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THE NATURE AND DEVELOPMENT OF ENGLISH LAW

Classification of English law

The following are the main classifications of English law with which this book deals. The areas of law mentioned will be considered in more detail as relevant in the chapters which follow. They are given here merely as an overview of what is to come.

Private and public law

Private law is concerned with the legal relationships of ordinary persons in everyday transactions. It is also concerned with the legal position of corporate bodies and associations of persons the first of which are given a special form of legal personality. Private law includes contract and commercial law, the law of tort, family law (e.g. divorce, adoption and guardianship), trusts and the law of property which involves a consideration of the rights which can exist in property and how property can be transferred from one person to another.

Public law is concerned with the constitution and functions of the many different kinds of governmental organisations, including local authorities, such as county councils, and their legal relationship with the citizen and each other. These relationships form the subject matter of constitutional and administrative law. Public law is also concerned with crime which involves the state's relationship with the power of control over the individual.

There is also a division into *criminal and civil law*. Criminal law is concerned with legal rules which provide that certain forms of conduct shall attract punishment by the state, e.g. homicide and theft. Civil law includes the whole of private law and all divisions of public law except criminal law.

In order to understand the various branches of substantive private law which are considered in detail later, it is necessary to be able in particular to distinguish the following:

Contract

A contract is an agreement made between two or more persons which is intended to have legal consequences. Thus, if there is a breach of contract, the parties can go to court and obtain a remedy. We shall see in the chapters on contract which agreements the courts will enforce, under what conditions they are enforceable, and what remedies are available to injured parties. It should be noted that the parties to a contract in general enter voluntarily into their obligations; the function of the law is merely to act in an impartial way in order to settle any disputes which may arise between the parties to the contract.

It is, however, worth noting even at this early stage that not all contractual obligations are undertaken voluntarily. In order to protect the consumer, certain obligations are implied into some contracts by statute and cannot in some cases be removed, e.g. an undertaking that the goods are of satisfactory quality in consumer sales where the Sale of Goods Act 1979 applies.

Tort

A tort, on the other hand, is a civil wrong independent of contract. It arises out of a duty imposed by law, and not by agreement, and a person who commits a tortious act does not voluntarily undertake the liabilities which the law imposes on him. There are many kinds of tort with a common characteristic: injury of some kind inflicted by one person on another. Nuisance, inflicting injury by negligence, trespass, slander and libel are well-known civil wrongs. The typical remedy in this branch of the law is an action for damages by the injured party against the person responsible for the injury. Such damages are designed not to punish the wrongdoer but to compensate the injured party.

Crime

A crime is in a different category. It is difficult to define a crime, but it is basically a public offence against the state, and, while an individual may be injured, the object of a criminal charge is to punish the offender, not to compensate the victim, though under the provisions of the Powers of Criminal Courts (Sentencing) Act 2000 compensation orders can be made. Criminals are prosecuted, usually by a Crown Prosecutor, and if found guilty receive the appropriate punishment.

Crimes and civil wrongs distinguished

The distinction does not lie in the *nature of the act* itself. For example, if a railway porter is offered a reward to carry A's case and runs off with it, then the porter has committed a crime, that of theft, and two civil wrongs, i.e. the tort of conversion and a breach of his contract with A. Again, a railway signalman who carelessly fails to operate the signals so that a fatal accident occurs will have committed one crime, i.e. manslaughter, if persons are killed, and two civil wrongs, the tort of negligence in respect of those who die and those who are merely injured and a breach of his contract of service with the employer in which there is an implied term to take due care. It should also be noted that in this case the right of action in tort and the right of action in contract would be brought by different persons. However, although the example is valid, it should be noted that an employer who has been successfully sued for damages by those injured by the signalman's act is unlikely in modern law to try to recoup them from the employee by an action for breach of contract because this upsets industrial relations and is strongly resisted by trade unions.

The distinction does depend on the *legal consequences* which follow the act. If the wrongful act is capable of being followed by what are called criminal proceedings, that means that it is regarded as a *crime*. If it is capable of being followed by civil proceedings, that means that it is regarded as a *civil wrong*. If it is capable of being followed by both, it is both a crime and a civil wrong. Criminal and civil proceedings are usually easily distinguishable; they are generally brought in different courts, the procedure is different, the outcome is different and the terminology is different.

Terminology and outcome of criminal and civil proceedings

In *criminal proceedings* a prosecutor *prosecutes* a defendant. If the prosecution is successful, it results in the *conviction* of what is now the offender. After the conviction the court may deal

with the offender by giving him a custodial sentence, e.g. prison; or a non-custodial sentence, e.g. a community sentence. In rare cases the court may discharge the defendant without sentence.

As regards *civil proceedings*, a claimant *sues* (brings a claim against) a defendant. If the claimant is successful, this leads to the court entering judgment ordering the defendant to pay a debt owed to the claimant or money damages. Alternatively, it may require the defendant to transfer property to the claimant or to do or not to do something (injunction) or to perform a contract (specific performance). Some of these remedies are legal and others equitable. The matter of remedies for breach of contract and for torts will be dealt with in more detail in the chapters on those topics.

Trusts

A trust arises where one or more persons holds property, e.g. shares, for the benefit of other persons. People often wish to provide for their children or grandchildren when they die. They may leave some of their property on trust, particularly where, as in the case of grandchildren, they are minors, i.e. under the age of 18 years. They can appoint trustees who will take over the ownership of the property but they will not themselves benefit from that ownership since the capital and/or income of the trust will be used for the benefit of the children or grandchildren who are called the beneficiaries. It is, however, necessary to include a charging clause in the trust instrument or will to allow payment of fees where the trustees are professional persons or a trust corporation. Trusts may also be set up by living persons. The characteristics of a trust are that the trustees own the trust property but the beneficiaries get the benefits.

The development and sources of English law – generally

Our present legal system began, for all practical purposes, in the reign of Henry II (1154–89). When he came to the throne justice was for the most part administered in local courts, i.e. by local lords to their tenants in the feudal courts, and by the County Sheriffs, often sitting with the Earl and the Bishop, in the courts of the Shires and Hundreds. A Shire was a territorial division of England equivalent in many ways to what we would call a county. A Hundred was an administrative division of a Shire supposed originally to have contained 100 families. They administered the law in their respective areas and decided the cases which came before them on the basis of local custom. Many of these customary rules of law were the same or similar in all parts of the country, but there were some differences. For instance, primogeniture, the right of the eldest son to inherit the whole of his father's land where there was no will, i.e. on intestacy, applied almost universally throughout England; but in Kent there existed a system of landholding called gavelkind tenure whereby on intestacy all the sons inherited equally; while in Nottingham and Bristol, under the custom of Borough-English, the property passed to the youngest son. These customs were finally abolished by s 1 and Part IV of the Administration of Estates Act 1925, and replaced by the rule that land goes to those administering the deceased's estate for distribution to near relatives – in most cases spouse and children.

A Royal Court existed called the Curia Regis (King's Council) but this was in general available only to high-ranking persons to whom the King had granted interests in large estates.

In addition, the Curia Regis followed the person of the King and those wishing to complain to the court had to incur the expense, delay and frustration of pursuing the King in his constant movements about the country and abroad. It seems that one claimant followed the King through England and France for five years before his case was heard.

However, s 17 of the Statute of 1215, Magna Carta, provided that what is now the High Court should not follow the King but should be held 'in some certain place'. This turned out to be Westminster and so what is now the High Court became centred in London. It is now in the Strand.

Steps were also taken to ensure that royal justice would go out to the shires and be open to all. This began with the General Eyre which also was instrumental in unifying the law. This is considered below.

The common law

The administrative ability of the Normans began the process destined to lead to a unified system of law which was nevertheless evolutionary in its development. The Normans were not concerned to change English customary law entirely by imposing Norman law on England. Indeed, many charters of William I giving English boroughs the right to hold courts stated that the laws dispensed in those courts should be laws of Edward the Confessor, which meant that English customary law was to be applied.

Attempts were made to ensure a greater uniformity in English law and the chief means by which this was achieved was the introduction of the General Eyre (which simply means 'a journey') whereby representatives of the King were sent from Westminster on a tour of the Shires for the purpose of checking on the local administration. During the period of their visit they would sit in the local court and hear cases, and gradually they came to have a judicial rather than an administrative function and were then called the Justices in Eyre.

Henry II took steps to formalise the jurisdiction of the General Eyre by the Assize of Clarendon (1166) and the Assize of Northampton (1176). These provided that in relation to the criminal law there should be 12 men in every county to be responsible for presenting to the sheriff those suspected of serious crimes. The accused were then brought before the General Eyre when it arrived in the area. As regards the civil law, a new civil remedy called the Assize of Novel Disseisin (lately dispossessed) was offered to persons who complained that their land had been wrongly seized. From this remedy grew a range of civil actions which were brought before the General Eyre. Thus, royal and more uniform justice began to come to the country as a whole.

The General Eyre disappeared in the reign of Richard II (1377–99), but a system of circuit judges from what is now the High Court took its place, the first circuit commission being granted in the reign of Edward III (1327–77). The Justices in Eyre were replaced by more formally trained lawyers over the period 1327–77. By selecting the best customary rulings and applying these outside their county of origin, the circuit judges gradually moulded existing local customary laws into one uniform law 'common' to the whole kingdom. Thus, customs originally local ultimately applied throughout the whole of the realm. Even so, there was no absolute unification even as late as 1389, and in a case in what is now the High Court in that year, a custom of Selby in Yorkshire was admitted to show that a husband was not in that area liable for his wife's trading debts, though the common law elsewhere regarded him as liable.

Furthermore, the right to make a will of personal property, e.g. jewellery, was not universal in England until 1724 when it finally extended to the City of London. Before that time half of the personalty (i.e. property unconnected with land), 'the dead man's part', went to the church and the other half to the wife and children. Land could still not be left by will but descended to the heir at law, though it later became possible, as it is today, to leave land by will.

However, many new rules were created and applied by the royal judges as they went on circuit and these were added to local customary law to make one uniform body of law called

'common law'. Thus, the identity between custom and the common law is not historically true, since much of the common law in early times was created by the judges, who justified their rulings by asserting they were derived from the 'general custom of the Realm'. Thus, in *Beaulieu* v *Finglam* (1401) YB 2 Hen 4, f 18, pl 6, it was said that a man who by his negligence failed to control a fire so that it spread to his neighbour's house was liable in damages according to 'the law and custom of the realm', though it is not easy to see which customary rule the court based its decision on.

The Royal Commissions

The circuit judges from what is now the Queen's Bench Division came eventually to derive their authority from Royal Commissions, the granting of which marked the real beginning of the assize system. The Commissions were:

Commission of oyer and terminer

This commission, which dates from 1329, directed the judges to 'hear and determine' all complaints of grave crime within the jurisdiction of the circuit. It was given to persons by now referred to as circuit judges.

General gaol delivery

This commission, which dates from 1299, gave the judges power to clear the local gaols and try all prisoners within the jurisdiction of the circuit. It was originally given to the Justices in Eyre to formalise the purpose of their visits to the Shires.

Other criminal cases were heard by Justices of the Peace either summarily or sitting in quarter sessions (now abolished) and the circuit judges were also made Justices of the Peace so as to increase their jurisdiction.

Commission of Assize for Civil Actions

Civil actions were usually heard at Westminster but under the Statute of Westminster II, 1285, the Justices in Eyre and later the circuit judges heard *civil cases* under provisions known as *nisi prius* which required the local sheriff to send a jury to London *unless before* the appointed time the royal justices came to hear the case locally, which in practice they always did. Thus, civil cases were opened in London, tried by a circuit judge and jury in the locality and the verdict recorded in London. This lasted until the nineteenth century when a Commission of Assize for Civil Actions was granted to assize judges on circuit.

The Courts Act 1971

The system, which lasted for many years, was brought to an end by the Courts Act 1971, s 1(2) which provided that all courts of assize were abolished and commissions to hold any court of assize would not be issued. This section, having achieved its purpose, was repealed by Sch 7 to the Supreme Court Act 1981.

Stare decisis

Initially the system was held together by the doctrine of *stare decisis*, or standing by previous decisions. Thus, when a judge decided a new problem in a case brought before him, this became a new rule of law and was followed by subsequent judges. In later times this practice crystallised into the form which is known as the binding force of judicial precedent, and the

judges felt bound to follow previous decisions instead of merely looking to them for guidance. By these means the common law earned the status of a system. Indeed it was possible for Bracton, Dean of Exeter and a Justice Itinerant of Henry III, to write the first exposition of the common law before the end of the thirteenth century – *A Treatise on the Laws and Customs of England*. There was also an earlier treatise ascribed to Ranulph de Glanvill in 1187, but this was not so comprehensive as the work of Bracton. Nevertheless, the number of writs which Bracton describes as being available in the Royal Courts is much in excess of those described by Glanvill and shows the rapid growth of the system in its first 100 years.

To sum up, the common law is a judge-made system of law, originating in ancient customs, which were clarified, *much* extended and universalised by the judges, although that part of the common law which concerned the ownership of land was derived mainly from the system of feudal tenures introduced from Europe after the Norman Conquest. It is perhaps also worth noting that the term 'common law' is used in four distinct senses, i.e. as opposed to (*a*) local law; (*b*) equity; (*c*) statute law; and (*d*) any foreign system of law.

Equity

The growth of the common law was rapid in the thirteenth century but in the fourteenth century it ceased to have the momentum of earlier years. As a legal profession came into existence the judges came to be chosen exclusively from that profession instead of from a wider variety of royal officials as had been the case in the thirteenth century. The common law courts became more self-conscious about what they were doing and attempted to become more systematic. There was much talk about the proper way of doing things, of not being able to do this or that and much clever reasoning. Reports of cases in the Year Books, the nearest we have to law reports at this time, show a considerable concern with procedural points and niceties, a reluctance to depart from what had become established, a close attention to the observance of proper forms and much less concern with what the circumstances of a particular case demanded if it was to be settled in an appropriate way.

Defects of the common law

As a result of this hardening up of the system, complaints were made by large numbers of people about the inadequacy of the service provided by the courts and the defects of the common law. The main defects were as follows:

The writ system

Writs (now claim forms) were issued by the clerks in the Chancellor's office, the Chancellor being in those days a clergyman of high rank who was also the King's Chaplain and Head of Parliament. In order to bring an action in one of the King's courts, the party wishing to do so had to obtain from the Chancery a writ for which he had to pay. A writ was a sealed letter issued in the name of the King, and it ordered some person, Lord of the Manor, Sheriff of the County or the defendant, to do whatever the writ specified.

The old common law writs began with a statement of the plaintiff's (now claimant's) claim, which was prepared in the Royal Chancery (or office) and not by the claimant's advisers as is the statement of case today. Any writ which was new, because the claimant or his advisers

had tried to draft it to suit the claimant's case, might be abated, i.e. thrown out by the court. Thus, writs could only be issued in a limited number of cases, and if the complaint could not be fitted within one of the existing standard writs, no action could be brought.

For example, the writ of trespass to land was available. However, trespass is a *direct* wrong, e.g. actually being on the land. *Indirect* activity affecting enjoyment of land was not covered, e.g. nuisance from smelly pigs or smoky bonfires. There was *at that time* no writ to deal with this type of indirect harm. The common law came to expand its writs to cover an action for damages in this situation, but in the meantime equity had carved out a jurisdiction and had an ideal remedy to deal with nuisance, i.e. the issue of an injunction requiring the defendant to cease the activity or pay a fine or be imprisoned for contempt of court. Moreover, writs were expensive, and their cost could deprive a party of justice. In some cases the cost of the writ was more than the amount of the claimant's claim so he did not bother to sue.

However, a practice grew up under which the clerks in Chancery provided new writs even though the complaint was not quite covered by an existing writ, thus extending the law by extending the scope of the writ system. This appeared to Parliament to be a taking away of its powers as the supreme lawgiver. Further, it took much work away from the local courts into the Royal Courts, thus diminishing the income of the local barons who persuaded Parliament to pass a statute called the Provisions of Oxford in 1258, forbidding in effect the practice of creating new writs to fit new cases. This proved so inconvenient that an attempt to remedy the situation was made by the Statute of Westminster II in 1285 which empowered the clerks in Chancery to issue new writs *in consimili casu* (in similar cases), thus adapting existing writs to fit new circumstances. The common law began to expand again, but it was still by no means certain that a writ would be forthcoming to fit a particular case, because the clerks in Chancery used the statute with caution at first.

Procedure

Other difficulties arose over the procedure in the common law courts, because even the smallest error in a writ would avoid the action. If X complained of the trespass of Y's mare, and in his writ by error described the mare as a stallion, his action could not proceed and he would have to start again. Furthermore, some common law actions were tried by a system called 'wager of law', and the claimant might fail on what was really a good claim if a defendant could bring more people to say that the claim was false than the claimant could get to support it.

The system worked well in local courts where the witnesses (called 'oath helpers') knew the parties and circumstances of the case. However, in cases brought at Westminster it fell into disrepute because 'oath helpers' who would support any case could be hired outside court for a few pence a head.

Defences and corruption

In common law actions the defendant could plead certain standard defences known as *essoins* which would greatly delay the claimant's claim. For example, the defendant might say that he was cut off by floods or a broken bridge. He might also plead the defence of sickness which could delay the action for a year and a day. In early times these defences were checked by sending four knights to see the defendant, but at a later stage there was no checking and the defences were used merely to delay what were often good claims. There were also complaints about the bribery, corruption or oppression of juries, the bias of sheriffs in favour of the powerful and the inability of a successful claimant to enforce a judgment or recover property from his more powerful neighbour.

Remedies

The common law was also defective in the matter of remedies. The only remedy the common law had to offer for a civil wrong inflicted on a claimant was damages, i.e. a payment of money, which is not in all cases an adequate compensation.

For example, if A trespasses each day on B's land, B is unlikely to be satisfied with damages. He would rather stop A from trespassing which equity could do by its remedy of injunction. The common law could not compel a person to perform his obligations or cease to carry on a wrong, though it is not true to say that the common law was entirely lacking in equitable principles, and even in early times there were signs of some equitable development; but generally the rigidity of the writ system tended to stifle justice.

Trusts and mortgages

Furthermore, the common law did not recognise the 'concept of the trust or use' and there was no way of compelling the trustee to carry out his obligations under the trust. Thus, if S conveyed property to T on trust for B, T could treat the property as his own and the common law would ignore the claims of B. In addition, the main right of a borrower (or mortgagor) is the right to redeem (or recover) the land he has used as a security for the loan. Originally at common law the land became the property of the lender (or mortgagee) as soon as the date decided upon for repayment had passed, unless during that time the loan had been repaid. However, equity regarded a mortgage as essentially a security, and gave the mortgagor the right to redeem the land at any time on payment of the principal sum, plus interest due to the date of payment. What is more important, this rule applied even though the common law date for repayment had passed. This rule, which still exists, is called the equity of redemption.

Many people, therefore, unable to gain access to the King's courts, either because they could not obtain a writ, or because the writ was defective when they got it, or because they were caught in some procedural difficulty, or could not obtain an appropriate remedy, began to address their complaints to the King in Council. For a time the Council itself considered such petitions, and where a petition was addressed to the King in person, he referred it to the Council for trial. Later the Council delegated this function to the Chancellor, and eventually petitions were addressed to the Chancellor alone.

The Chancellor began to judge such cases in the light of conscience and fair dealing. He was not bound by the remedies of the common law and began to devise remedies of his own. For example, the Chancellor could compel a person to perform his obligations by issuing a decree of *specific performance* or could stop him from carrying on a wrong by the issue of an *injunction*. The Chancellor also recognised interests in property which were unknown to the common law, in particular the concept of the trust (as it became known) under which persons might be made the legal owners of property for the use or benefit of another or others. As we have seen, the common law did not recognise the interests of the beneficiaries under a trust, but allowed the legal owner to deal with the property as if no other interests existed. Equity, however, enforced the beneficial interests.

In order to bring persons before him, the Chancellor issued a form of summons, called a *subpoena*, which did not state a cause of action but merely told the recipient to appear in Chancery. There were no rules of evidence and the Chancellor's Court did not sit in a fixed place; some hearings were even held in the Chancellor's private house. Equity was thus not cramped by anything like the writ system or the excessive formality of the common law. Eventually, as new Chancellors took over, and Vice-Chancellors were appointed to cope with the increasing volume of work, uncertainty crept into the system, and conflicting decisions were common.

At this stage in its development equity adopted the practice of following previous decisions (or *stare decisis*) which had proved so powerful a force in unifying the diverse systems of local custom under the common law. This was precipitated by the Reformation and by the appointment in 1530 of Sir Thomas More as Chancellor. More was a common lawyer and not a cleric. From then on non-clerical Chancellors were drawn from the ranks of the common lawyers and naturally followed the system of precedent which they had seen used in the common law courts. Lord Ellesmere (1596–1617) began to apply the same principles in all cases of the same type, and later, under Lord Nottingham (1673–82), Lord Hardwicke (1736–56) and Lord Eldon (1807–27), equity developed in scope and certainty.

Relationship of law and equity

Although law and equity eventually operated alongside each other with mutual tolerance, there was a period of conflict between them. This arose out of the practice of the Court of Chancery which issued 'common injunctions' forbidding a person on threat of imprisonment from bringing an action in the common law courts, or forbidding the enforcement of a common law judgment if such a judgment had been obtained.

Thus, if X by some unfair conduct, such as undue influence (see further Chapter 13), had obtained an agreement with Y, whereby Y was to sell X certain land at much below its real value, then, if Y refused to convey the land, X would have his remedy in damages at common law despite his unfair conduct. However, if Y appealed to the Chancellor, the latter might issue a common injunction which would prevent X from bringing his action at common law unless he wished to suffer punishment for defiance of the Chancellor's injunction. Similarly, if X had already obtained a judgment at common law, the Chancellor would prevent its enforcement by ordering X, on threat of imprisonment, not to execute judgment on Y's property.

However, the common law courts retaliated by waiting for the Chancellor to imprison the common law litigant for defiance of the injunction, and then the common law would release him by the process of *habeas corpus*, which was and still is a type of writ used to obtain the release of a person who has been unlawfully detained in prison or elsewhere (see further Chapter 21).

This period of rivalry culminated in the *Earl of Oxford*'s Case in 1615 when Lord Coke, representing the common law courts, offered a direct challenge to the Court of Chancery's jurisdiction. The challenge was taken up and James I, on the advice of Lord Bacon, then his Attorney-General and later Lord Chancellor, gave a firm decision that, where common law and equity were in conflict, equity should prevail. This principle now appears in s 49 of the Supreme Court Act 1981, having appeared in a number of earlier Judicature Acts.

After that the two systems settled down and carved out separate and complementary jurisdictions. Equity filled in the gaps left by the common law, and became a system of case law governed by the binding force of precedent. However, it also lost much of its earlier freedom and elasticity. It is certainly no longer a court of conscience.

Many reforms were still to come. Equitable and legal remedies had to be sought in different courts, but this in due course was rectified by the Judicature Acts, 1873–75, which brought about an amalgamation of the English courts. Since then both common law and equitable remedies have been available to a litigant in the same action and in the same court.

Before leaving the topic, a final characteristic of equity should be noted which is that equity never says the common law is wrong but merely provides alternative solutions to legal problems. This is illustrated by certain cases in the Law of Contract. For example, the decision

in *Central London Property Trust Ltd* v *High Trees House Ltd* (1947) (see Chapter 10) shows how modern equity sometimes adopts a different solution from that provided by the common law. Equity is not, therefore, a complete system of law. It complements the rules of the common law but does not replace them.

The *Earl of Oxford*'s Case, 1615 – Relationship of law and equity (1)

Legislation

In early times there were few statutes and the bulk of law was case law, though legislation in one form or another dates from AD 600. The earliest Norman legislation was by means of Royal Charter, but the first great outburst of legislation came in the reign of Henry II (1154–89). This legislation was called by various names: there were Assizes, Constitutions, and Provisions, as well as Charters. Legislation at this time was generally made by the King in Council, but sometimes by a kind of Parliament which consisted in the main of a meeting of nobles and clergy summoned from the shires.

In the fourteenth century parliamentary legislation became more general. Parliament at first asked the King to legislate, but later it presented a bill in its own wording. The Tudor period saw the development of modern procedure, in particular the practice of giving three readings to a Bill.

From the Tudor period onwards Parliament became more and more independent and the practice of law making by statute increased. Nevertheless, statutes did not become an important source of law until the last two centuries, and even now, although the bulk of legislation is large, statutes form a comparatively small part of the law as a whole. The basis of our law remains the common law, and if all the statutes were repealed we should still have a legal system of sorts, whereas our statutes alone would not provide a system of law but merely a set of disjointed rules.

Parliament's increasing involvement with economic and social affairs increased the need for statutes. Some aspects of law are so complicated or so novel that they can only be laid down in this form; they would not be likely to come into existence through the submission of cases in court. A statute is the ultimate source of law, and, even if a statute is in conflict with the common law or equity, the statute must prevail. It is such an important source that it has been said – 'A statute can do anything except change man to woman', although in a purely legal sense even this could be achieved. No court or other body in the UK can question the validity of an Act of Parliament.

However, the validity of an Act of Parliament can be challenged before the European Court of Justice (ECJ) on the ground that it is in conflict with the Treaty of Rome. Reference should be made to *Factortame Ltd* v *Secretary of State for Transport (No 2)* (1991) (Case **34**, below) where a successful challenge to the validity of the Merchant Shipping Act 1988 in the ECJ was successful and resulted in the repeal by the UK government of certain sections of that Act.

It should also be noted that the Human Rights Act 1998 permits UK courts to make declarations of incompatibility where a UK Act of Parliament is found to violate the European Convention on Human Rights. However, UK courts cannot disapply Acts of Parliament on this ground in contrast to the situation where a challenge is made on the ground of violation of Community law.

Statute law can be used to abolish common law rules which have outlived their usefulness, or to amend the common law to cope with the changing circumstances and values of society.

Once enacted, statutes, even if obsolete, do not cease to have the force of law, but common sense usually prevents most obsolete laws from being invoked. In addition, statutes which are no longer of practical utility are repealed from time to time by Statute Law Repeal Acts. Nevertheless, a statute stands as law until it is specifically repealed by Parliament. This may take place by implication as where an earlier Act is repealed by a later one which is inconsistent with it.

An Act of Parliament is, in general, binding on everyone within the sphere of its jurisdiction, though it may not be binding if it infringes the Treaty of Rome, as the *Factortame* case shows, but all Acts of Parliament can be repealed by the same or subsequent parliaments; and this is a further exception to the rule of the absolute sovereignty of Parliament – it cannot bind itself or its successors.

Cheney v *Conn*, 1968 – The court cannot in general declare a statute to be invalid (2)

Prince of Hanover v *Attorney-General*, 1957 – A statute remains law until repealed (3)

Vauxhall Estates Ltd v *Liverpool Corporation*, 1932 – Repeal by implication (4)

Repeal of statutes and the European Communities Act 1972

As regards the power of Parliament to abolish or alter statute law by a later Act, an interesting situation arises in connection with our membership of the European Community.

Since this is the first time we have met the expression 'European Community' it would perhaps be desirable to consider whether the expression 'Community' or 'Union' should be used. The parts of the European co-operation arrangements include: the European Community (economic co-operation – the old EEC); the European Atomic Energy Community (EURATOM); the European Coal and Steel Community (ECSC); and the Maastricht areas (new areas of co-operation such as political, foreign affairs, defence and conventions (for instance, on drugs)).

When referring to all of them, the correct legal reference is to the European Union, and the same is true when referring only to the Maastricht area of co-operation. Otherwise, the correct references are to the European Community or EURATOM or ECSC as the context requires.

The European Court of Justice has no automatic jurisdiction in the Maastricht areas and so rightly continues to call itself the Court of Justice of the European Communities, though confusingly the Council calls itself the Council of the European Union even when passing EC legislation! The Treaty of Amsterdam, which was agreed at the European Council in Amsterdam in June 1997 and which was incorporated into UK law by the European Communities (Amendment) Act 1998, has relevance to the legal system in that it extends the powers of the ECJ in regard to action by the Union on asylum and immigration and co-operation on police and judicial matters.

Those in business tend to use the term 'Union' at all times and there is no harm in this. Practising lawyers would no doubt feel that they had to be precise.

The obligation of the British Parliament on entry to the European Community was to ensure that Community law was paramount. The view of the European Court is that Community law overrides English law where the latter is inconsistent with it. Section 3 of the European Communities Act 1972 binds our courts to accept this principle and talks of applying the principles of Community law with the idea that it prevails. Section 2(4) of the 1972 Act states that a UK statute should be construed so as to be consistent with Community law. However, many authorities on constitutional law see this obligation as a dilemma in the