had come for a reformulation of the relevant principles. So here we can see the influence of the facts of cases upon the development of principles by judges.

These are both examples of conscious change of direction, completed in a comparatively short space of time. They are also examples of principles of fairly limited application. For there are principles and principles, as some Dickensian character might have said, and probably did. Occasionally we experience moments when an important principle seems to reach the culmination of a period of development, so that the law of the whole topic makes a significant change of direction. The example of such a development which is nearly always cited is the effect of *Donoghue* v. *Stevenson*[2] upon the law of negligence. I must confess to a personal prejudice. I have never liked Lord Atkin's reference to the New Testament: and my literal mind rebels against the use, in the context of negligence, of the word 'proximity', which has acquired respectability from the biblical 'neighbour'. I think of the word as relevant to time or space or order, though its use in relation to the duty of care has now become hallowed by the passage of time. But the most extraordinary feature of *Donoghue* v. *Stevenson* is that it decided so little, and yet had so great an effect. Many volumes of [1932] Appeal Cases fall open at page 562, where the headnote is revealed as reading:

> . . . the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

[1] *MacShannon* v. *Rockware Glass Ltd.* [1978] AC 795. [2] [1932] AC 562.

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The headnote summarizes with reasonable accuracy the *ratio decidendi* of the case. Yet its effect is to be found in its innumerable progeny of cases of liability in negligence, reported and unreported, which followed in its wake. Conceptually speaking, a generalized principle of negligence did not come until forty-five years later, with the statement of Lord Wilberforce in *Merton London Borough Council* v. *Anns*[1] that 'the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist'. Yet I doubt if this statement of principle will be as influential as Lord Atkin's. It is likely to result in a change of emphasis; but the principle, though generalized, will always be subject to exceptions, to accommodate situations where the imposition of liability is felt to be individually or socially unjust. The stream of the law of negligence will in all probability flow majestically along, unless and until an enthusiastic and underemployed legislature is attracted to the principle of strict liability; though on one recent occasion, in a moment of overexuberance, the stream appeared to me to overflow its banks in a case which, out of courtesy, I shall forbear from identifying by name.

I find it of interest to compare the development of the principle of negligence with the development of another perhaps even more fundamental principle, the principle of unjust enrichment. Lord Diplock has stated that there is no general doctrine of unjust enrichment recognized in English law.[2] If by that he meant that there is no such principle which is, subject to exceptions, of general application, I would agree with him that this is not as yet the case. But if (which I very much doubt) he meant that there is no such principle explaining the basis of recovery in a large group of cases in English law, he would not expect me to agree with him. The law of restitution (as it is now commonly called), consisting of many hundreds of decided cases, can, so far as I am aware, only be explained by reference to the principle of unjust enrichment: there is, quite simply, no other runner in the field, and if this is not accepted there must be a very substantial number of sheep now lost, unshepherded, in Tennyson's wilderness of single instances. But the principle of unjust enrichment, in its present state of development, has not so sweeping an effect as the principle of negligence. The growth of the principle of negligence has led to

[1] [1978] AC 728 at p. 751.

[2] *Orakpo* v. *Manson Investments Ltd.* [1978] AC 95 at p. 104.

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a substantial extension of liability, and therefore of protection of interests, founded on that principle, subject to exceptions which are in the process of becoming more rationally explained and defined. The gradual development of the principle of unjust enrichment has resulted in the recognition of a unifying link between a number of recognized heads of recovery, leading to the shedding of anachronistic technicalities, to the better definition of substantive rights and liabilities, and to cross-fertilization of ideas between the various topics within the law of restitution. Let me illustrate this last point with reference to the concept of change of position. This is well recognized as a limit to the exercise of the right of rescission which, although it affects contractual rights, should, since its effect is to deprive a party of a benefit (a chose in action) which it is unjust that he should retain, properly be classified as a restitutionary remedy. So there can only be rescission in so far as there can be *restitutio in integrum*. But, in relation to recovery of money paid under a mistake, the law is in a state of flux. Because change of position has historically been known to common lawyers as an element of estoppel, they have been disinclined to allow change of position to prevent recovery in the absence of some representation by the payer which has caused the change of position, and have been inclined to treat such an estoppel as an absolute bar to recovery even though the change of position may be of relatively minor financial effect compared with the sum of money mistakenly paid—a view of the law which is to some extent reflected in a very recently reported decision of the Court of Appeal.[1] Yet if recovery of money paid under a mistake is founded on the principle of unjust enrichment, estoppel should logically have nothing to do with the matter—the situation should be regarded as comparable to rescission, and bona fide change of position should of itself be a bar to relief, though only to the extent that it prevents retention of the benefit from being unjust.

I must confess that I found recourse to the principle of unjust enrichment of great assistance to me in one case which it fell to me to decide, *BP* v. *Bunker Hunt*.[2] The case was, mysteriously, the first to be decided under the Law Reform (Frustrated Contracts) Act 1943, though that Act had been in force for nearly forty years. Under the Act, if a contract is discharged by frustration, and the defendant has obtained a valuable benefit before the time of discharge by reason of the plaintiff's contractual performance, the plaintiff can recover from the defendant a just sum not exceeding

[1] *Avon County Council* v. *Howlett* [1983] 1 All ER 1073.

[2] *BP Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)* [1979] 1 WLR 783.

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the value of the benefit. So there are two distinct stages—the identification and valuation of the benefit, and the award of the just sum: the amount to be awarded is the just sum, unless the defendant's benefit is less, in which event the award will be limited to the amount of the benefit. However, there is one particular matter to be taken into account; because, consistently with the principle of unjust enrichment, the Act requires the court to have regard to the amount of any expenses incurred by the defendant before discharge in, or for the purposes of, the performance of the contract. But are those expenses to be taken into account at the stage of the valuation of the defendant's benefit, or at the stage of the assessment of the just sum? This was one of the points which fell to be decided in *B.P.* v. *Bunker Hunt*: millions of pounds depended upon its solution. For me, the answer lay in the fact that the allowance for expenses is a statutory recognition of the defence of change of position. Only to the extent that the defendant's position has so changed that it would be unjust to award restitution, should the court make an allowance for expenses. It follows that such expenses must be deducted from the value of the benefit, with the effect that only in so far as they reduce the value of the benefit below the amount of the just sum which would otherwise be awarded will they have any practical bearing on the award.

My decision in that case was affirmed by the Court of Appeal[1] (contrary to the view of the editors of Chitty on Contracts[2] who, perhaps confusing hope with reality, record that it was reversed). It may therefore be thought churlish of me if I cavil at one aspect of their judgment, which was that they treated the assessment of a just sum under the Act as a matter of discretion, in the exercise of which more than one approach might be regarded as correct.[3] With the greatest respect I find it very difficult to believe that restitution of a money sum should be a matter of discretion. This is surely no case for the Chancellor's foot: and one can foresee a profound sense of injustice being felt by litigants if they see a judge exercizing his discretion to select to their disadvantage one of a number of different approaches—especially where, as in *BP* v. *Bunker Hunt*, the choice of approach can affect the result by many millions of pounds. In every legal system both hard and fast legal rules, and discretionary powers of judges, are sometimes necessary; but neither is to be encouraged, because the one lacks the flexibility, and the other the consistency, of legal principle. The

[1] [1981] 1 WLR 232.
[2] 25th edn., p. lxv.
[3] [1981] 1 WLR 232 at p. 243.

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law of restitution is founded upon clearly recognizable principles; and an award of restitution is a far cry from discretionary relief where the nature of the remedy requires a balancing of various factors, as in the case of injunctions or, to revert to an example I have already used, a stay of proceedings in this country where there is another clearly more appropriate forum overseas.

For myself, I see the law of restitution gradually developing towards the acceptance of a fully fledged principle of unjust enrichment, of the kind at present unrecognized by Lord Diplock, with the emphasis changing from the identification of specific heads of recovery to the identification and closer definition of the limits to a generalized right of recovery. Here indeed a parallel can legitimately be drawn with the principle of negligence where, certainly since Lord Wilberforce's speech in *Merton London Borough Council* v. *Anns*,[1] the emphasis has shifted to the identification and more precise definition of exceptions to a generalized duty of care. Even so, we must not expect to find too close a similarity between the fundamental principles underlying the law of contract, the law of torts, and the law of restitution. The principle of unjust enrichment cannot beget in restitution the extraordinary unity of principle that we find in the law of contract; though it will in due course provide a greater unity than can ever be found in the more diverse law of torts.

Although I have confined myself to examples of the development of principles by judges, the work of the judges has become more and more influenced by the teaching and writing of jurists. This influence is likely to continue to increase, especially as over three-quarters of those entering the legal profession now read law for their degrees, and become exposed at their most impressionable and formative period to the influence of their teachers through their critical exposition of the principles of law. As both judges and jurists attempt, in their respective roles, to formulate principles of law, it is possible to detect differences in their approach. But the contrast which may be drawn between their work, though real, can be exaggerated, even distorted, by prejudice or by ignorance. It is sometimes suggested, for example, that the one group, rather than the other, is more creative; and so on. For me, to draw comparisons of that kind is unproductive. The basic truth is simply this; that we are each of us, judge and jurist, conditioned by the work which we are called upon to perform. Judges have to decide particular cases. In one case, a judge may have to consider a particular point of law. If so, he examines it in

[1] [1978] AC 728.

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minute detail; he considers it in relation to a particular set of facts; he is assisted by counsel, each of whom has considered the law with care and will advance an argument designed to persuade the court to state the law, even to develop or qualify it, in a way which fits his own client's case. There are at least three effects of this exercise: the judge's vision of the law tends to be fragmented; so far as it extends, his vision is intense; and it is likely to be strongly influenced by the facts of the particular case. In terms of principle, the fragmented vision is of itself undesirable, except that it permits, even requires, an intensive examination; but the factual influence is almost wholly beneficial. If I were asked what is the most potent influence upon a court in formulating a statement of legal principle, I would answer that in the generality of instances it is the desired result in the particular case before the court. But let me not be misunderstood. When we talk about the desired result, or the merits, of any particular case, we can do so at more than one level. There is the crude, purely factual level—the plaintiff is a poor widow, who has lost her money, and such like. At another level there is the gut reaction, often most influential. But there is a more sophisticated, lawyerly level, which consists of the perception of the just solution in legal terms, satisfying both the gut and the intellect. It is in the formulation, if necessary the adaptation, of legal principle to embrace that just solution that we can see not only the beneficial influence of facts upon the law, but also the useful impact of practical experience upon the work of practising lawyers in the development of legal principles. We can see the same influence at work in argument, in the employment of the familiar technique of testing the validity of abstract propositions of law by reference to hypothetical examples. Any competent common lawyer is adept at inventing such examples; the more extreme they are, the more effective they often can be in searching out the weaknesses in, or limits of, a proposition of law—just as a startlingly erroneous argument can sometimes only be refuted by a re-examination, and possibly also a restatement, of fundamental legal principles. Hard cases may make bad law; but, to a remarkable degree, bad cases may also make hard law. But let there be no doubt about it: as we perform this forensic exercise, we are using facts to develop principles. We are considering, too, whether a particular conclusion is right or wrong, in accordance with our ideas of right and wrong, of practicality and impracticality. But here again, let me not be misunderstood. The judgment so exercised should not be, and is not, a purely personal judgment. It is an informed and educated judgment, formulated

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in public discussion and founded not merely upon a shared experience of the practical administration of justice, but also upon an accepted basis of systematic legal principle.

It is here, of course, that a doctrine of precedent comes in. Precedent is the cement of legal principle. When I visit universities and talk to law students, I find myself often confronted with the question: how can there be at the same time a doctrine of binding precedent, and yet the facility for the law to change? The answer must lie in both not adopting too strict a view of the doctrine of precedent, and yet according sufficient respect to it to enable it to perform its task of ensuring not merely stability in the law, but consistency in its administration. Of course, unlike the students I meet, I have never taken seriously Lord Denning's mischievous remark, so often repeated by him though always with a twinkle in his eye, that he was not bound by the doctrine of precedent: on the one hand, it would be absurd if one judge alone should be free from its restraint, and on the other hand for all of us to be free of it would lead not only to injustice, but indeed to anarchy. But perhaps, in the perspective of time, when the magic of his personality has died with the memories of his peers, one of Lord Denning's principal contributions will be perceived to have been his loosening of the reins of a doctrine of precedent which had become too strict. When I was a student, there appeared to exist some judges who saw the law almost as a deductive science, a matter of finding the relevant authorities and applying them to the facts of the particular case. This is no longer so; and there is now a readiness among judges, not of course to disregard or ignore precedents by which they are bound, but, where they are at liberty to do so, to adapt or qualify them—not simply to achieve a personally desired result, but to ensure that principles are so stated as to embrace the legally just result on facts possibly not foreseen by those who had previously formulated them.

Jurists, on the other hand, do not share the fragmented approach of the judges. They adopt a much broader approach, concerned not so much with the decision of a particular case, but rather with the place of each decision in the law as a whole. They do not share our intense view of the particular; they have rather a diffused view of the general. This is both their weakness and their strength. On the one hand, a point of law which is debated for days in the law courts may end up as one line, or even a fragment of a footnote, in a legal textbook. Furthermore the adversary system, in which opposing theories are propounded and debated by advocates on behalf of real clients in whose interests they act, is

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more likely to reveal the strengths and weaknesses of conflicting arguments than the solitary ruminations of a scholar in the quietness of his study. But in the courts, single points of law are placed under the microscope; the broader view tends to be forgotten. Here lies the greater strength of the jurist. Indeed, I sense a movement among jurists in my own lifetime as a lawyer, away from the criticism of individual decisions—from, so to speak, trying to do the judge's job for him, without the benefit of his practical experience or the assistance of counsel—towards considering more fundamental questions about the law, whether in terms of jurisprudence, or legal principle, or social desirability. Certainly, the prime influence upon jurists is not so much facts as ideas: and just as fragmentation presents a danger for practising lawyers, who tend to adopt an unsystematic approach to their work, so jurists are subject to danger from preconceived ideas, and may regard too inhospitably a judicial decision which does not accord with their own preconceptions. But their broader view of the law is not only creative, but immensely influential—both through their teaching, upon the formation of the views and attitudes of future practising lawyers, and through their books which are so very useful to, and so widely used by, the practising profession, and many of which have since the war become of an astonishingly high quality. It would, for example, be difficult for us to chart our course through that surprisingly difficult topic, the law of sale of goods, by reference only to the Sale of Goods Act and the mass of case law which has preceded and succeeded it, without the assistance of the admirable new editions of *Benjamin on Sale of Goods* of which the first was published nine years ago.

It is sometimes asked—who should be dominant, judge or jurist? Years ago, a brilliant young German pupil said to me: 'In Germany, the professor is God: in England, the judge is God.' The aphorism is perhaps too extreme, though it reflects not only the undue respect, now happily abandoned, of past times, but also a state of affairs in each country which is a product of history—ultimately due, I suspect, to the difference between the dates when each country achieved political unity, dates separated by many centuries. Dominance can be considered in many forms, and in terms of power or influence. However, in the one matter which I regard as important for present purposes, which is the development of legal principles, the dominant power should, I believe, be that of the judge. This is not because the judge is likely to be a better lawyer than the jurist; far from it. It is because it is important that the dominant element in the development of the

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law should be professional reaction to individual fact-situations, rather than theoretical development of legal principles. Pragmatism must be the watchword. We are constantly being surprised, in our own work, by the new problems which are born of the complexity of life. Life is a far more fertile creator of legal problems than the most ingenious draftsman of moots, and theories are not necessarily drawn sufficiently widely or accurately to accommodate all these unforeseen and unforeseeable contingencies.

Even so, I see the whole corpus of the law as consisting not only of the statutes and cases, but also of the work of jurists who have expounded, interpreted, and often illumined the law. This is consistent, though not identical, with the continental view, in which the writings of jurists are considered to be works of authority. I speak, of course, not in terms of a binding doctrine of precedent, but in terms of influence. It is not unreasonable to define the law upon any particular topic as being whatever is understood to be so by the relevant professional opinion of the day. That is the law which guides and controls the innumerable actions and transactions of everyday life, the vast majority of which will never be subjected to the scrutiny of the courts. And that professional opinion is not by any means derived only from statutes and decided cases, but to a very substantial extent from the writings of jurists.

I also see the law not so much as Maitland's seamless web, but as a mosaic, and a mosaic that is kaleidoscopic in the sense that it is in a constant state of change in minute particulars. The legislature apart, it is the judges who manufacture the tiny pieces of which the mosaic is formed, influenced very largely by their informed and experienced reactions to the facts of cases. The jurists assess the quality of each piece so produced; they consider its place in the whole, and its likely effect in stimulating the production of new pieces, and the readjustment of others. In this their approach is certainly broader, perhaps more fundamental, and also more philosophical than that of the judges. Judges are not generally philosophers, they are not generally jurisprudents. The majority of them do not interest themselves in current schools of philosophic thought, linguistic or otherwise: indeed, if tempted to philosophize, many might react favourably to Sir Karl Popper's celebrated anti-essentialist exhortation—

> Never let yourself be goaded into taking seriously problems about words and their meanings. What must be taken seriously are questions of fact, and assertions about facts: theories and hypotheses: the problems they solve and the problems they raise.[1]

[1] Sir Karl Popper, *Unended Quest* (Fontana/Collins, 1976), p. 19.

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But for present purposes this does not matter. The *modus operandi* of the judges, on the rare occasions when they attempt to formulate statements of principle, is to react as trained lawyers to factual situations and to generalize from their reactions; this task they should be able to perform unencumbered by any such thing as a philosophy.

But the roles of judge and jurist, though distinct, are complementary: they should be co-operative, not competitive. The search for principle is a task which judge and jurist share together; and since, as is reflected in the words of the Persian poet and in the words of Sir Ranulfe Crewe, nothing is permanent, and since everything is in a perpetual state of change, we must recognize that the road which we travel together stretches out into the distance to the horizon. We should welcome each other's assistance in our work; and, while doubtless conscious of each other's shortcomings, recognize and appreciate each other's strength and the nature of our respective contributions in the unceasing restoration and embellishment of the mosaic which is the common law.

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