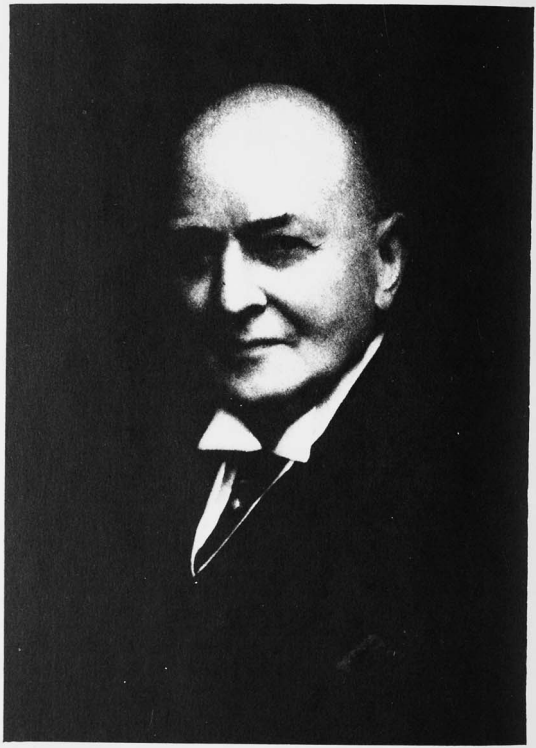

LORD ATKIN

LORD ATKIN OF ABERDOVEY

1867–1944

JAMES RICHARD ATKIN, who afterwards became Lord Atkin of Aberdovey, must rank as one of the greatest lawyers and judges of the first half of the present century. That period has been most important in the centuries old development of the English law which has gone on continuously through medieval times, through Tudor and Stuart days, through the eighteenth century, and right on to the nineteenth century and to our own day. But the last fifty years have been especially prolific in new ideas in law and in new adjustments of older ideas to new conditions of life. Law is in one sense a closed area with its own traditions and modes of thought and practice, and its own special body of learning and functional contact with affairs. It has its own principles and theories and its own schools and professors and writers who explore the theoretical aspects. But a most prominent feature in its practical life is that it has always been closely involved in men's affairs. In a sense, though with differences, it resembles in this respect the kindred disciplines of medicine, engineering, and the like, though these are more concerned with physical matters and are more modern in origin and character. Like law they have their professional organizations and their systems of training and of qualifying examinations. Law, however, is more nearly bound up with the State, inasmuch as its activities are exercised by the judges, from the Lord Chancellor to the Justices of the Peace and magistrates; and the members of the legal profession are a closely organized body, though independent of government control in the exercise of their functions because the Western governments, and in particular the Anglo-American systems, are based on the separation of the powers and the freedom and independence of the judicial authorities. It is accepted that the promotion and administration of justice is one of the features of free nations. Law accordingly is not a self-contained and separate system but is functional in the layout of the State. This has become even more manifest in these days in which the object of social welfare and amelioration has bulked so largely in political ideas. The old individualism which was so great a feature of the common law, has been cut into by more socialistic ideas which have largely received

force and effect by legislation, making new law, which has had to find its place alongside, or in the midst of, the old common law. But all the same, law must deal with individuals and their rights and duties. For instance the Criminal Law remains, though subject to constant criticism with the object of making it more liberal and of humanizing it. Thus the function of law in our day has become not less, but even more, pervasive. It has also become more complex, because of the constant legislation needed to give effect to purposes of social welfare and also to grapple with the great changes consequent on the changes in external life, due to the transition from the simpler days of more primitive mechanical power through macadamized roads and canals to railways, motor transport, and airplanes. Alongside of that is the almost incredible development of machinery, which has increased productivity almost beyond earlier belief, and has created the vast undertakings, in particular of social utility. All these, separately and jointly, have necessitated vast changes in the law owing to government restraints and control, culminating in many directions in nationalization. Even where the process stops short of that, there has gone with these changes the long series of Factory Acts, of workmen's compensation, of trade union legislation, of social insurance, and, more recently, measures of health, immigration, and the like. All these enormous changes have had their effect on the growth of law. The modern law library is a vast collection of books, as we see if it is compared with what was sufficient to satisfy the requirements of judges like Mansfield or Blackstone. Still, though a judge like Lord Atkin may be called upon in the Appellate Tribunal to hear lengthy arguments about such topics involving fact and law as the validity of a patent for a wireless instrument, or in a different sphere questions relating to finance and currency, or to Dominion constitutions, or a failure properly to direct the jury in murder cases, to give only a few instances, the vital principles remain in essence as far reaching and as fundamental. Law must differ from physical science because it is not, like physical science, a matter of observation and of uniformity of sequence in fact, but it is imperative or mandatory. The fundamental idea is that of the 'ought', that is, of the conduct which justice requires. The object of law is to trace out and define justice under all the cloaks and disguises of fact under which it is worked out. Law is ideally the product of what may be called 'natural justice' (if the unfortunate historical associations of that expression may be disregarded) and its aim is to apply its principles to

the particular facts. At whatever level they are taken they are not dry or abstract principles; they are for use and service in the aid of justice. They never lose their quality of practicality: they are of the stuff of human life. The living quality can be best understood by seeing how they have grown and developed in history. Hence the importance of the historical school of thought. But history alone will not explain them. They must be tested and examined by the criterion of social utility, and the consensus of the human instinct and the sense of right and wrong. It is for this reason that the purely analytical school is seen to fail. All these different elements must be combined to give a true understanding of the operative body of law at any time and in any particular region of the world. I may add that law regards the facts it has to deal with at the level of ordinary common sense; it looks at things with the eye neither of the metaphysician nor the scientist. Causation is commonsense causation, as the ordinary educated man would understand and apply it. The law does not search deep into the origin or essence of things, though its range is very wide.

Common law is composed partly of judge-made rules of law, which the courts will enforce, and partly by Statute, including statutory instruments. Both types, judicial and statutory, embody commands emanating from a competent authority. Customary law is no exception to that. It comes into full effect when adopted by the competent judicial or other authority. It was in this complicated maze, which I have vastly simplified in this statement, that Lord Atkin, like other judges and like all lawyers in their different spheres, had to make his way. He brought to law the entire devotion of an intense nature; it was his life work and his life interest and his claim to distinction. His private life and character inspired by this object were those of the virtuous citizen, public-spirited and thoughtful, blessed with domestic happiness, and cultivating the domestic and social relationships. It was in essence not different from that of other men of good will and professional pursuits, of good education and happy temperament. I shall briefly summarize the course of his life and of his numerous valuable and practical activities. I shall then attempt, by a very limited selection of representative judgements from those which he delivered, which were some hundreds in number and which form his contribution to the law, to illustrate his methods of thought and literary expression. He did not seek to influence legal thought by extra-judicial writings, as some have done; to do so is, indeed, difficult for a lawyer, counsel or judge,

immersed in the constant activities of his professional duties, but judgements like those of Lord Atkin are entitled to rank as a high form of literature—the *Oxford Book of English Prose* has included in its selections some judgements of great lawyers.

When I come to Lord Atkin's actual judgements I shall have something to say about the character of his literary style and the prevailing tendency of his ideas. I must, however, begin by detailing in brief summary the external features of his life, which was in a sense as uneventful as that of most other lawyers and judges. For what I have to say on that topic I shall rely partly on my own recollection (because I knew him intimately from 1910 until his death), and partly on the basis of an admirable résumé prepared by Professor Gutteridge of Cambridge, who had been his close friend even longer than I had; that résumé was published in *The Law Quarterly Review*, October 1944.

Atkin was born in Brisbane, Australia, in 1867, where his parents had emigrated a few years before and his father had become a member of the Queensland Legislative Assembly. His father having died, his mother decided to return home and bring her children, including the future Lord of Appeal. They came by sailing-ship round Cape Horn. In later years, as I had always been interested in the history of the Australian clipper ships, I tried to get from him the story of the voyage, but he could not help me: as he pointed out, he was an infant in arms when his mother brought him over. It must have been a rough voyage for the mother, not long widowed, with the anxieties of her children. On arrival in this country she went to her mother's house in Merionethshire. Wales thus became his home in his early years. He went to school in Wales, then to Christ's College, Brecon, and then to Magdalen College, Oxford. As a boy and youth his health was far from robust; no doubt for that reason, rather than lack of ability, he had to be content with a good second in Greats. He was consoled for this comparative academic failure when he was later elected to an Honorary Fellowship of Magdalen College. Oxford conferred on him its Doctorate, Honoris Causa, and the same honour was conferred by Cambridge, and by other universities. But from the beginning he was preparing for a legal career. He was called to the Bar by Gray's Inn, of which he became eventually a Bencher and twice Treasurer. Gray's Inn is not the largest of the four Inns of Court; it had grown enormously in size and prestige since his early days. It had always counted among its members, from Bacon downwards, many illustrious English lawyers. But there

may be a great gulf fixed between being called to the Bar and acquiring a practice, which was always Atkin's ambition. It has often seemed to me difficult to explain why, of the barristers who are called, some rather than others are chosen to attain great success and eminence. The way is often long and arduous; waiting for briefs is a great trial and the patience of many able men breaks down under the strain and they are glad to accept employment in other walks of life as an alternative to the weariness of waiting and of hope deferred. It may be that sometimes the alternative choice leads to more useful and distinguished service than a career at the Bar would have done, but Atkin, like others, was *tenax propositi*. No doubt at times he was tempted to turn aside, especially as he had married and his family was increasing. His father-in-law, Mr. Hemant, a family friend of Australian days who had come back to England, set aside a sum of money to help in the years of waiting, but that could not last for ever. However, as some of us have found, opportunity seems to come from the least-expected and the most unexpected quarters. Atkin at his father-in-law's house used to meet a high official of the London Stock Exchange who was impressed by his acuteness and ability, and was able to put briefs in his way. For various reasons there was at that time a great deal of important legal work arising out of Stock Exchange transactions, and once Atkin had got his foot on the ladder he could not fail to rise. His legal career pursued a steady upward course: one thing led to another; his ability and aptitude won the confidence of clients and the appreciation of judges. Briefs began to come in. Life must have been very pleasant to him. He loved his work and all the contact with men and affairs that it brought. The more prosaic advantages of a large income were not altogether to be despised, especially as his family had grown; they also enabled him to gratify his generous taste for hospitality as he did in his large house in Cornwall Gardens. Many will still remember the kindness they received in that way. In 1906 he took silk and became K.C. Some barristers had found that step not only hazardous but disastrous, but that was not so with Atkin. His practice increased and became less exacting because he could limit his work, which was now in what is often called 'heavy' cases, not only in cases in the Commercial Court, but also those which involved complicated issues of fact and difficult questions of law. He was never a fashionable or 'society' advocate, and he was not often heard by a jury. As Professor Gutteridge has observed, his qualities were not histrionic. That period in which he was a

leader at the Bar only lasted seven years. In 1917 he was appointed a Judge of the King's Bench Division. That post he did not long hold because in 1919 he was promoted to the Court of Appeal and before many years had passed he was made a Lord of Appeal in Ordinary and took his seat in the House of Lords. That was in 1928. At the same time he became a member of the Judicial Committee of the Privy Council, the work of which was principally to hear appeals from the Dominion and other overseas British tribunals. It is work in these Appellate Courts which will mainly interest us in this short memoir. His most noteworthy judgements are those which he delivered during his long activity as Lord of Appeal, which continued until his death in 1944. They constitute the solid work which he leaves to posterity. A memoir of the life and work of a great judge ought, as far as space allows, to have some regard to those judgements, or at least to some of those which are more outstanding and representative. In the Anglo-American legal communities there has grown up what may be called, though not very exactly, a more or less standard general form of the judgement. It has grown up from the nature of things and from traditional practice, though there is no rigid rule. From its general brevity, and from the fact that it usually deals with a comparatively limited and definable situation, this form of literary composition has been compared to a miniature, and a judge has been called a miniaturist in constructing his judgements. The judgement embodies a decision on a dispute submitted to the court of particular facts which may be controverted. The judge, after hearing the evidence and contentions, arrives at a judicial determination of what the facts were, with the help in some cases of the findings of the jury, if there is one. In Appellant cases that stage has generally been passed; what is presented to the Appellant Court is in most cases a factual situation based upon evidence given in the Trial Court, but revised and analysed by the court so as to give a brief but accurate picture of the facts upon which the decision will proceed. The picture should be not only brief, but precise so far as that is possible. A careful judge will often expend much time and care in this statement of facts. Then there is the judge's statement of the law so far as is material for the decision of the case, and then the decision will follow. For the persons concerned the actual decision is generally the most material fact; it is an act in the law which determines rights of the parties and may have the most important consequence on their respective positions. But there will have been the legal statement of the

governing principles which have determined the decision. This may be in the nature of a limited legal essay. It is from the decision that in Anglo-American law jurisdictions precedents are created. The finding of the facts is peculiar to the particular case. The legal analysis forms one item in the constant development of the law, growing from precedent to precedent. To adopt a not very precise simile, each precedent is like a single piece in a patchwork, the finished pattern is composed by putting together in their appropriate places the different pieces; too much must not be made of this somewhat crude simile, but it may help, if not made too much of, to explain the use of precedents in the growth of the law. A judge is thus in a double sense a creator; he creates the decision which depends on the actual facts, and affects the rights of the parties, but in addition, by each ruling that he gives on legal principles, he in greater or less degree enlarges or changes the law. But tradition restricts what the judge does in this respect to what is material to the particular case. For a more general analysis and synthesis it is necessary mainly to look to the works of the theoretical (or, as it is sometimes said, philosophical or scientific) writers on the law. Their discussion can well take a wider scope, but what they say has not the authority of a judicial pronouncement. But all the same a judge in some particular instance may evolve a wide generalization which legal writers will develop or criticize. Atkin has to his credit several such generalizations made by him in the course of his judgements, no doubt each one directly pertinent to the decision but reaching out into wider areas of legal thought. To some few of these I shall in due course advert. The work of the essayist or writer of legal principles might have been thought likely to appeal to Atkin, with his clear analytical mind and varied equipment of experience. This has been the case with some great judges; I may, for instance, particularly refer to some Justices of the United States Supreme Court, such as Holmes or Cardozo. But as a rule the English judges have been reluctant to indulge in philosophical dissertations, being generally content to express their views partly in the form of the actual decision which constitutes the direct precedent, and partly in the form of observations incidental to the actual precedent. They have thus left the general scientific discussions of set legal topics or of general subjects like contract or tort to writers like Sir Frederick Pollock, or in the case of legal history to writers like Pollock and Maitland or Sir William Holdsworth. I have, however, found one exception to Atkin's general practice of limiting his legal

pronouncements to those which were judicial. My attention has been drawn to this instance by Professor Goodhart. It is a brief, but very clear and concise address on *Appeals in English Law*, published in volume three of the *Cambridge Law Journal* in 1929. It has all the charm of his lucid and direct style. The article states, what I believe to be correct, that of appeals from the Trial Courts in the first instance to the Court of Appeal, 33 per cent. were successful, and that the same proportion holds of appeals to the House of Lords from the Court of Appeal. He added a characteristic aside, that if there were a still higher tribunal the same proportion of successes and failures would no doubt apply. He then made some wise observations on the question whether a system of having only one judgement is superior to a system where each member of an Appeal Court is entitled to give his reasons in his own way, either agreeing or dissenting. Atkin, in a few words, gives his opinion in favour of a system of separate judgements. He says this may help the student and the lawyer; law, he says, may grow out of the excrescences and variations in different judgements. He was, of course, familiar with the distinction between precedents and matters of observation. Lord Sumner somewhere referred to this distinction when he spoke of the 'will o' the wisp' of the *obiter dictum*. But even dissenting judgements may be of value in advancing the science of the law. Atkin adds from his experience, what every Appellate judge knows, that it is not very often a decision is reversed on a pure question of fact.

I have already referred to Atkin's pure, lucid, and logical style. I hope to give further illustrations later, but here I may give one or two short passages which also help to illustrate his views on important issues. Atkin was a great master of what is called practice and procedure. In old days when a junior he was a famous performer in the preliminary skirmishing, often of importance in the issue of a case, on matters of practice; but he never forgot, at least as a judge, the difference between the substantial issue and the subsidiary disputes. I can illustrate what I mean by an example; it will also show his mastery of simple and illuminating expression. In *United Australia Ltd.* v. *Barclays Bank Ltd.*, 1941, A.C., it was necessary to examine what effect in modern law could be given to what were called the 'forms of action'. In the early days of the law a writ could only be issued (as indeed is still in form the case to-day) under the sanction of the king. It was a royal writ, it had to define the cause of action, and a list of permissible particular forms was prepared and pub-

lished, though the list admitted of being extended according to limited rules. Forms of action were abolished in the nineteenth century, but Maitland in his time said that their ghost still haunted the courts. Some lawyers understood that as to some extent affirming their continued utility. The case I have cited had as its subject what has been called an action 'for money had and received'. In some cases the claim was said to be justified by a 'fiction' that the parties were in law assumed to have so agreed; that, however, was a mere fiction which had no basis in fact. A court, however, could order the defendant to repay the money or return the property which belonged to the plaintiff and which the defendant had no right to keep, and purported to do so on the basis of the fictitious agreement. Let me quote a few passages from Atkin's judgement on this point, he had referred to cases where the plaintiff had intentionally paid money to the defendant but had done so either by mistake or because he had been deceived. These may be taken as typical instances. He went on to say at p. 27:

> Now to find a basis for the action in any actual contract whether express or to be implied from the contract of the parties is obviously impossible. The cheat or the blackmailer does not promise to repay to the person he has wronged the money which he has unlawfully taken: nor does the thief promise to repay the owner of the goods stolen the money which he had gained by re-selling the goods. Nevertheless, if a man so wronged was to recover the money in the hands of the wrong-doer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract; for there was no form of action possible other than debt or assumpsit on the one side and an action for damages for tort on the other.

He then goes on to say that to meet the difficulty the law invented a fictitious promise to repay and then a still more fanciful fiction that the plaintiff had authorized the thief to sell who then had to account for the money received. 'The fiction', says Atkin, at p. 28, is 'too transparent . . . the law in order to do justice imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy.'

The passage should be read in full, but I can only extract here the final words at p. 29 particularly dealing with a fictitious waiver:

> If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue for them I am not excusing him. I am protesting violently that he is a thief and because of his theft I am suing him; indeed he may be in prison upon my prosecution. Similarly in the case of a

blackmailer, in such a case I do not understand what can be said to be waived. The man has my money which I have not delivered to him with any real intention of passing to him the property. I sue him because he has the actual property taken; and I suggest that it can make no difference if he extorted a chattel which he afterwards sold. I protest that a man cannot waive a wrong unless he has either a real intent to waive it or can fairly have imputed to him such an intention, and in the case we have been considering there can be no such intention either actual or imputed. These fantastic resemblances of contracts invented in order to meet the requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.

This is an almost perfect instance of judicial writing; with elegance of language it combines antiquarian knowledge, reforming zeal, regard for the paramount requirements of justice, and sound practical common sense. In all these aspects it is not singular in the judgements of Atkin, but can be paralleled in many other contexts. It is tempting to multiply such passages. I shall be content with one short phrase. It happened that while Atkin was in the House of Lords there were some important cases on what lawyers call 'public policy'. That was a rule of law under which the Courts assume the power to refuse to give effect to particular contracts or dispositions on the ground that they are contrary to the public good. It is a striking illustration of the judicial exercise of legislative power. Thus a testamentary disposition of the proceeds of a life policy failed because the courts held that it was against public policy that the estate of a suicide who deliberately ended his life while sane could be enforced at law. Again, there was a question of a promise to marry made by a man after decree nisi but on the terms that it was not to be acted upon until the divorce was made absolute. Atkin held that the promise was binding. He said, however, that the doctrine of public policy could only be invoked in clear cases when the harm to the public was substantially incontestible, as, for instance, allowing a felon to reap the fruits of his felony. But he added the pregnant warning that the court must be sure that it did 'not depend on the idiosyncratic tendencies of a few judicial minds'. Such a warning needs to be kept in mind in every case of judicial legislation. It is perhaps less likely to be ignored nowadays than four or five centuries ago.

Atkin was a firm believer in the importance of strict adherence

to precedents in the House of Lords, for all his desire to throw off the fetters of dogmas or cast-iron rules imposed by the past. His view was that law was indeed dynamic, not static, and should adapt itself to the requirements of the present. But he insisted as paramount the need in our common law system for having settled rules, because he felt that without them certainty would be impossible so long as judge-made law in its own way and within its limitations ranked along with statutory law as part of the legal system. Judges have sometimes been tempted to use the power they possess of drawing distinctions in order to get rid of what they regard as a mischievous rule, even one laid down by the House of Lords. Atkin's view was expressed in a few words in Cull's case, a dry revenue case, where he said he declined to embark upon the consideration of the question whether the decision was right or wrong—'it binds me', he said, 'and I necessarily accept it. If it leads to wrong results the effect can be remedied by legislation'. That was his guiding rule, as it must be for every common law judge. There have been, however, some judges rather more prone than he was to seek refuge in drawing distinctions between cases, a practice which has often led to the amelioration of the law if carefully kept within limits. Precedents may have a seriously cramping effect on the development of law, and legislative amelioration of a bad rule may be long delayed, if, indeed, it ever comes. Witness the long reign of the doctrine of common employment and many other equally bad rules. Atkin, for all his determination not to depart from binding precedents, was, however, able to promote in many ways, and to a large extent, the adaptation of the law to the needs of present-day human life. A judge sitting in the House of Lords has frequent opportunities, which Atkin never failed to make use of, of taking a statesmanlike view of earlier precedents. I want to refer a little more fully, though still briefly, to three important doctrines which bulked large in Atkin's legal thought: freedom, and the two pillars of the common law system, the rule *pacta sunt servanda*, the rule of contract, and the rule of due regard to one's neighbour, the basis of the law of tort. Atkin's contribution to the common law in respect of the last is decisive. In regard to freedom, his application of the rule to the instances before him has been more controversial, indeed in the decision itself he was in a minority of one.

Atkin was statesmanlike in regarding freedom from arbitrary arrest, that is, outside due process of law, as the most vital of all kinds of freedom. Freedom of speech or freedom from fear is of

little value to a man arbitrarily arrested and put into prison or sent to a concentration camp. This has been seen clearly enough in the Nazi or Fascist régimes or in the Soviet countries and their satellites. No one can question the need of protecting the citizen against unlawful arrest. Under the rule of law in England, which applies even in war time, a man who is detained in custody by the executive may always demand his release by the writ of Habeas Corpus unless the government can show a lawful justification. It is, however, true that the government, by effecting a change of the law with the help of Parliament, may always create a new liability to arrest. They can, therefore, show a lawful justification if the law so provides: whether that is so or not must accordingly depend on the true construction of the law which the government invokes as its warrant. That was the issue in the cases heard by the House of Lords in 1941, and reported under the names of *Liversidge* v. *Anderson*, and *Greene* v. *Anderson* in 1942 A.C. p. 206. The whole issue turned upon the meaning of certain Orders made by the Secretary of State which it was admitted had statutory effect. These purported to enable him to detain by way of preventive arrest persons suspected of acts prejudicial to the public safety or the defence of the realm in the war then raging. The various courts to which the applicants appealed decided that the detention was justified by a valid Statutory Regulation, reg. 18B. Atkin dissented in a minority of one. It was a striking proof of his independence and his devotion to the cause of freedom. I cannot say that I agreed with him in that, as I was one of his colleagues who came to the opposite conclusion, but like everyone else I admired his judicial valour. It was clear that the detention would be unlawful unless the Regulation on its true construction validated it. No doubt at the basis of it all was the requirement that the Secretary of State must act in good faith. That he did so was conceded. Atkin's contention was that the Regulation, by expressly making powers of the Secretary of State conditional on his 'having reasonable cause to believe' that the man was of hostile origin or had recently been concerned in acts prejudicial to the public safety and defence of the realm or the other conditions specified in the Order, made the Secretary's powers conditional on his having reasonable cause to believe and that that was a matter which, if disputed, must be decided by the courts and hence that such an Order could only be legal if a court of law found that the condition was fulfilled. He quoted a long series of cases to show that where powers to arrest are conferred on a police constable or

other public functionary subject to the condition that there was reasonable cause for the arrest, the legality of the arrest could always be denied unless the court held there was the necessary 'reasonable cause'. He thought that the natural meaning of the words was not that the Secretary of State reasonably believed in his own mind; he had to show, so Atkin thought, that he had objectively, that is to the satisfaction of an independent judge, had grounds for his belief which were reasonable in the judgement of the court. He said scornfully at p. 245:

> I know of only one authority which might justify the suggested method of construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean and neither more nor less.' 'The question is,' said Alice, 'whether you can mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'" ("*Through the Looking-Glass*", Chap. vi.)

But the strength of the Government's case lay largely in the provisions of the Regulation for an advisory Committee which was established under the presidency of so powerful a judge as Mr. Justice Birkett. It is true that the Committee's powers were advisory and did not bind the Secretary to obey them or even invoke them, but that, with the whole context of the Regulation and the circumstances of the time, was held sufficient to justify a construction of the Regulation in the sense claimed by the Government and thus to legalize the man's detention. I am not seeking to-day either to justify or condemn the dissenting view put forward by Atkin. I have not changed either my own opinion or my respect for Atkin's independence of mind and his love of freedom, which is something never more important to the world than it is to-day. I may add that Regulation 18B was never repealed or amended in any way by Parliament, but remained in force throughout the war.

I now pass to Atkin's massive contribution to the common law in regard to the tort of negligence. The case in which he made it is *Donoghue* v. *Stevenson*, 1932 A.C. 562. That appeal was heard by the House of Lords on appeal from the Scottish courts on the point of law whether the averments of the pursuer showed a cause of action. The Lords were divided in the result, two of their number, Lords Buckmaster and Tomlin, holding that they did not. The majority, Lords Atkin, Thankerton, and Macmillan, held that they did, and a trial of the issue was ordered accordingly. The plaintiff was claiming damages for an injury to her health owing to the negligence of the

defendants in preparing for sale a bottle of ginger beer in which a snail had been left, so that when the contents were poured out of the bottle for her to drink she suffered severe physical and mental shock when the snail came out. There was no contract between the pursuer and the defenders. The bottle had been purchased in the ordinary course by the pursuer's friend and passed on by her to the pursuer in the way of hospitality. As there was no question of any obligation in contract, it was a pure question of tort or nothing. The claim involved that a stranger to the contract came in a case like that within the scope of the duty of care in the same way as the persons lawfully using the highway come within the scope of a driver's duty to drive with due care. Atkin and the two Lords who agreed with him came to the affirmative conclusion.

Lord Atkin's judgement is of particular importance. It was of the utmost value in laying down a logical general rule with a precision and an accuracy which had never been achieved before. It affirmed in clear and general terms a broad law of tort liability, namely that liability depends on reasonable foreseeability on the part of the actor that harm to the other may follow if the actor fails to use reasonable care in the matter. The stranger's identity may be unknown to the actor. I can best indicate the effect of Lord Atkin's masterly judgement by quoting a few passages which will incidentally again illustrate how delicate, strong, and effective his style was. It can best be seen how great the advance was by comparing the more conservative view explained by Lord Buckmaster, based primarily on earlier decisions, with the more realistic exposition by Atkin, based on appreciation of social values. The matter was open for discussion on the part of the House of Lords without any fettering precedent. All the material cases up to that time were discussed in the two leading judgements. Atkin could pray in aid, among other things, a well-known dictum of Lord Esher in a dissenting judgement in the Court of Appeal. Lord Buckmaster could invoke decisions which he claimed showed that in such a case there must be privity of contract. Scots law and English law were treated as being the same for the purpose of the decision. Atkin, having pointed out that they were solely concerned with the question whether as a matter of law in the circumstances alleged the defender owed any duty to the pursuer to take care for her interest, went on at p. 579:

> It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties

that give rise to the duty. The court are conversant with the particular relations which come before them in actual litigation and it is sufficient to say whether the duty exists in these circumstances. The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions based on the particular relations of one side or the other, whether manufacturer, salesman, or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based on some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. . . . At present I content myself with pointing out that in English Law there must be and is some general conception of relations giving rise to a duty of care in which the instances given in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa" is no doubt based on a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give every person injured by them a right to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply: you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

One more passage alone I can quote from a long and elaborate judgement which the curious must read and reflect upon and also compare with the method of case law adopted by Lord Buckmaster. My last quotation will be short. Atkin has been discussing the very important qualification to the general statement. He concludes at p. 583:

I confine myself to articles of common household use where everyone, including the manufacturer, knows the articles will be used by other persons than the actual ultimate purchaser—namely by members of his family, and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it

makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

The wider and more liberal doctrine puts the common law on its true basis as the service of social welfare. No one who has been engaged in the study or practice of law in the last seventeen years can fail to realize what influence views like this have had on the orientation of the concept of law and the reading of the authorities, and on the adaptation of traditions to modern needs and modern conditions. Law is seen to be within its limits a vast engine of social amelioration.

I must now pass to a very brief reference to Atkin's insistence on the importance of the maxim *pacta sunt servanda*. I take the statement from a case *Bell* v. *Laver*, 1932, A.C. 161; the case was not merely complicated, but led to extraordinary differences of opinion among the different courts and the different judges. Atkin, after giving certain instances of misunderstanding or mistake between parties who were making a contract, adds his formulation of the overriding principle at p. 224:

> All these cases involve hardship on *A* and benefit *B*, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts, —i.e. agree in the same terms on the same subject-matter—they are bound and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

It was on the strength of that general principle that Atkin and two of his colleagues held that the appeal should be allowed and the case decided in favour of the validity of the agreement notwithstanding the contention that there had been a misunderstanding when the contract was made. What is important here is the forthright and uncompromising assertion of the principle that sanctity of contract is the governing motive only to be overridden by the strongest possible counterbalancing circumstances, such that they can be treated as of the substance of the contract. The case arose upon a contract to cancel a service agreement on the payment of a large sum by way of compensation for the cancellation. The employers claimed the contract was void because it was entered into on the basis of a mutual mistake. Atkin rejected the claim on the gound of the paramount principle he stated. But he did not do so without considering the argument based on a principle formulated by Sir John Simon in his argument on behalf of the employers who were claiming to invalidate the agreement. Atkin said few would demur to the

statement which was: 'Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached on the basis of a particular contractual assumption and that assumption is not true the contract is avoided, i.e. it is void *ab initio* if the assumption is of present fact.' Atkin commented: 'I think few would demur to this statement, but its value depends upon the meaning of a "contractual assumption" and also upon the meaning to be allotted to basis.' In the end of a long judgement he came to the conclusion on the whole that the contract in question was not void. As I read his judgement he did so on the basis of the particular circumstances and vindicated the general principle *pacta sunt servanda*.

It is impossible here to give any fuller picture of the scope of Atkin's many illuminating judgements which have added so much to the common law and also, as I have already observed, infused a new spirit into it, and a new and realistic sense of its essential importance. I have, I hope, given at least an idea of the methods of his legal thought. Important as are his individual judgements, I think his influence may be even more important, if that were possible, in promoting the practical and realistic study and practice of the law. He was always particularly interested in legal education, which certainly in his earlier days needed enlightened support and encouragement. All through his life, in addition to his judicial work, he was constantly engrossed in energetic activities in various ways such as committees or commissions or inquiries. Among other things he was Chairman of the Council of Legal Education from 1919 to 1934. It would not be useful here to give a full list of his very many activities of similar character. I may merely, as a single illustration, refer to the important work which he did as Chairman of the Committee on Insanity and Crime established in 1922, and concluding its operations by an important report in November 1923. The topic was the relationship between responsibility for crime and mental disease, as laid down in what has been called McNaghten's case, which consisted of certain answers given by the judges in 1843. The main addition which Atkin's committee proposed was to add to the matters mentioned by the judges in 1843 a further but very important element, namely lack of control due to disease of the mind.

His was a full and happy life, blessed both in his work and in his family and friends. Though his health was never robust and he had constant smaller ailments, he never suffered from any

severe or lingering illness, or from any failure of mental energy. When he died in 1944, he was practically still in harness. Some of his finest judgements were given in the last years of his judicial career, and some even within a few months of the end of his life. He had gone down to his beloved home in Aberdovey, Merionethshire, which had for him the immense advantages of being on the edge of a golf course as well as close to the seashore. He loved Wales and always regarded it as his own country. The end came very peacefully. It could be said with truth that he simply passed away.

He had a family of two sons and six daughters. One of his sons, 'Dick', was killed serving in the First World War; that was a terrible blow to him and to Lady Atkin. His other son has achieved a position in the banking world. All his six daughters have married. Of his many grandchildren I can here only mention one, Brigadier Austin Richard Low, who distinguished himself in almost every field in which the British Forces were engaged during the Second World War and gained the distinctions of D.S.O. and C.B.E., and is now M.P. for Blackpool North.

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