ROBERT GOFF

Robert Lionel Archibald Goff

12 November 1926 – 14 August 2016

elected Fellow of the British Academy 1987

by

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Robert Goff, Lord Goff of Chieveley, will be remembered as a master of common law technique, a creative and original scholar, and for twenty-three years a judge of the highest distinction, latterly as Senior Law Lord at the apex of the UK's legal system. As a scholar, he, with Professor Gareth Jones, disinterred the law of restitution in England and Wales and in their 1966 book *The Law of Restitution* sought to place it on a principled basis. As a judge, he was involved in many fundamentally important decisions at all levels and was pivotal in the authoritative acceptance by the House of Lords in *Lipkin Gorman v Karpnale Ltd* of restitution as an independent branch of law founded on the principle of unjust enrichment.

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Overview

Robert Goff, Lord Goff of Chieveley, died on 14 August 2016 at the age of 89. He will be remembered as a master of common law technique, a creative and original scholar, and for twenty-three years a judge of the highest distinction, latterly as Senior Law Lord at the apex of the United Kingdom's legal system. As a scholar, he, with Professor Gareth Jones who died on 2 April 2016, disinterred the law of restitution in England and Wales and, in their 1966 book *The Law of Restitution*,[1] sought to place it on a principled basis. As a judge, he was involved in many fundamentally important decisions at all levels and was pivotal in the authoritative acceptance by the House of Lords in *Lipkin Gorman v Karpnale Ltd* of restitution as an independent branch of the law of England and Wales founded on the principle of unjust enrichment.[2] He worked hard and with dedication and was a devoted family man. He could at first seem formidably formal, perhaps because of his reticence and modesty, but his warmth, kindness and sense of fun (often accompanied by a giggle and a twinkle in his eye) very soon dispelled that impression.

Although, after the publication of the American Law Institute's *Restatement of Restitution* in 1937,[3] restitution was discussed in English courts[4] and law journals,[5] there was no comprehensive treatment of it and it was dealt with only briefly in contemporary books on contract.[6] Suggested definitions and underlying principles were controversial, either excluding cases that were, 'for want of a better name',[7] described as quasi-contracts, or including cases which were not.

The preface to Goff and Jones stated that 'the law of Restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment'. The book analysed the cases on common law quasi-contractual obligations and those on equitable doctrines and remedies, both of a personal and a

[1] R. Goff and G. Jones, *The Law of Restitution* (London, 1966), hereafter 'Goff and Jones'.
[2] [1991] 2 AC 548.
[3] Its full title was the *Restatement of Restitution: Quasi-Contract and Constructive Trust*, and the reporters were Professors Seavey and Scott of Harvard.
[4] Notably *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 27–9 (Lord Atkin); *Fibrosa* [1943] AC 32 at 61, 64 (Lord Wright); *Nelson v Larholt* [1948] KB 339, 343 (Denning J).
[5] E.g. Winfield, (1937) 53 *Law Quarterly Review* 447, (1939) 55 *Law Quarterly Review* 161, and (1944) 60 *Law Quarterly Review* 341–2; Seavey & Scott (1938) 54 *Law Quarterly Review* 29; Allen (1938) 54 *Law Quarterly Review* 201, 202, 26–7; Holdsworth, (1939) 55 *Law Quarterly Review* 37; Lord Wright, *Legal Essays and Addresses* (Cambridge, 1939) and (1941) 57 *Law Quarterly Review* 200.
[6] The post-war treatment was fuller than it had been. The chapter in the 1945 edition of W. R. Anson, *Principles of the English Law of Contract* (19th ed.) (London, 1945) was nineteen pages long, and that in the first edition of Cheshire and Fifoot's *The Law of Contract* (London, 1945) was twenty-two pages long, whereas the chapter in the 1937 18th edition of *Anson* was six pages long.
[7] Anson, *Principles of the English Law of Contract*, pp. 422–3.

proprietary nature, and gain-based remedies. The relationship in English law of the various common law and equitable doctrines had not previously been considered in a systematic way. The authors acknowledged their debt to the scholarship of Professors Seavey and Scott, the Reporters of the American *Restatement*, but were determined that their work should, as far as possible, constitute 'an organic development of English case law and so be acceptable to the legal profession'.[8]

The book was an immediate success. Within two months of publication it was described as 'admirable' by Edmund Davies J.[9] In his review in the *Law Quarterly Review*, Lord Denning stated that the book was 'long-needed' and 'a creative work': the authors have 'done for Restitution what Pollock and Anson did for Tort and Contract … [they have] given us relevant principles which we can understand', and 'not hesitated to expose false doctrines'.[10] Other reviewers welcomed its clarity of style and analysis, the critical appraisal of the law as it then was, and the suggestions for future developments or reforms.[11] An observation in Bill Cornish's review highlighted the originality of the book. He said the book had caused some perplexity in academic circles; the library of one ancient university classified it as Criminal Law and the library of one Inn of Court refused to take it at all.

As a judge, apart from restitution, Robert Goff was involved in many significant decisions on commercial law, jurisdiction and tort. But his range was far wider. It included decisions raising profound moral and ethical questions about the end of life and the position of incapacitated adults. It also included important questions of public and private international law and policy such as those that arose in the *Pinochet* cases about whether a former head of state charged with acts of torture could be extradited, and cases about the boundaries of public and private law.

In his judgments he displayed careful creativity which was the product of a deep understanding of the law and an ability carefully and lucidly to reveal the principles underlying the result in individual cases and so to develop the law organically and incrementally. He described the process in his 1983 Maccabaean Lecture, 'The Search for Principle',[12] a process which led him to have regard for the contributions of gener-

[8] Robert Goff's speech at the dinner of the conference in Cambridge in January 1998 marking Gareth Jones's retirement from the Downing Professorship of the Laws of England which he had held since 1975 (hereafter 'Speech at dinner for Gareth Jones').

[9] *Chesworth v Farrer* [1967] 1QB 407, 417. Robert had been tipped off in advance and was present in court with his pupil Andrew Longmore, now a Lord Justice of Appeal, who described it as the judicial baptism of the book.

[10] (1967) 83 *Law Quarterly Review* 277–8.

[11] Harris, (1967) 25 *Cambridge Law Journal* 114; Cornish, (1966) 29 *Modern Law Review* 579.

[12] R. Goff, 'The search for principle', *Proceedings of the British Academy*, 69 (1984), pp. 285–308 (hereafter *The Search for Principle*). This reflected the maturation of ideas which can be seen in, for example, his 6th Lord Upjohn Lecture, R. Goff, 'The law as taught and the law as practised', *The Law Teacher*, 11 (1977), 75–88.

alists. Five years later he stated 'obviously the work of the generalist may appear shallow to the modern specialist; but generalists themselves have their own virtues which specialists often lack'.[13] In 1999, in a letter graciously declining an invitation to contribute to a Festschrift, he said 'although I can claim that my understanding of the law has become profound, my knowledge of the law is unsystematic and, unlike a professor of law I have no particular topics in mind which I can readily work up into a learned paper suitable for a Festschrift'.[14] In his Maccabaean Lecture he had observed that a judge's vision of the law tends to be fragmented because he considers the point of law in relation to the particular set of facts in the case.

Professor Andrew Burrows' obituary stated that 'for many in the legal academy, Lord Goff was the greatest judge of all times', that 'his judgments were models of clarity and rigour and epitomised his oft-expressed aim of achieving principled "practical justice"'.[15] In difficult cases, in his search for principle he deployed insights from other systems, in particular German law, and the contributions of comparative lawyers, although he did not favour the development of a single European body of private law.[16]

In all that Robert did, he promoted what he described as 'the proper recognition of the contribution made by the academic world to the development of English law'. He valued their analyses in building up a systematic statement of the law on a particular topic in a coherent and principled way with criticism and suggestions for its beneficial development, something different from but complementary to the focus of judges on the facts of the particular case. He stated that it is the fusion of the work of academics and judges 'which begets the tough, adaptable system which is called the common law'.[17] In *The Spiliada,* in 1986, he described jurists as 'pilgrims with [judges] on the endless road to unattainable perfection'.[18] In a letter to Professor Peter Birks in 1999, he said that he did not know how far he succeeded in promoting proper recognition of the contribution of the academic world to the development of English law, but that, if he had, 'that alone will give me great satisfaction'.[19]

Family was fundamentally important to Robert Goff. He married Sarah Cousins in 1953. They had four children, Katherine, Juliet, William and Thomas. Tragically,

[13] R. Goff, *A Voyage around Holdsworth* (Birmingham, 1988), Presidential Address to the Holdsworth Club of the University of Birmingham, p. 12 (hereafter *A Voyage around Holdsworth*).
[14] Letter dated 22 February 1999 to Professor Schwengzer of the University of Basle, who was co-editing a Festschrift to mark the 70th birthday of Professor Peter Schlechtriem.
[15] (2016) *Society of Legal Scholars Reporter* 39.
[16] Letters dated 2 and 17 December 2001 to Professor Peter Schlechtriem and Lord Bingham.
[17] Goff, *The Search for Principle*, p. 171. For a more qualified view by a judge-jurist, see Rodger (1993-5) 28–30 *Irish Jurist* 1; (2010) 29 *University of Queensland Law Journal* 33.
[18] [1987] AC 460, 488.
[19] 28 November 1999.

William contracted viral meningitis at seven months and, despite Robert and Sarah's devoted care, died of its consequences when he was two. At Robert's funeral, Juliet's address captured the warmth of the atmosphere of the family home and the closeness of the family.[20] Robert and Sarah, who had survived the illness and death of William, had a relationship of absolute dependence and trust. Robert worked hard, not only at the law, but with Sarah, acquiring DIY skills, making their home a place of beauty and comfort, and nurturing the family. Robert spent a lot of time with the surviving children, being patient, taking them skating on Sunday mornings, and 'most of all' giving them music, which, although he loved his work, was what 'fed his soul and relaxed him'.[21]

Family background, childhood, school and war service

Robert was born in Perthshire on 12 November 1926. He was the second child of Lieutenant Colonel Lionel and Isobel Goff. His sister Josephine was a year older than him. His father was educated at Eton and the Royal Military Academy, Woolwich, and commissioned in the Royal Artillery in 1897. He fought in the Boer War, was badly wounded at the relief of Ladysmith, mentioned in despatches, and was brought back to Portsmouth on a hospital ship. He also fought in the First World War and was again wounded and mentioned in despatches. He remained in hospital until about 1921. In 1923 he married Isobel Higgon, née Denroche-Smith. Isobel was much younger than Lionel, and the widow of Archie Higgon, who was killed in action in September 1915. Isobel's father, Thomas, married her mother, Florence Bayley, after a very successful career in the Bengal Civil Service and they had four children. Their family home was Balhary, near Alyth, North Perthshire.

As a child Robert and his family lived at Monk Sherborne in Hampshire. He had a close relationship with his mother, who remained a passionate Scot. During his childhood and adolescence they spent many summer holidays at Isobel's family home in Perthshire, then lived in and owned by her brother Lewis. His relationship with his father was not as close. Robert did not share his father's principal interests of hunting, shooting and riding, and refused to shoot after his eighteenth birthday. His passion for music was not shared by his father.

Robert's first school was a Dame School in Basingstoke. From the age of eight he attended St Aubyn's, a preparatory school in Rottingdean, and he started at Eton in September 1939, the beginning of the war. His family say he regarded himself as

[20] St Mary's Church, Chieveley, 5 September 2016.
[21] Ibid.

fortunate there. He continued to concentrate on the classical languages and history but, save for some biology, he did no science. He was taught history by C. R. N. ('Dick') Routh and classics by Cyril Butterwick, who was also his housemaster. Routh and Butterwick greatly influenced Robert and may have been instrumental in turning him into a scholar. Dr Henry Lee, one of the organists who had played at George VI's coronation, taught him the piano and encouraged him. Robert became a very good pianist and his love of music stayed with him even after his health failed. Its importance to him is illustrated by his statement many years later that 'one can always tell whether people are musical from the way they talk'.[22] He also loved wild things. At some stage as a boy he made a scholarly and extensive collection of birds' eggs, which he kept for the rest of his life.

In December 1944 Robert left Eton. He had been offered a place at New College, Oxford, after completing his military service. An indication of how he was regarded at school is seen in a letter dated 13 December 1944 from Dick Routh to Nigel Wykes, who had succeeded Butterwick as his housemaster. Routh stated that Robert was 'very gifted and intelligent'. He referred to his 'sense of humour, shrewd judgement, and an almost fantastic modesty'. He, however, regarded the most attractive of Robert's gifts to be 'his sensitivity, the instinctive appreciation of everything which is Good, and the capacity not only to recognise it but to feel it deeply'. Routh considered that, although worth a scholarship, Robert was unlikely to win one because in his last half at school 'he has not been able to give that unremitting attention and wholehearted absorption' to his studies and a large part of his time had been taken up with friends, and cultural, social and athletic activities.

Robert was called up in December and commissioned in the Scots Guards. He was told that he would be going to the Far East in September 1945 and trained for combat in that theatre, but the surrender of Japan that August meant that he was not sent there. After a period of Guard Duty at Windsor Castle he volunteered to go to Italy as part of a force to deal with the threat posed by Marshal Tito at that time. He travelled by train across Germany and via the Brenner Pass. His obituary in *The Times* refers to him being amazed by the beauty of the landscape and saying of the gushing waters of the River Adige and the sight of peach orchards in bloom that he thought someone had picked him up and put him in the Garden of Eden.[23]

He remained in the army and in Italy until July 1948. He spent periods of leave travelling and exploring northern Italy. He went skiing and pursued his musical and cultural interests when he could and introduced his men to them. While stationed at Windsor, he had been allowed into the Royal Art Collection with its Leonardo

[22] Goff, *A Voyage around Holdsworth*, p. 13.
[23] 23 August 2016.

drawings, and his time in Italy enabled him to nurture his love of Italian art, religious frescos and other monuments. He combined the task of setting up communications posts with visits with his men to see the art, including Michelangelo's *David* in Florence and Piero della Francesca's Polyptych in Perugia. In Venice, he stayed at the Hotel Danieli, which had been taken over by the NAAFI, and where those in the services could stay for a shilling a night. He was allowed to play two of the hotel's four pianos.

The reason Robert remained in the army and Italy after December 1947 when, having done three years' service, he could have been demobbed was that the place he was offered at New College for the two-year 'shortened' Final Honour Schools course for ex-servicemen started in October 1948. He was told that he could read either Greats, Law or History. He thought that History in two years would be no fun and decided to read Law, and then to qualify and practise as a barrister. He was able to pay for Oxford out of savings from his army salary.

John ('Jack') Butterworth, who later became the first Vice-Chancellor of Warwick University, was the Law Fellow and Robert's tutor. One of his other tutors was Wilfrid Bourne who 'weekended' there while starting at the Bar, but later joined the Lord Chancellor's Department and ultimately held the paired top offices of Clerk of the Crown in Chancery and Permanent Secretary to the Lord Chancellor. Teaching arrangements were then much more informal. Many tutors did not provide reading lists, leaving the undergraduates to identify the leading cases and any articles on a topic from the recommended textbook and any lectures or classes which they attended.[24] Robert used to contact Wilfrid Bourne during the week identifying the chapter of the relevant book on which he was preparing for the tutorial. Although clearly committed to his subject, Robert later stated he 'attended hardly any lectures on law', but that 'Cecil Fifoot's admirable lectures provided one great exception'.[25] He probably attended a joint New College/Queen's revision class given by Butterworth and Professor Tony Honoré, then a Fellow of The Queen's College but who, as a Rhodes Scholar, had done the graduate Bachelor of Civil Law degree at New College immediately after the war.[26] Robert won an outstanding reputation both as a potential

[24] The introduction of reading lists after the War is attributed to Dr John Morris, the Law Tutor at Magdalen from 1936, although before the War Stallybrass at Brasenose is said to have achieved the same result by simply telling his pupils what to read for the next tutorial: see P. M. North, 'John Humphrey Carlile Morris 1910-1984', *Proceedings of the British Academy*, 74 (1988), p. 443.

[25] Goff, *A Voyage around Holdsworth*, pp. 8–9.

[26] Honoré succeeded Butterworth as the law tutor at New College in 1964 and in 1971 became the Regius Professor of Civil Law. His successor at New College was Alan Rodger, later Lord Rodger of Earlsferry, another scholar judge and a Fellow of the Academy: see H. L. McQueen, 'Alan Ferguson Rodger 1944–2011', *Biographical Memoirs of Fellows of the British Academy,* 13 (2013), p. 361.

lawyer and as Steward (President) of the Junior Common Room and was awarded a distinguished first-class degree in 1950.[27]

Fellow and Tutor in Law, Lincoln College, Oxford 1951–5

The plan to go straight to the Bar changed soon after Robert's examination results came out. While at his mother's family home in Perthshire, he was telephoned by Keith Murray, the Rector of Lincoln College, who invited Robert to come to see him. At the meeting, the Rector offered him the fellowship and tutorship in law that had become vacant in 1949 when Harold Hanbury became the Vinerian Professor of English Law.[28] Robert said he was astonished and asked for half an hour to consider the proposal.[29] Although the Rector was apparently equally surprised that Robert needed to think about the offer, the half hour was given, after which Robert accepted provided he could first do the Bar exams and be called to the Bar.[30] He was called to the Bar at the Inner Temple in 1951, began teaching at Lincoln in October that year, and remained in the post until the end of the 1954–5 academic year.[31] As well as his teaching, he did his share of administrative duties, serving on a number of committees and as Dean in 1952–3 while the incumbent was on leave.[32]

Robert was very conscious of the fact that he had done the shortened Schools, which involved studying only six subjects and not in great depth. In his 2002 talk to law students at Oxford he said that he could tell them two things: 'first—taking six papers in Schools was a woefully inadequate preparation for the job: second—the best way of learning law is to know that you have to teach it!'[33] He described having to get up at 5.00 am to do 'some pretty hectic and thorough preparation for tutorials' but said 'at least I was not stale'. Whether or not Robert was inadequately prepared for the job at the outset, he became a very effective teacher. In the *Lincoln College Record* for 1954–5, after

[27] *Lincoln College Record*, 1954–5, p 3.
[28] At that time the teaching was done by Peter Webster, a College Lecturer who was determined to practice at the bar but agreed to stay on for a second year. The *Lincoln College Record*, 1950–1, p. 3, stated that Webster was 'an exceptionally fine tutor' and the 'pleasantest of colleagues'. He became a very successful commercial practitioner, chairman of the Bar, and a High Court judge.
[29] Talk to Law Students at Oxford, Hilary Term 2002.
[30] He was elected to the Law Fellowship for a probationary year commencing in October 1951: Lincoln College Governing Board Minutes, 6 November 1950.
[31] Lincoln College Governing Board Minutes, 24 October 1951 (admitted to Fellowship), 22 October 1952 (confirmation of Fellowship), 26 January 1955 (resignation from the end of the academic year).
[32] Lincoln College Governing Board Minutes, 6 May 1952 (Dean), 6 November 1952 (refurbishment of public rooms), 6 November 1953 (award of scholarships, improvements to the library, choice of artist to paint former Rector's portrait).
[33] Hilary Term 2002 (hereafter '2002 talk').

referring to the fact that when he was appointed to his Fellowship 'it was already clear that he was attracted by the idea of practice at the Bar', Sir Walter Oakeshott, then Rector of the College, stated that 'the quality of his teaching proved so good that there was widespread hope of his being content to go on as an academic lawyer, and by his departure law studies at Oxford, as well as the College, will suffer greatly'.[34]

As was usual at that time, Robert taught a wide range of subjects. They included Criminal Law and Roman Law, the last of which gave him a fund of jokes on legal occasions about 'the useful subject of manumission of slaves'.[35] As was also usual at the time, he had a network of exchanges, for example sending his Lincoln pupils to Robert Heuston at Pembroke for Constitutional Law and taking the Pembroke lawyers for Roman Law.

In his 2002 talk to law students Robert said that the numbers reading Law at Lincoln and the fact that all the third years needed two tutorials a week meant that his hours were very stretched.[36] The College allowed him to recruit a weekender, and between 1953 and 1955 his friend and contemporary Patrick ('Pat') Neill, then a Prize Fellow of All Souls,[37] fulfilled this role. Robert also gave joint classes with Tony Honoré, where he may have first met A. W. B. ('Brian') Simpson, one of Honoré's Queen's pupils, and Robert's successor at Lincoln. Robert enjoyed engaging with enthusiastic young minds. He stayed in contact with a number of his Lincoln pupils. One of them, Swinton Thomas (later a member of the Court of Appeal of England and Wales), became a lifelong friend and died two days before Robert.

Lecturer (CUF), University of Oxford 1953–5

In 1952 Robert was appointed to a Common University Fund (CUF) lectureship in law with effect from 1953.[38] The lecture lists published in the *University Gazette*

[34] *Lincoln College Record*, 1954–5, p. 3.

[35] For example, his speech to Nottinghamshire Law Society in 1987, the President of which was a former Lincoln pupil, Jeremy Ware.

[36] In that talk he stated that he had fifty-four pupils in his first year and in a letter dated 9 November 2001 to Lord Jenkins of Hillhead following a dinner in Lincoln College to mark the end of his tenure as High Steward of the University of Oxford stated that he inherited 'nearly 50' pupils. These numbers probably include those from other colleges who were 'farmed out' to be taught by him, but law was the largest single honour school at Lincoln between 1951 and 1953 with twenty-nine (16.7% of the total) reading Final Honours School Jurisprudence in 1952-3: *Lincoln College Record*, 1950–1, p. 10, and 1952–3, p. 11.

[37] Patrick Neill subsequently became a distinguished QC, Warden of All Souls, Vice-Chancellor of Oxford, and chaired many bodies including the Council of the Securities Industry, the Press Council, and the Committee on Standards in Public Life. He was ennobled as Lord Neill of Bladen in 1997.

[38] The University Statutes for 1953 stated his appointment was from 1953 until 30 September 1957.

between Michaelmas Term 1952 and Trinity Term 1955 state that he gave classes with Ronald ('Ronnie') Maudsley, the Law Tutor at Brasenose, on Restitution, also described as 'Unjustifiable Enrichment' and 'Quasi Contract',[39] and gave lectures on Defamation.[40]

As to restitution, in his 2002 talk to law students Robert said that he 'noticed at the end of *Anson on Contracts* a strange subject called Quasi-Contract—with rather weird headings' and 'surely' this needed attention. It was not on the syllabus, but he decided that he could build up a course of lectures.[41] The first edition of Cheshire and Fifoot's *Law of Contracts,* published in 1945, stated that 'the attempts made from time to time to tame the refractory material have provoked acute controversy' and that 'it may be that the ultimate solution will be to free the topic from its historical associations … and to merge it in a unique and generic doctrine of Restitution'.[42] It is not clear whether Robert picked this up from Fifoot's lectures. But, for whatever reason, Robert was attracted by the idea of trying to tame what was both unruly and undervalued and got together with Maudsley, who he discovered was also interested in the subject.

Because the subject was not on the syllabus, not many students came to the seminars, but those that did included some who became distinguished academic lawyers.[43] After an introduction to the subject, the seminars included one on proprietary claims, one on necessity, and one on mistake in contract and in restitution. They were joint seminars, but either Robert or Ronnie Maudsley took the lead. Robert said that in the seminar on necessity he was trying to create in English law something like the Roman law doctrine of *negotiorum gestio.* He described it as all very exciting and decided that it could become a book. Because the work would involve researching both common law and equity (Maudsley's principal speciality) they were a well-matched pair. Robert started work on the book that was to become *The Law of Restitution* in 1953 but the joint project with Maudsley later floundered.

As to defamation, the lectures probably focused on the important changes made by the Defamation Act 1952. It had implemented the recommendations of the Porter Committee *inter alia* on unintentional defamation, qualified privilege and the defence of justification.[44]

[39] In Michaelmas Term and Trinity Term 1953 and 1954.

[40] In Hilary Term and Trinity Term 1953 and Hilary Term 1955.

[41] 2002 Talk.

[42] Goff and Jones, *The Law of Restitution*, pp. 429 and 434.

[43] In his 2002 talk to law students Robert said they included Professor Tony Guest and Sir Peter North, both Fellows of the Academy. As Peter North only came up to Oxford in 1956, the year after Robert left full-time academic life, in his case this must have been when Robert was teaching on a part-time basis. Sir Peter North's memory is that Robert 'in his very learned but unassuming way, had the skill to engage us in debate without our feeling overawed': email dated 18 December 2018.

[44] Cmnd. 7536 HMSO 1948. In his 2002 talk to law students, Robert said that he was told that, in his first

Family life

Robert met Sarah at a 21st birthday party near his parents' home in Hampshire in the autumn of 1952, after his first year at Lincoln. She had read History at St Anne's College, Oxford, and at the time was starting a BLitt. They married in July 1953 and spent their honeymoon in Italy. After their return they rented an attic flat in 58 High Street from Magdalen College and Robert began preparing for his teaching.

They lived in the flat in the High Street until they left Oxford in 1955. Robert continued to work very hard on his teaching, and they enjoyed the social life of a young academic couple. This included music and dining with friends and with some of the more senior academics. Jack Butterworth and his wife entertained them, and Robert recalls visiting Maurice Platnauer, then Vice-Principal of Brasenose and a friend of his Uncle Lewis.[45] As a result of his interest in Italy and the history of art, Robert also came to know Tom Boase, then President of Magdalen College, with whom he got on very well.

After marriage, Robert began to think again about his plan to go to the Bar. He said that Oxford was a marvellous place to live and work, but he wanted to be at the centre of gravity for the common law. At that time that was not in the universities but in the courts. Great judges were responsible for some of the most remarkable developments of the common law. They stamped their mark on it and academic jurists were much less influential.[46] He was later to say that although he admired and valued the work of the jurists, he considered that judges were more important in the development of legal principles because the dominant element in such development should be professional reactions to individual fact situations rather than theoretical development of principles.[47] Robert left full-time academic life in 1955 and began to practise in Sir Ashton Roskill QC's Chambers in King's Bench Walk, a commercial and shipping law chambers now known as 7 King's Bench Walk.

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year he would have to give a basic and factual lecture course on 'a new Criminal Justice Act' but that, after that, he could lecture on any aspect of the law that interested him. There is, however, no record of lectures by Robert on criminal law. The *University Gazette* states that between 1952 and 1955 lectures in that subject were given by Philip Landon, Reader in Criminal Law and Evidence, Fellow of Trinity College, and Rupert Cross, Tutorial Fellow of Magdalen College, and that in Hilary Term 1954 Landon also gave four lectures on the *Criminal Justice Act* 1948.

[45] Letter to Bill Swadling after the lunch on 27 November 1999 at which Robert was presented with W. Swadling and G. Jones (eds.), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999)—hereafter Swadling & Jones, *The Search for Principle*. The lunch was in the rooms which Platnauer had occupied when Vice-Principal of Brasenose.

[46] 2002 Talk, in which he recognised the changes since then and the profound influence of many jurists, including Glanville Williams, Herbert Hart, and later Peter Birks.

[47] Goff, *The Search for Principle,* pp. 185–6.

Between 1955 and 1975, the family lived at 5 Holland Villas Road in Holland Park, London. Robert travelled to chambers on the tube and was often able to complete the *Times* crossword between Holland Park and Chancery Lane. In 1966 they bought a barn in West Penwith, Cornwall to convert into a cottage. After sorting out the granite shell, the family spent summers there, although Robert sometimes had to go to London for work. The location was idyllic and had extraordinary views. Robert loved the wild coastline and the sea. Juliet described herself and Katherine clinging onto him for dear life when he took them 'to bathe in the huge crashing waves of the Atlantic Ocean'.[48] But it was an eight-hour journey from London and its isolation meant that, when they decided to move out of London, one of their criteria was to find a house in a reasonably large village. They sold the barn in 1974 and in 1975 moved from Holland Villas Road to Chieveley House in Berkshire, between Newbury and Oxford. Their London base became a flat on the top floor of 12 King's Bench Walk in the Inner Temple.

Robert introduced Sarah to opera and they would often go to Covent Garden. Juliet remembers being woken up in the middle of the night on which her parents had been to *Parsifal*. They had enjoyed it so much that when they got home they listened to the whole opera again on the gramophone. The way Robert 'gave' music to the children was by encouraging them to play, accompanying them, arranging pieces for them to play, and listening to music on the gramophone with them. At his funeral, the music included an arrangement of 'Soave sia il Vento' from *Cosi fan Tuti*, one of the many pieces arranged by Robert for his children. The family's repertoire extended beyond Bach, Mozart and Tchaikovsky to Flanders and Swann and Fats Waller whose songs were sung on the long car drive from Holland Villas Road to West Penwith.

Practice at the commercial bar

Robert's pupil master was Basil Eckersley, from whom he learned precise and concise draftsmanship. After becoming a member of chambers, Robert was instructed in shipping matters by Ken Elmslie of Richards Butler and several solicitors at Botterell & Roche, which later amalgamated with Norton Rose. He drafted contracts and rules such as those of Protection and Indemnity Clubs, but he 'had a pretty lean time'. This was because at the time he started in practice there was very little small work for junior barristers at the commercial bar. It was, he said, 'mostly silk's work'. The silks, that is Queen's Counsel (QC), tended to have almost permanent juniors. For instance, Eckersley (who never took silk) was generally led by Ashton Roskill. Robert was only

[48] Juliet Jackson's funeral address, 5 September 2016.

led by Roskill on two occasions when Eckersley had pneumonia. He was hardly led by anyone else.[49] As a result, he did not particularly enjoy being a junior barrister, but he had time to continue to teach and to research the law of restitution.

Robert's great interest in students and encouraging the young, evident in his Lincoln years, continued after he went into practice. Because his Inn, the Inner Temple, at that time gave its bar students virtually no educational support, he and an Inner Temple friend, Ted Laughton-Scott, arranged for lectures to be given for them. The Goffs and the Laughton-Scotts prepared the room and brought coffee, milk and biscuits. The lecturers included Robert's former Oxford colleagues Rupert Cross, Cecil Fifoot, Peter Carter and Robert Heuston, and the historian Marjorie Reeves[50] (who happened to be Sarah's tutor at St Anne's) gave a talk on the courts at the time of Henry II.

This interest in encouraging young lawyers later produced an important legacy in the form of the Pegasus Scholarship Trust which supports exchanges of young lawyers in many common law countries, placing them with private practitioners, judges and government law offices. Robert created and chaired the trust between 1987 and 2001. Originally confined to the Inner Temple, it soon became a collaboration between all four Inns. Robert used his skill, charm and formidable networking skills to assist in marshalling resources and providing practical assistance in this and other countries. His group included a former Prime Minister, Lord Callaghan, and Lord Mackay, shortly to become Lord Chancellor.[51] Considerable financial and other support was secured from British Airways for travel and, for those who wished to take a degree, from the Cambridge Commonwealth Trust.

As to teaching, Robert 'weekended' at Lincoln. At some stage after 1962 he gave classes on restitution at the London School of Economics with Bill Cornish. He also continued his research on that subject in the library of the Inner Temple. One of his principal sources was the noted 1929 edition of *Smith's Leading Cases,* one of the three editors of which was the young 'Tom' Denning.[52] Robert later said that it was analysing hundreds of cases for the book for so many years that turned him into a decent lawyer. By 1959, when the project with Ronnie Maudsley floundered, he had a clear idea of the structure and shape he wanted for the book.

[49] There are exceptions; for instance, in *Schtraks v Government of Israel* [1964] AC 558, an extradition case, he was led by Leonard Caplan QC.

[50] A Fellow of the Academy. See the obituary by Ruth Deech, *The Guardian*, 13 December 2003, and G. Lewis, 'Marjorie Ethel Reeves 1905–2003', *Proceedings of the British Academy*, 138 (2006), pp. 309–18.

[51] Foreword to Swadling and Jones, *The Search for Principle*, p. v.

[52] *Smith's Leading Cases* (13th ed.), (London, 1929), the other editors were Thomas Chitty KC and Cyril Harvey.

While a junior barrister, Robert considered his practice was not large enough for him to take pupil barristers and he had only one pupil. Andrew Longmore, a graduate of Lincoln College, now Lord Justice Longmore, started with Robert in 1966 and spent nine months with him until Robert took silk in 1967.[53] Longmore says he learned a lot from Robert about life, music and the issues of the day as well as the law. Once in silk, Robert Goff's practice took off quickly. He appeared in many important and technically difficult commercial cases[54] and also in commercial arbitrations in the City of London. His first choice of junior in chambers was Brian Davenport, who had the room next to his and was a great friend.[55] He also led his former pupil master, Basil Eckersley, his former pupil, Andrew Longmore, and many from other commercial chambers who went on to have distinguished careers including Mark Saville, Nicholas Phillips and John Hobhouse.

Robert was in the habit of working early in the morning, often playing Mozart on his piano to clear his head for what he described to Andrew Longmore as the 'tyranny of 10.30' when court sat. But there was also time for fun. Sir Stephen Tomlinson, who became a member of chambers in 1975, the year Robert was appointed to the High Court Bench, recalls visits during his pupillage to the Temple Table, a coffee house at which Robert and others met friends from other commercial chambers and regaled each other and the youngsters with anecdotes about amusing encounters with judges and others.[56]

Goff and Jones

Robert's project with Ronnie Maudsley floundered after Maudsley spent an extended period in the United States and was not responsive to Robert's communications. The breaking point came one day in 1959 when Robert opened the *Law Quarterly Review*

[53] In 1965 Robert appeared in two reported cases; *Margaronis Nav. Agency v Henry W Peabody* [1965] 2 QB 430 and *Fidelitas SS Co. v V/O Exportchleb* [1966] 1 QB 650. In both his opponent was Michael Mustill, another scholar judge and a Fellow of the Academy: see S. Boyd, 'Michael John Mustill 1931–2005', *Biographical Memoirs of Fellows of the British Academy*, 16 (2017), pp. 281–99.

[54] Examples include *York Products v Gilchrist Watt* [1970] 1 WLR 1262 (liability of sub-bailees who were not in a contractual relationship with the owner of goods); *The Mihalis Angelos* [1971] QB 164 (classification of contract terms; anticipatory breach); *Comp Tunisienne de Nav. SA v Comp. d'Armament Maritime SA* [1971] AC 572 (private international law; effect of choice of law clause governing contract); *The Atlantic Star* [1974] AC 436 (unsuccessfully arguing for widening circumstances in which English proceedings would be stayed because of prior proceedings in another more appropriate jurisdiction); *The Brimnes* [1975] QB 929 (repudiation of contract; effectiveness of telex received during office hours but unread).

[55] *The Mihalis Angelos* was one of the many cases in which he led Davenport.

[56] Memorial Service, The Temple Church, 6 February 2017.

and saw what he believed was largely the material on proprietary remedies in restitution from their seminars.[57] Robert wrote to Ronnie again but, when he still heard nothing, he 'concluded he was signing off and didn't feel able to tell me'.[58] By then Robert's practice was growing and he realised that if what he described as 'a rather difficult book on Restitution was ever to see the light of day' he had to have a collaborator.

Brian Simpson introduced Robert to Gareth Jones, who had undertaken graduate work at the Harvard Law School, and was leaving a temporary post at Oriel College, Oxford, for a lectureship at King's College London.[59] They got on very well and worked successfully together. Robert described Gareth as 'the ideal co-author—hard-working, good tempered, and generous to a fault',[60] and thought they 'were both quite surprised at the way their thoughts met' and that their minds 'seemed to fit together like a pair of gloves'.[61]

In 1961, the year Gareth Jones moved to a Fellowship at Trinity College, Cambridge, and a lectureship in the Faculty of Law, an issue of the *Modern Law Review* devoted to law reform contained an article by Robert about the 'Reform of the law of restitution'.[62] This demonstrated the amount of work he had done by then and may be said to contain the essence of the approach later developed in Goff and Jones, his Maccabaean lecture, and his judgments on restitution. Not surprisingly, he considered that restitution was in too unsettled and undeveloped a state for codification. His approach to specific proposals to eliminate obvious injustices is telling. He stated that two principal temptations had to be resisted.[63] The first was 'to substitute a wide discretion for ascertainable legal rules'. The second was to avoid piecemeal reform. He considered the *Law Reform (Frustrated Contracts) Act 1943* to be an example of the failure to resist both temptations.[64] He stated that, although the Act had the merit of reducing the scope of the doctrine of entire contracts, it did so by vesting in the court a discretion so wide that it was difficult for a lawyer to give firm advice on the prospects

[57] 2002 Talk. See R. Maudsley, 'Proprietary remedies for the recovery of money' (1959) 75 *Law Quarterly Review* 234.

[58] Ibid.

[59] Simpson was a good matchmaker: he had already introduced Jones to his future wife, Vivienne. See C. McCrudden, 'Alfred William Brian Simpson 1931–2011', *Biographical Memoirs of Fellows of the British Academy*, 11 (2012), pp. 547–81.

[60] W. R. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds.), *Restitution Past, Present and Future, Essays in Honour of Gareth Jones* (Oxford, 1998), p. vii.

[61] 2002 Talk.

[62] R. Goff, 'Reform of the law of restitution', (1961) 24 *Modern Law Review* 85.

[63] Ibid.

[64] He expressed his criticisms and grappled with some of the difficulties in *BP Exploration Co. (Libya) Ltd v Nelson Bunker Hunt (No 2)* [1978] 1 WLR 783, 799, 800 aff'd [1981] 1 WLR 232; [1983] 2 AC 352 (CA & HL), although see Paul Mitchell's critique of the case in C. Mitchell and P. Mitchell (eds.), *Landmark Cases on the Law of Restitution* (Oxford, 2006), ch. 10.

of a claim. Moreover, in only applying to contracts discharged by frustration, the doctrine was unaffected in contracts discharged for breach or some other reason. The criticisms were repeated five years later in the first edition of Goff and Jones when the 'cumbrous, discretionary provisions' of the 1943 Act were contrasted with 'the simplicity and clarity' of §468 of the American Law Institute's *Restatement of Contracts* and almost twenty years later when the first case on the Act came before him in the Commercial Court.

After Gareth Jones moved to Cambridge, Robert spent many weekends staying with him and his wife, Vivienne, at their house in Cavendish Avenue and working on the book in Trinity College. On other weekends Gareth came to work at Holland Villas Road. At the beginning of their collaboration, Robert produced more than Gareth. Later on, as Robert's practice at the Bar grew, Gareth produced more than him, especially during the final stages.[65] They reckoned that, overall, they had made equal contributions to what they regarded as a total collaboration. Robert said that whoever had produced the first draft of a chapter, they 'threaded [their] way through the minefields of legal argument in every chapter, during contented hours of debate and writing' as they hammered out the final text together.[66]

Robert gave a sense of their excitement with the project in an evocative after-dinner speech to mark Gareth's retirement from the Downing Chair in 1998. He acknowledged the great debt they owed to their predecessors, Lord Mansfield in the UK and, in the United States, Professors Keener and Woodward,[67] and the Reporters of the 1937 *Restatement*, Professors Seavey and Scott. But, casting aside his usual modesty at this celebration for Gareth, who he described as a good man to go tiger-shooting with, he said:

> Gareth and I may have been callow youths in those days; but we knew that we were pioneers, and we revelled in it. You have, if you please, to imagine a fitter Goff and a slimmer Jones, hacking our way through the jungle of precedents, liberating our chosen subject from the tyranny of false concepts, cutting logs and building shelters for rational principles, [and] bravely tackling a few ravening beasts, Lord Sumner among them … and carefully nurturing some precious green shoots, the fruits of our analysis.[68]

Robert's growing practice and Gareth's academic commitments in Cambridge and elsewhere meant that, as often happens with a new work by busy people, it all took

[65] Speech at dinner for Gareth Jones in January 1998.
[66] 2002 Talk.
[67] W. A. Keener, *A Treatise on the Law of Quasi-Contracts* (New York, 1893) and F. C. Woodward, *The Law of Quasi-Contracts* (Boston, MA, 1923); see also J. B. Scott, *Cases on Quasi-Contracts* (New York, 1905).
[68] Speech at dinner for Gareth Jones in January 1998.

much longer than they had anticipated. Their publishers, Sweet and Maxwell, pressed them over finishing times and they eventually submitted the manuscript in the last part of 1964. The page proofs, which arrived in January 1965, contained many mistakes, and they also made many alterations to the text. The publishers made them pay for a second set of proofs. Robert said that, as a result, they made practically no money at all out of the first edition. He commented that Sweet and Maxwell 'appeared to understand nothing about writing pioneering books'.[69] The book was published in 1966. Robert maintained that it was one of the reasons he was appointed a QC in 1967.

The book had four parts.[70] At its core was the demonstration of the fictional nature of the explanation that the basis of recovery is implied contract, and a statement of the principle of unjust enrichment and the limiting principles marking its boundaries. Its discussion of the nature and place of proprietary claims in the law of restitution and, in the second part of the book, of the character of the benefit to a defendant (and the challenges posed in cases of non-monetary benefits) are also of importance.

The closeness of the authors' collaboration and their commitment to it is illustrated by the fact that when, on the basis of the first edition, they supplicated for higher degrees at their respective universities, they refused to differentiate between their contributions. Apparently the Oxford Law Faculty Board initially declined to consider Robert's application on this basis because it was necessary to know who had written which parts of the book. But an administrator in the University Registry who was Secretary of the Law Board pointed out that the statutes required the Board to appoint examiners and that the syllabus for the subject introduced in 1970 to the graduate BCL course consisted of chapter headings from the book.[71] Robert took his DCL in 1971 and Gareth his LLD in 1972. In 1975 Robert was appointed to the High Court and Gareth to the Downing Professorship of the Laws of England at Cambridge. They wrote two further editions jointly, which were published in 1978 and 1986, the year in which Robert was appointed a Lord of Appeal in Ordinary.

The prefaces of the three editions, which they wrote jointly, show how they kept the boundaries and shape of the subject under review. So, in the second edition several scenarios involving gifts and the restitution of stolen property were omitted on the ground that they were part of the law of property. There was a new chapter on benefits

[69] Ibid.

[70] The fourth part, on restitution in the conflict of laws, was dropped from subsequent editions because the authors considered they had little to add to its treatment in J. H. C. Morris, *Dicey and Morris on the Conflict of Laws* (9th ed.), (London, 1973).

[71] Speech at dinner for Gareth Jones in January 1998. In a letter to Peter Birks dated 27 September 1999, Robert stated that H. W. R. Wade was the prime mover and wondered 'how they managed to give Crick and Watson Nobel Prizes for the Double Helix'.

acquired in breach of confidence and a fuller analysis of proprietary claims, in particular for mistake, and the defences to such claims. Contracting out and illegality, originally in the part of the book on defences, were moved to the section on the limits to restitutionary claims as factors meaning that an enrichment was not 'unjust'.

The second edition rejected the previous 'free acceptance' analysis of *Craven Ellis v Canons Ltd.*,[72] where recompense was granted for services rendered under a void contract to a company with no qualified directors as 'manifestly erroneous'. It also re-analysed the difficulties posed where restitution is claimed for services rendered and the relationship of restitution and contract, and its treatment of subrogation, described as one of the most intractable subjects in the law of restitution, was revised. Subrogation is a good illustration of the effect of the book. The authors' attempt in the second edition to formulate principles which unite all categories of subrogation was undoubtedly a major influence on the work of other scholars[73] and the ultimate recognition by the House of Lords in 1998 that non-contractual subrogation is concerned to reverse or prevent unjust enrichment.[74]

In a note at the end of the preface to the fourth edition, published in 1993, Robert stated that the edition was the work of Gareth Jones alone because his work as a Law Lord and increasing calls on him to give lectures and chair bodies precluded him from fulfilling the role of an editor. As Gareth observed, Robert's contribution to the book nonetheless remained a real one, albeit in the form of the influence of his innovative and closely reasoned decisions which did much to mould the modern law and the text of the book. Gareth edited three further editions, in 1998, 2002 and 2007, after which responsibility for Goff and Jones passed to a new team[75] which produced the eighth edition in 2011, renaming it *The Law of Unjust Enrichment*,[76] and removing the discussion of gain-based remedies founded on wrongdoing on the ground that the relevant cause of action is a civil wrong not unjust enrichment.

[72] [1936] 2 KB 403. Compare 1st ed., pp. 269–71 and 2nd ed., pp. 303–5.

[73] Notably P. Birks, *An Introduction to the Law of Restitution* (Oxford, 1985), p. 93; A. Burrows, *The Law of Restitution* (Oxford, 1993) p. 92; C. Mitchell, *The Law of Subrogation* (Oxford, 1994), p. 4.

[74] In *Banque Financière de la Cit*é *v Parc (Battersea) Ltd* [1999] 1 AC 221 Lord Steyn stated (at 228) that 'distinguished writers have shown that the place of subrogation on the map of the law of obligations is by and large within the now sizeable corner marked out for restitution'. See also 234 (Lord Hoffmann, with whom Lord Griffiths and Lord Clyde agreed) and 245 (Lord Hutton).

[75] Professors Charles Mitchell and Paul Mitchell, and Dr Stephen Watterson. The 9th edition was published in 2016.

[76] Peter Birks had done this in 2003: see P. Birks, *Unjust Enrichment* (2nd ed.) (Oxford, 2004).

The bench

After eight busy years as a Queen's Counsel, Robert was appointed a High Court judge in October 1975. He had been appointed a Recorder of the Crown Court in 1974. After seven years in the High Court, two as the Judge in Charge of the Commercial Court, he was appointed to the Court of Appeal in 1982 and to the House of Lords in 1986. He served as Senior Law Lord between 1996 and 1998 when he retired aged 72 but continued to sit on an occasional basis until his 75th birthday. He participated in over 300 cases in the House of Lords and 160 cases in the Judicial Committee of the Privy Council and gave many luminous, pathbreaking and painstakingly crafted judgments.

In the High Court he soon showed his qualities, particularly in commercial and other areas of private law. Once he became an appellate judge his qualities were seen in many new areas and I remember him telling me how stimulating he found his discussions with the other judges hearing an appeal. There are important judgments in criminal law,[77] although his extra-judicially expressed views about the mental element required for murder attracted academic criticism.[78] His formulation of the test for disqualification on the ground of bias or apparent bias as a 'real danger' from the perspective of the court in possession of all the relevant evidence clarified what had been a confusing body of authority,[79] and he gave an important judgment in *Pinochet (No. 2)* in which the rule of automatic disqualification for interest was extended to non-pecuniary and non-proprietary interests.[80] He also made important contributions in cases raising profoundly difficult ethical questions such as arose in the *Bland* case about the end of life of a young man in a persistent vegetative state,[81] and in filling

[77] For example, *R v Preddy* [1996] AC 815 (revealing a lacuna in the law of obtaining property by deception because the payee of a cheque obtains a different chose in action to the one the victim of the fraud has lost, on which see text to n.142 below); *R v Brown* [1996] AC 543 (retrieving information from computer screen was not the offence of 'using' data); *R v Morhall* [1996] AC 90 (provocation). See also *Collins v Wilcock* [1984] 1 WLR 1177 (rationalisation of defences to action for trespass to the person under a general umbrella of conduct which is generally accepted in ordinary life); *C v Eisenhower* [1984] QB 331 (rupture of purely internal blood tissues not a wound); *Whittaker v Campbell* [1984] QB 318 (no general principle of law that fraud vitiates consent).

[78] Compare Goff, (1988) 104 *Law Quarterly Review* 30 with Glanville Williams, (1989) 105 *Law Quarterly Review* 387.

[79] *R v Gough* [1993] AC 646.

[80] *R v Bow St. Metropolitan Stipendiary Magistrate, ex p. Pinochet (No 2)* [2000] 1 AC 119.

[81] *Airedale NHS Trust v Bland* [1993] AC 284 (doctors' conduct in discontinuing artificial feeding and supply of antibiotics to patient in persistent vegetative state is lawful because it can properly be characterised as an omission. Lord Mustill concurred but considered that the distinction was 'morally and intellectually misshapen').

apparent lacunae by using the principle of necessity in cases of lack of capacity.[82] There are also significant and sometimes high profile cases on public and private international law and policy, such as those in the *Pinochet* cases about whether a former head of state charged with acts of torture was immune from the jurisdiction of English courts,[83] and in cases concerning the jurisdiction of English courts where the defendant is not within their territory.[84]

When dealing with public law questions, he generally had a more cautious approach but there are important exceptions in judgments holding that there was unlawful sex discrimination in an area where there were fewer grammar school places for girls than for boys,[85] in the *Factortame* case disapplying the rule of national law barring injunctive relief against the Crown as contrary to European Union law,[86] and in the *Woolwich* case discussed below giving a right to the restitution of *ultra vires* payments received by public authorities. He did not favour allowing public law concepts to make it more difficult in practice to vindicate private law rights: his view that a person whose private law right (by claim or defence) involved challenging a public law act or decision was not required to proceed by way of judicial review with its very short time limit and other procedural disadvantages was endorsed by the House of Lords.[87]

In private law, as well as much cited decisions on sales and international carriage,[88] arbitration,[89] and the conflict of laws,[90] in tort he made his mark on the law governing liability in tort for pure economic loss and the complexities of fault and strict liability.[91] In one judgment he asked whether the fear of too much liability in such cases had a rational basis or was blind conservatism.[92] In *Muirhead v Industrial Tank Specialities*

[82] *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; *R v Bournewood Community and Mental Health NHS Trust, ex p. L* [1999] 1 AC 458 (principle of necessity the basis for lawfulness of medical intervention or informal admission to hospital where it is in the best interests of the patient and court has inherent jurisdiction to declare that it is in patient's best interests).

[83] Discussed below.

[84] *Spiliada v Cansulex Ltd* [1987] AC 460; *Re Norway's Application (Nos 1 & 2)* [1990] 1 AC 723; *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran (Service Outside Jurisdiction)* [1994] 1 AC 438 (jurisdiction and service out); *Kuwait Airways Corp. v Iraqi Airways Co (No 1)* [1995] 1 WLR 1147 (sovereign immunity).

[85] *R v Birmingham CC, ex p. Equal Opportunities Commission* [1989] AC 1155.

[86] *R v Secretary of State for Transport, ex p. Factortame Ltd (No 2)* [1991] 1 AC 603.

[87] *Wandsworth LBC v Winder* [1985] AC 461, at 480.

[88] For example, *The Pioneer Container* [1994] 2 AC 324 (ability of non-party to rely on contract); *Clough Mills v Martin* [1985] 1 WLR 111 (effect of retention of title clause on insolvency); *The Ocean Frost* [1985] 3 WLR 640 (ship purchase, bribery and corruption).

[89] For example, *The Leonidas D* [1985] 1 WLR 925 and *The Antclizo* [1988] 1 WLR 603.

[90] For example, *Coupland v Arabian Gulf Oil* [1983] 1 WLR 1136; *Amin Rasheed v Kuwait* [1983] 1 WLR 228 (aff'd [1984] AC 40).

[91] *Cambridge Water Co. v Eastern Counties Leather plc* [1994] 2 AC 264.

[92] *The Aliakmon* [1985] QB 350, 394–5.

Ltd., he grappled with the problems of principle and policy in such cases and identified the underlying principle as a voluntary assumption of responsibility limited by a need not to undercut contractual allocations of risk.[93] In Lord Rodger's words, the principle then had a chequered history,[94] but was revived and developed, largely by Robert in three significant decisions of the House of Lords.[95] Robert also made important contributions to the understanding and analysis of fact situations which prima facie give rise to claims based on more than one branch of the law of obligations. In the case of overlapping claims in contract and tort his view has been that, notwithstanding the apparent elegance of insisting that one claim should take precedence, there are advantages in permitting, as it is now clear that English law does, a claimant to choose which case to pursue, although he was always sensitive to the need not to allow the undermining of contractual allocations of risk.[96] That sensitivity was also apparent where the overlap was between claims in contract and in restitution: 'The existence of the agreed regime' was more likely to render 'the imposition … of a remedy in restitution both unnecessary and inappropriate.'[97]

Robert Goff's willingness to develop the common law to meet wholly new situations involving difficult questions meant that other great judges sometimes took a different view.[98] This was particularly evident in three decisions—*Woolwich Equitable BS v IRC*,[99] mentioned above, *White v Jones*,[100] and *Kleinwort Benson Ltd. v Lincoln CC*.[101]—in all of which the House of Lords split 3:2. The first and the third were restitution cases. *White v Jones* was one of the 'assumption of responsibility' cases. Although where opinions were divided Robert did not always prevail,[102] in these three cases he was in the majority and gave the leading speech. His speeches in these cases

[93] [1986] QB 507.

[94] *Customs and Excise Commissioners v Barclays* [2007] 1 AC 181 at [49]. It was not favoured in *Smith v Eric S Bush* [1990] 1 AC 831, 862, 864–5 and *Caparo Industries plc v Dickman* [1990] 2 AC 605, 628 and 637.

[95] *Henderson v Merrett Syndicates* [1995] 2 AC 145, 180*, White v Jones* [1995] 2 AC 207 and *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

[96] See *Henderson v Merrett Syndicates* [1995] 2 AC 145, *White v Jones* [1995] 2 AC 207, and *Coupland v Arabian Gulf Oil* [1983] 1 WLR 1136.

[97] *The Trident Beauty* [1994] 1 WLR 161, 164. See also *The Evia Luck* [1992] 2 AC 152, 165.

[98] For example, in *White v Jones* Lord Mustill. In *Tinsley v Milligan* [1994] 1 AC 340, Nicholls LJ and Lord Browne-Wilkinson were more willing to develop the law.

[99] [1993] AC 70.

[100] [1995] AC 207.

[101] [1999] 2 AC 349.

[102] See, for example, *The Gladys (No 1)* 1990] 1 WLR 115 (was defendant a party to arbitration clause); *Tinsley v Milligan* [1994] 1 AC 340 (effect of illegality); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (on award of compound interest); *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407 (whether special criteria needed when considering case of very young person convicted of murder); *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539 (fixing

and in other cases on liability in tort for economic loss referred to above deployed powerful analysis of the authorities, the conceptual difficulties, and (where relevant) the way common law principles and statutory regimes co-existed. He also considered and used the position in other jurisdictions but did so with sensitive awareness of how difficult and potentially misleading an exercise in comparative law can be when conducted by an English judge.[103]

What do his judgments tell us about his approach to the common law, his view of the role of the judges in developing it, and what he believed about the boundary between legitimate development by judges and illegitimate trespass on the province of the legislature? One way of examining this is to consider how his approach changed as he rose in the judicial hierarchy and the extent to which he avoided what, in 1983,[104] he would describe as the three pitfalls that lie in the path of those who seek to state legal principle: the temptation of elegance; the fallacy of the instant, complete solution; and the danger of an unhistorical approach to earlier authority. In important early first instance decisions on the doctrine of *forum non conveniens* and the scope of sovereign immunity, his search for principle of course respected precedent.[105] However, where precedent produced what he saw as illogicality, he lucidly identified the difficulties, thus laying the ground for future reconsideration of the precedent by a higher court.[106]

Two of his first instance judgments made significant contributions to the development and understanding of the principle or principles of estoppel which preclude those who have made a promise or representation which has been relied on from resiling from it where it would be unfair or unjust to do so.[107] His first instance decisions

minimum period to be served under a life sentence); *Alfred MacAlpine (Construction) Ltd. v Panatown Ltd.* [2001] 1 AC 518 (scope of exception to principle that a third party can recover damages only for its own loss).

[103] See e.g. *White v Jones* [1995] AC 207, 263.

[104] Goff, *The Search for Principle*, pp. 174–5.

[105] In *MacShannon v Rockware Glass Ltd* [1977] 1 WLR 376 he followed *The Atlantic Star* [1973] QB 364 (which had rejected his submissions as counsel) and in *The Playa Larga* [1978] QB 500 he followed *The Philippine Admiral* [1977] AC 353. In both cases although the House of Lords reversed his decisions it did so by departing from the decisions which had bound him: see [1978] AC 795 and [1983] AC 244.

[106] In *MacShannon v Rockware Glass Ltd* the issue was the rule that proceedings in this country should only be stayed where continuing them would be oppressive, where he considered (as the law now is) that the principle is that a stay should be granted wherever there is another clearly more appropriate forum overseas. In *The Playa Larga* the issue was having a qualified rather than an absolute principle of sovereign immunity only in actions *in rem,* which he described as illogical. See also Goff, *The Search for Principle*, pp. 170, 177–8.

[107] *The Post Chaser* [1982] 1 All ER 19 (while not necessary to show detriment, absence of prejudice to one may mean that it is not inequitable for the other to resile) and *Amalgamated Investments & Property Co Ltd v Texas Commercial International Bank*]1982] QB 84, 105–6, (which first identified the relevance of unconscionability in this context). See Lord Goff's discussion in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 39 and Justice Handley (2007) 7 UQTLJJ 477.

on frustrated contracts,[108] payments made under a mistake,[109] and benefits conferred in anticipation of a contract which does not materialise[110] are important *hors d'oeuvres* to his major contributions to the law of restitution starting with the recognition by the House of Lords in *Lipkin Gorman* in 1991 that it is an independent branch of private law.[111] They are also illustrations of the way he deployed detailed textual analysis of untidy and sometimes illogical bodies of case law to deduce the underlying principles and their limits. In the case of mistaken payments causation replaced 'supposed liability' as the test, but principled limits, including that the payment discharged a debt, and that the payee had changed its position in good faith as a result of it were imposed. This style would also be seen in his appellate judgments.[112]

In 1978 the first case on the *Law Reform (Frustrated Contracts) Act 1943* came before him in the Commercial Court. His judgment contains a sophisticated analysis of the nature of the benefit conferred where services are rendered and seeks to weave what the Act required into the fabric of the common law, for instance as providing statutory recognition of the defence of change of position. His categorical statement that the Act was intended to reverse unjust enrichment and that the determination of the 'just sum' under it had nothing to do with loss apportionment has, however, been criticised as not borne out by the statutory language.[113] It is also possible his analysis of claims for the repayment of money and the fact that the Act did not limit recovery to cases of total failure of consideration may have influenced his later support for allowing recovery at common law for a partial failure of consideration where apportionment can be carried on without difficulty.[114]

These cases are good illustrations of Robert's approach. He considered that, in general, the most potent influence upon a court in formulating a statement of legal

[108] *BP Exploration Co (Libya) v Hunt* (No. 2) [1979] 1 WLR 783, aff'd [1981] 1 WLR 232, [1983] 2 AC 352.

[109] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd.* [1980] 1 QB 677.

[110] *British Steel Corp. v Cleveland Bridge & Engineering Co Ltd.* [1984] 1 All ER 504.

[111] *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548, 578.

[112] For example, in *Attorney-General v Guardian Newspapers (No. 2)* about the publication of extracts from *Spycatcher,* a book by a former spy, a statement of 'the broad general principle' of when a duty of confidence arises (which Lord Goff did 'not in any way intend to be definitive') was followed by three limiting principles: (a) once information enters the public domain it cannot be confidential; (b) the duty does not apply to useless information or trivia; and (c) the public interest that confidences should be preserved may be outweighed by a countervailing public interest which favours disclosure: see [1990] 1 AC 109, 281–3.

[113] The Court of Appeal ([1981] 1 WLR 232, at 243) did not endorse his approach and the critics are Paul Mitchell in Mitchell & Mitchell, *Landmark Cases on the Law of Restitution*, ch. 10 and the editors of Goff and Jones, *The Law of Unjust Enrichment* (8th ed.), (Oxford, 2011), para. 15–41.

[114] *Goss v Chilcott* [1996] AC 788, 798 and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

principle is the desired result or the merits of the particular case.[115] But they also show that he meant 'the perception of the just solution in legal terms, satisfying both the gut and the intellect'. This, he considered, was achieved by combining the impact of the practical experience of practising lawyers and using facts to develop principles in a pragmatic way, achieving principled practical justice but leaving 'wriggle room' to deal with unanticipated consequences. In a lecture in 1984 he summarised his view in vivid language:

> We have to be very careful indeed to avoid too precise a formulation of principles. Legal principles are perhaps best regarded as basking sharks, lying just beneath the surface of the water, perceptible, indeed recognisable, but undefined. Definition may not only lead to error or injustice, as new fact-situations, unperceived by the author, come to light. Definition may also preclude an adjustment, a re-drawing of the boundaries, a shifting of the marking buoys.[116]

It is for this reason that, despite his important role in identifying and developing the principle of 'assumption of responsibility', Robert would surely have agreed with the more recent statements that the principle must be used with care and does not provide a complete answer to all cases of pure economic loss.[117]

Robert's focus in *White v Jones* on 'practical justice' was criticised by Tony Weir as appearing to be ready to create what Lord Mustill in his dissenting speech in that case described as a specialist pocket of tort law in cases of negligently inflicted economic loss in a way which the dissenters (and Weir) considered was not reconcilable with principled law.[118] However, flexibility within a principled framework which did not deprive it of the stability that is needed to enable citizens to obtain advice, regulate their affairs and resolve their disputes was the essence of Robert Goff's view of the law. In 1983 he stated that the law is a kaleidoscopic mosaic 'in the sense that it is in a constant state of change in minute particulars'.[119] In 1986 he stated that 'although the framework within which we work today' was governed by 'fundamental legal principles', 'seen in the perspective of time all statements of the law … are no more than

[115] Goff, *The Search for Principle*, p. 183.
[116] R. Goff, 'An innocent turns to crime' [1984] *Statute Law Review* 5 at 14–15.
[117] *Customs and Excise Commissioners v Barclays* [2007] 1 AC 181 at [4], [35]–[38], [52] and [87] (Lords Bingham, Hoffmann, Rodger and Mance).
[118] T. Weir, 'A damnosa heriditas', (1995) 111 *Law Quarterly Review* 357, 361. See Lord Mustill at [1995] 2 AC 207 at 291. This case and Lord Mustill's criticism of the distinction relied on by Robert in *Bland's* case (see n. 81 above) suggests he had a more rigid view of what principle required and was less attracted to what Robert described as 'practical justice'.
[119] Goff, *The Search for Principle*, p. 186.

working hypotheses'.[120] But Sir Andrew Longmore is surely correct to say that the words 'no more than' rather overstate the case.[121]

For Robert, seeing law in terms of rules rather than principles was 'the dogmatic fallacy'[122] but nor did he favour the development of the law by courts creating wide discretions.[123] He stated that, while hard and fast rules and discretionary powers are necessary in every legal system, 'neither is to be encouraged because the one lacks the flexibility, and the other the consistency, of legal principle'.[124] He would surely have approved of Dr. Johnson's statement that 'the more precedents there are, the less occasion is there for law; that is to say the less occasion is there for investigating principles'.[125] There is also some similarity with the approach of Ronald Dworkin,[126] and it was thus not surprising that, in *Lipkin Gorman v Karpnale Ltd.*, Robert stated:

> The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.[127]

In *Woolwich Equitable BS* he commented on the boundary traditionally understood to lie between legitimate development of the law by judges and legislation. It was that case in which English Law recognised that an *ultra vires* exaction by a public authority was itself a ground for restitution irrespective of whether the payor was mistaken or under duress. Robert stated that, while he was 'well aware' of the boundary, he was 'never quite sure where to find it': 'its position seem[ed] to vary from case to case'.[128] His reasons for concluding that development of the law by the judges in that case would not illegitimately trespass on the province of the legislature included the constitutional principle that taxes cannot be levied without the authority of Parliament, the inequality in the legal and factual positions of the state and the citizen, and the fact that the Law Commission was considering the various statutory regimes governing *ultra vires* payments to public authorities and could assess whether the common law defences to recovery sufficed or additional defences were needed.

[120] R. Goff, 'Judge, jurist and legislature', *The Denning Law Journal*, 2 (1987), 79–95.
[121] A. Longmore, 'Is law no more than a working hypothesis?', Lords Goff and Hobhouse Memorial Lecture, 25 February 2019: https://7kbw.co.uk/the-2019-lords-goff-and-hobhouse-lecture/ (accessed 10 July 2019).
[122] Goff, *The Search for Principle*, p. 183.
[123] See the discussion above of his 1961 *Modern Law Review* article.
[124] Goff, *The Search for Principle*, p. 181.
[125] J. Boswell, *Life of Dr Johnson LLD* (3rd ed.), (Oxford, 1976), p. 468.
[126] R. Dworkin, *Law's Empire* (London, 1986), pp. 226–7 and 400 (law as integrity).
[127] [1991] 2 AC 548, 578.
[128] [1993] AC 70, 173.

In *Kleinwort Benson,* Robert led a unanimous court in holding that there is no rule or principle precluding the recovery of money paid under a mistake of law. However, but for a change of mind by Lord Hoffmann after the hearing, he would have been in the minority as to whether a payment made in accordance with a settled and generally accepted view of the law at the time of payment the payer was to be regarded as mistaken. As it was, he also led the majority in holding that the declaratory theory of judicial decision-making as a matter of principle meant that such a payment was mistaken. He was not deterred by the fact that the Law Commission had reported and recommended denying restitution in such a case on grounds of policy. While such a limit might be justified in respect of overpaid taxes because of the numbers affected and the consequent effect on the public finances, it should be introduced by legislation because these policy factors did not apply to payments under transactions between citizens and standard restitutionary defences sufficed.

Kleinwort Benson was heard six months before Robert retired as Senior Law Lord and a full-time judge and handed down a month after he did so. Lord Hoffmann described Robert's speech in that case as 'one of the most distinguished of his luminous contributions to this branch of the law'.[129]

These are cases in which Robert considered that development of the common law was justified by principle. What of the role of discretion? Robert recognised that it is not always possible to avoid giving a court wide discretion, but he considered that this should not be by judicial development of the law. Despite some reservation about legislation in private law and a hostility to codes (not needed in a jurisdiction with treatises such as Dicey and Morris *on the Conflict of Laws* and *Bowstead on Agency*),[130] he considered that conferring wide discretion on a court was a matter for legislation rather than by developing the common law.

His dissenting judgment in *Tinsley v Milligan*[131] accepted that there were problems with the common law principle precluding a claim or a defence which relied on an illegal transaction but stated that reform by the introduction of a discretion (such as a 'public conscience' test favoured in the Court of Appeal in that case) should occur only after a full inquiry by the Law Commission and by legislation. His judgment suggested such a review and his response to the Law Commission's 1999 consultation paper on the topic reiterated his view that the topic is not suitable for judicial development of the law.[132] Notwithstanding his general view, in the particular context of

[129] [1999] 2 AC 349, 357 and Lord Browne-Wilkinson, who dissented, stated that it contained 'yet another major contribution to the law of restitution'.

[130] Goff, *The Search for Principle*, pp. 173–4 ('the best code is one which is not binding in law').

[131] [1994] 1 AC 340, 363–4.

[132] Response to Law Commission, *Illegal Transactions: the Effect of Illegality on Contracts and Trusts*, Consultation Paper 154 (London, 1999) in a letter dated 6 December 1999 stating that this was because

illegality, had he been sitting when twenty-two years later the matter came before the Supreme Court in *Patel v Mirza*[133] he may possibly have joined the majority, which introduced a structured discretion to deal with the effect of illegality.[134] The Law Commission recommendations to this effect[135] were not going to be implemented and three Supreme Court decisions had left the law on illegality in further disarray.[136]

Public service and engagement

Robert had a profound sense of public duty and engagement throughout his career. He chaired many legal committees and bodies; these included the sub-committee of the House of Lords Select Committee on the European Communities dealing with law and institutions between 1986 and 1988 and the Court of the University of London between 1986 and 1991.[137] Between 1991 and 2001 he served as High Steward of Oxford University. He enjoyed these roles, particularly where they had a strong educational or international or comparative character. They could be time-consuming, involving strategic questions about financial priorities and appeals from disciplinary tribunals, but also relatively minor but sometimes sensitive matters where he had patiently to act as an intermediary between those in dispute.

On appointment to the Lords, he was concerned about the poor library and research facilities available and sought to get them improved. Later, and particularly after becoming Senior Law Lord, he worked hard to improve other administrative arrangements concerning appeals. He was concerned about the handling of petitions for leave to appeal which he considered 'too subjective and too superficial'.[138] As Senior Law Lord he also had to deal with the expectations of those qualified to sit in the House of Lords or the Privy Council by reason of their judicial office or former office who were not a Lord of Appeal in Ordinary and the financial and other barriers to them sitting except when there were insufficient Law Lords available.[139]

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of the wholesale re-examination of contract, trusts and restitution and because long-standing rules of policy would have to be rejected and replaced by different principles, probably of a discretionary nature.

[133] [2016] UKSC 42.

[134] The contributions to S. Green and A. Bogg (eds.), *Illegality after Patel v Mirza* (Oxford, 2018) show that the decision to do this by common law development was controversial.

[135] Law Commission, *The Illegality Defence*, Report 320 (London, 2010).

[136] *Hounga v Allen* [2014] 1 WLR 2889; *Les Laboratoires Servier v Apotex Inc* [2015] AC 430; *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1.

[137] He also chaired the Law Reform Committee of the Bar (1974–6); Council of Legal Education (1976–82); British Institute of International and Comparative Law (Chairman 1986–2000), President (2000–2008); and the Chartered Institute of Arbitrators (President, 1986–91).

[138] Letter to Lord Bingham dated 2 May 2000.

[139] On the position of Lord Cooke of Thorodon who expected to sit regularly during his visits to England, and the effect of an expressed wish from a source in New Zealand that he should not sit on New Zealand

Despite his hostility to codes, suspicion of legislation and preference for incremental development of the common law by judges, Robert was a strong supporter of the work of the Law Commission. He referred to the Commission's work in his judgments and was available to advise the Commissioner responsible for a project.[140] In 1992 he introduced and piloted through the House of Lords Bills implementing Law Commission reports on transfer of title in carriage of goods by sea[141] and filling the lacuna in the offence of obtaining property by deception in the Theft Act 1968[142] which had been identified by him in *Preddy*.[143]

He gave many public lectures to lawyers and students in the United Kingdom and many other parts of the world. These included two three-week tours of India where he gave four lectures and participated in smaller functions.[144] His range extended well beyond topics building on and relating to the theme of development of the common law by judges.[145] His Lionel Cohen Lecture in Jerusalem in 1987 dealt with the mental

Appeals, see P. Spiller, 'Lord Cooke of Thorndon: the New Zealand dimension', (2002) 10 *Waikato Law Review* 55, 63 and 'A Commonwealth judge at work: Lord Cooke in the House of Lords and Privy Council' (2003) *Oxford University Commonwealth Law Journal* 29, 48, 66.

[140] See Lord Mackay of Clashfern's Foreword to Swadling and Jones, *The Search for Principle*, p. vi: The Commissioners he assisted were Brian Davenport QC, Jack Beatson, and Andrew Burrows. In his early days in the Lords, some of his colleagues did not approve of him citing the work of the Commission, an attitude which he helped to dispel, and which, since the UK Supreme Court at present includes three former Chairmen of the Law Commission and two former Commissioners (one a Scottish Commissioner), seems extraordinary.

[141] *Carriage of Goods by Sea Act 1992*, implementing Law Commission, *Rights of Suit: Carriage of Goods by Sea*, Report 196 (London, 1991); Scottish Law Commission, *Rights of Suit: Carriage of Goods by Sea*, Report 130 (Edinburgh, 1991); and see also *Sale of Goods Amendment Act 1994,* implementing Law Commission, *Sale of Goods Forming Part of a Bulk*, Report 215 (London, 1993) and Scottish Law Commission, *Sale of Goods Forming Part of a Bulk*, Report 145 (Edinburgh, 1993).

[142] [1996] AC 815, see note 77 above.

[143] *Theft (Amendment) Act 1996*, implementing Law Commission, *Offences & Dishonesty: Money Transfers*, Report 243 (London, 1996).

[144] The tours to India in 1984 and 1986 were organised by Dr L. M. Singhvi, a jurist and Parliamentarian, and later the Indian High Commissioner to the UK.

[145] The lectures include: 'The Law as Taught and the Law as Practised', 6th Lord Upjohn Lecture, (Kings College London, 1977); 'The Judicial Ethic in the Administration of the Law' (University of Birmingham, 1980 and 1981); 'Force Majeure and Frustration' in La Vendita Internazionale, Milan: Giuffrè (1981) 301–25; 'An Innocent turns to Crime' (Statute Law Society's Conference, Institute of Advanced Legal Studies, 1983); 'The Commercial Court and Commercial Contracts' (Society of Public Teachers of Law, 1983); Presidential Address to the Bentham Club, 'A Visit from Jeremy Bentham' (1986); The Child & Co Oxford Lecture 1986, 'Judge Jurist and Legislature'; Talk at University of Chicago Law School Symposium on 'The Concept of a Constitution' to mark the Bicentennial of the Constitution of the United States (June 1987); the Lionel Cohen lecture, 'The Mental Element in the Crime of Murder' (Hebrew University of Jerusalem, 1987 and (1988) 104 *Law Quarterly Review* 30); Presidential Address to the Holdsworth Club, 'A Voyage Around Holdsworth' (University of Birmingham 1988); 'The Distinctive Features of the Common Law' and Goff Lecture on Arbitration, 'Future Imperfect' (Hong

element in murder and his Cassel lecture in Stockholm in 1993 addressed end of life issues highlighted in the *Bland* case and considered the relevance to those issues of the Hospice movement. His talk on *The Concept of a Constitution* at a Symposium organised by University of Chicago Law School in 1987 to mark the bicentennial of the Constitution of the United States showed the power of his analysis applied to a topic which was not his natural legal home. Robert also led judicial and legal exchanges with a number of civil law countries, in particular Germany, France and Italy.

I have referred to the Oxford DCL recognising his scholarship in *The Law of Restitution.* His distinction was recognised by honorary doctorates awarded by five British universities,[146] his election as a Fellow of the British Academy in 1987, and his honorary Fellowships at New, Lincoln and Wolfson Colleges, Oxford. On Robert's retirement as Senior Law Lord, friends and colleagues presented him with a volume of essays aptly entitled *The Search for Principle*. In the words of the editors, William Swadling and Gareth Jones, this was 'not simply to mark his retirement from high office, but as a tribute to the significant part he has played in the development of English law'.[147]

The later years

As Robert retired three years before the compulsory retirement age he continued to sit until shortly before his 75th birthday in 2001. Of the cases he heard after stepping down as Senior Law Lord and a full-time judge, *Pinochet Nos 2 and 3*[148] and *Dextra Bank & Trust Co v Bank of Jamaica*[149] are noteworthy. By the turn of the century he had started to shed his other responsibilities. In 2000 he stepped down as Chairman of the British Institute of International and Comparative Law and became its President. In 2001 he stepped down as High Steward of Oxford University and Chairman of the Advisory Council of the Oxford Institute of European and Comparative Law.

In *Pinochet (No 1)* a majority of the House of Lords held that a former head of state was not immune from arrest and extradition in the United Kingdom for alleged

Kong, 1990); The Cassel Lecture 'A Matter of Life and Death' (Stockholm University, 1993); The Wilberforce Lecture, 'The Future of the Common Law' (1997) 46 *International and Comparative Law Quarterly* 745 (28 November 1999).

[146] The Universities of London, Bristol, Reading, and Buckingham and City University, London.

[147] Swadling and Jones, *The Search for Principle*, p. vii.

[148] *R v Bow St. Metropolitan Stipendiary Magistrate, ex p. Pinochet (No 2)* [2000] 1 AC 119 and *(No 3)* [2000] 1 AC 147.

[149] [2001] UKPC 50, [2002 1 All ER (Com) 193.

acts in breach of the Torture Convention 1984 committed while he was head of state because the acts could not be regarded as within the official functions of a head of state.[150] Robert was not a member of the court but was in *Pinochet (No 2)*, where the earlier decision was set aside on the ground that Lord Hoffmann's connections with Amnesty International meant he was automatically disqualified for interest,[151] and in *Pinochet (No 3)* which reheard the appeal. Six of the seven judges who heard *Pinochet (No 3)* reached the same conclusion as the differently constituted court had in *Pinochet (No 1),* albeit on very different reasoning.[152] Robert dissented. He rejected the suggestion that the customary rule of immunity of a head of state from the domestic courts of another state had been impliedly overruled by the Torture Convention as contrary not only to principle and authority, but also to common sense.[153] His judgment in what was at the time an area in which there was much confusion, has been described as exhibiting much moral courage and faithfulness to values inherent in the Rule of Law[154] and has the approval of Sir Robert Jennings, a former President of the International Court of Justice.[155]

In *Dextra Bank,* his very last case, Robert gave a joint judgment with Lord Bingham.[156] He had no doubts about the Privy Council's emphatic statement that the defence of change of position applies to changes in anticipation of as well as after the receipt of a benefit[157] or what he described in a letter to Lord Bingham as the rejection of ignorance as a ground for restitution.[158] But he stated that he was rather worried whether, buried in the complicated facts, there was, as commentators have subsequently argued,[159] a relevant mistake of fact as well as the misprediction which did not suffice as the ground for a restitutionary claim.

[150] *R v Bow St. Metropolitan Stipendiary Magistrate, ex p. Pinochet (No 1)* [2000] 1 AC 61.

[151] See above, text to note 80.

[152] See the summary in *R v Loma* [2017] QB 1729 at [25]–[39] of the differences between *Pinochet (No 1)* and *(No 3)* and of the disagreement among the majority in *No. 3* as to the basis of the decision.

[153] [2000] 1 AC 147 at 214, 219 and 223.

[154] G. Zellick, *Private Conscience: Public Duty*, Van der Zyl Lecture, London 8 May 2003, p. 12 (published in *European Judaism: a Journal for the New Europe*, 36 (2003), 118–31).

[155] R. Jennings, 'The Pinochet extradition case in the English Courts', in L. Boisson de Chazournes and V. Gowlland-Debas (eds.), *The International Legal System in Quest of Equity and Universality* (The Hague, 2001), pp. 677–98.

[156] Robert wrote the part of the judgment on restitution and Lord Bingham the part on bills of exchange.

[157] Letter to Peter Birks dated 5 December 2001. The letter also said he was relieved to have delivered his last judgment and that 'I tend to forget the judgments which I now feel were right; whereas the ones which I now think were wrong prey on my mind.'

[158] Letter to Lord Bingham dated 17 September 2001 stating that Peter Birks and Andrew Burrows would not be pleased by this. There is no express reference to 'ignorance' in the judgment but see [31]—[33].

[159] Burrows, *The Law of Restitution* (3rd ed.), p. 203; and J. Edelman and E. Bant, *Unjust Enrichment* (London, 2016), pp. 174–5.

In February 2002, three months after his 75th birthday, Robert's colleagues gave a dinner for him in the Inner Temple marking the end of his judicial sitting. In a letter to Tony Honoré, who could not be there, Robert said 'I have been very fortunate in my career; but am now more conscious of the judgments which I believe I got wrong than I am of the ones which I still think I got right. I expect that is true of many judges, particularly those who (like me) have stuck their necks out.' He also said that he had given up practically everything and looking back had a feeling that he 'took on too many commitments, and that they all suffered in consequence'.[160] That that feeling was clearly wrong is shown by the profound legal knowledge displayed in his judgments and lectures, which, as Lord Rodger stated in the Festschrift presented to him three years earlier, 'enriched us with a store of invaluable opinions'. He was a great judge not only because of the depth of his knowledge and the width of his interests, but because, in Lord Mackay of Clashfern's words, he 'did not come to any case with an entrenched point of view' and 'was willing to consider any reasonable and well-presented argument and to analyse it in a rigorous, very well-informed way'.[161]

By 2004 Robert's health had declined and in 2006 he and Sarah moved from Chieveley to Cambridge to live near their daughter Juliet. He remained in their home in Storeys Way until his death in 2016. In her funeral address, Juliet stated:

> And so we come to the last few years of his life, the last many years in which Dad's intellect faded. His ability to understand and to articulate words diminished. And yet, his essential nature remained: his love of music, the comfort he derived from being at home with Mum and his delight when family and friends came to visit. His kindness, his humour and his affection remained to the very end.

Acknowledgements

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[160] 26 January 2002.
[161] Lord Mackay of Clashfern, 'Foreword', p. v.

Professor Bill Cornish, Sir Julian Flaux, Simon Gardner, Sir Nicholas Green (Chairman of the Law Commission), Professor Tony Honoré, Juliet, Sean and Rupert Jackson, Lord David Lloyd-Jones, Sir Andrew Longmore, Professor Charles Mitchell, Sir Peter North, Celia Pilkington and Professor Francis Reynolds. Some of these will find their words pillaged here, not always with proper acknowledgement.

Note on the author: The Rt Hon. Sir Jack Beatson is Visiting Professor at the University of Oxford, and Professorial Fellow at the University of Melbourne. He was a Lord Justice of Appeal from January 2013 to February 2018. He was elected a Fellow of the British Academy in 2001.

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