Chapter 1

Introduction: the Mapping of Legal Concepts

> The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited.[1]

With these words William Blackstone introduced readers of the *Commentaries on the Laws of England* to the topic of private wrongs. Blackstone did not offer a definition of private law, nor is such a definition to be found in any authoritative source. Anglo-American law has claimed many merits, but linguistic and conceptual precision are not among them.[2] Private law, as the term is used in this study, is concerned principally with the mutual rights and obligations of individuals.[3] Like other legal concepts, the term takes its meaning partly from what it excludes, notably public international law, constitutional law, local government law, administrative law, criminal law, military law, and taxation.

Many attempts have been made to explain the relation to each other of

categories (organizing divisions) and concepts (recurring ideas) in private law, leading, since Blackstone's time, to a great variety of suggested maps, schemes, and diagrams; none of these has commanded general assent, or has fully explained the actual decisions of the courts. In this study a number of legal issues will be examined in which the inter-relation of fundamental concepts has been crucial. It will appear that the concepts have, when looked at from the standpoint of these legal issues,[4] operated not in isolation from each other, but cumulatively and in combination, and that their relation to each other is fully captured neither by the image of a map nor by that of a diagram. Often a legal obligation has been derived not from a single concept, but from the interaction of two or more concepts in such a way as to preclude the allocation of the legal issue to a single category.

A desire for precision and order naturally leads to a search for clear categories and good maps, but such a search, if pressed too far, may be self-defeating, for material that is inherently complex is not better understood by concealing its complexity. Schemes that have failed to account for the inherent complexity of the law have not been conducive to good intellectual order, and have engendered both academic scepticism and judicial resistance. The latter has an immediate complicating effect since judicial opinions are part of the data, as well as sometimes the effect, of

organizational schemes. Oliver Wendell Holmes, abandoning earlier attempts to reduce the law to tabular form,[5] said in 1881 that "the life of the law has not been logic: it has been experience",[6] and this was echoed in England by Lord Halsbury's statement that "every lawyer must acknowledge that the law is not always logical at all".[7] Very similar views were current a century later. "There are many situations of daily life", Lord Wilberforce observed, "which do not fit neatly into conceptual analysis".[8] Other twentieth-century judges have similarly warned against "the temptation of elegance",[9] against "that well known ailment of lawyers, a hardening of the categories",[10] against "a preoccupation with conceptualistic reasoning",[11] and against reasoning that is "legalistic", "formalistic", or "mechanical".[12] Where judges have used the phrase "strict logic" it has usually been for the express purpose of rejecting it.[13]

bib069

Such sentiments do not establish that legal categories and concepts are non-existent, or that reason is unimportant, but they do show that the courts in attempting to accommodate "life in all its untidy complexity",[14] have in many cases not derived their conclusions from pre-existing conceptual schemes or maps. The future might, no doubt, be different: historical evidence cannot exclude the possibility of future attainment of greater order and precision (though it might be relevant to an assessment of its

probability). Neither can evidence drawn from one legal system exclude the possibility of greater order and precision in others.[15] This study is restricted to Anglo-American law and to its fairly recent past. It does not and cannot establish that in the future, or in other systems, or in an ideal system, things might not be ordered differently

The idea of mapping, in relation to law, like many metaphors, owes its attraction partly to its indeterminacy: there is no consensus on what is to be mapped (facts, cases, issues, rules, reasons, categories, or concepts), on what is to be located on the map when drawn, or on whether the map is governed by the shape of the terrain, or vice versa. Use of the metaphor is so ingrained as to be to some degree inevitable, for any set of ideas may be said, in a sense, to have its map. Blackstone himself employed a mapping metaphor, writing that "an academical expounder of the laws . . . should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, and to fix the longitude and latitude of every inconsiderable hamlet".[16] The map that Blackstone offered to his readers, however, was very different from maps proposed in the nineteenth and twentieth centuries:

> Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero, and after him our Bracton, has expressed it, *sanctio justa, jubens honesta et prohibens contraria* [a just ordinance, commanding what is right and prohibiting the contrary]; it follows, that the primary and principal objects of the law are RIGHTS, and WRONGS. In the prosecution therefore of these commentaries, I shall follow this very simple and obvious division: and shall in the first place consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden by the laws of England.[17]

Blackstone then went on to divide rights into "rights of persons" and "rights of things", and wrongs into "private wrongs" and "public wrongs", supplying titles for each of his four volumes.[18] Despite the enormous success of the *Commentaries*,[19] this scheme gained little following. It depended too much on doubtful verbal parallels and antitheses,[20] and it omitted divisions that later came to be thought to be of fundamental importance, notably, the distinctions between public and private law,[21] and within private law between property and obligations, and within obligations between contractual and other kinds of obligation.[22] Peter Birks, the editor of *English Private Law* (2000) planned originally to base the work on Blackstone's scheme, but "[t]hat hope rather quickly faded. It became evident that it was impossible to base an enlightening account of

bib024

modern English law on Blackstone's scheme."[23]

Blackstone's purpose was not to set out an ideal or a universal legal system with which to contrast English law,[24] but to describe an existing institution. The matter to be mapped was English law as it was and as it had been, and so his "general map of the law" was more akin to the plan of an existing building than to a map of geographical territory. Blackstone himself made striking use of architectural metaphor. In a private letter of 1745 he described fifteenth-century English law as resembling "a regular Edifice: where the Apartments were properly disposed, leading one into another without Confusion; where every part was subservient to the whole, all uniting in one beautiful Symmetry: and every Room had its distinct Office allotted to it".[25] In the *Commentaries*, Blackstone likened remedial law to a gothic castle,[26] and he reverted to the architectural metaphor in the concluding words of the *Commentaries*, calling on legislators "to sustain, to repair, to beautify this noble pile".[27]

Though Blackstone's primary purpose was not to subject English law to critical analysis,[28] his work paved the way for others to do so.[29] Blackstone's scheme had found no explicit place for contract law. In the *Commentaries*, aspects of contracts formed part of rights of persons (employment) and of rights of things (transfers of property), general

contract law being assigned to a chapter of the book on private wrongs entitled "Of injuries to Personal Property", and very briefly treated.[30] In 1790 the first English treatise on contract law[31] gave conceptual unity to the topic, and in 1806 a treatise on *Obligations* by Blackstone's French contemporary Robert Joseph Pothier was published in English translation. So unfamiliar to English readers was the idea of a law of obligations that the translator found it necessary to add to the title, calling it *A Treatise on the Law of Obligations or Contracts*.[32] The modern reader might naturally suppose that the purpose must have been to enlarge the meaning of "contracts", but the translator explained that his purpose was in fact to enlarge the meaning of "obligations" beyond the restricted meaning (i.e., penal bond) that it had in contemporary English legal usage:

bib105

> To an English reader the name of the principal treatise would have conveyed a more extensive idea, if the term *Contracts* had been substituted for that of *Obligations*, as we are familiar with the latter term, in a more confined application of it; but the object of the treatise is, to comprize the general doctrines which relate to the obligations between one individual and another, as well for the reparation of injuries, as for the performance of engagements. The principles applicable to obligations resulting from contracts, however, constitute the leading subject of the author's attention, and the reference to other topics may be considered as subordinate and incidental.[33]

Pothier did indeed devote the vast bulk of the treatise (573 pages of 578 in Evans' translation) to contractual obligation, but he was notably concerned that his account should be conceptually complete. He divided obligations into "contracts" and "other causes of obligations", and though he devoted only five pages to these "other causes", he took care to divide them in their turn into "quasi contracts" (one page and a half), "injuries and neglects" (two pages and a half) and a residual class called "of the law" (one page), consisting of obligations derived directly from natural or positive law. Pothier's works were highly influential in England.[34] In 1822 it was said by Best J. (later Chief Justice of the Common Pleas) that

> [t]he authority of Pothier is . . . as high as can be had, next to the decision of a Court of Justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the Courts, and he is spoken of with great praise by Sir William Jones in his Law of Bailments and his writings are considered by that author equal, in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country.[35]

The demarcation of contract law from other bases of obligation had far-reaching implications, including a division between property and obligation, and divisions among different classes of obligation. It also implied that the contract law of a particular legal system was a

manifestation of a universal order, with which, therefore, it might be critically contrasted and compared. This attitude is well illustrated by Charles Addison's preface to his *Treatise on Contracts* (1847), where he said that English contract law was not "a mere collection of positive rules" or "founded upon any positive or arbitrary regulations, but upon the broad and general principles of universal law". He added that "the law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal", and went on to compare English writings, to their disadvantage, with "the elaborate and elegant works of Pothier".[36]

bib001

This approach gave to contract law a high conceptual significance that had been absent from Blackstone. But attempts to subordinate English contract law to a single classifying concept, such as consent, have not succeeded. Actual consent to be bound has been neither sufficient nor necessary in Anglo-American contract law: not sufficient, because it is ineffective in the absence of a bargain or a formality; not necessary, because contractual words and conduct are given effect according to the meaning reasonably ascribed to them by the promisee, not that actually

intended by the promisor.[37] Thus, an offer may be effectively accepted even though the offeror has intended to withdraw it. On this last question the authority of Pothier was expressly rejected by an English court in 1880, relying on American law:

> I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see *Tayloe* v. *Merchants' Fire Insurance Co.*[38]. . . . This view . . . appears to me much more in accordance with the general principles of English law than the view maintained by Pothier.[39]

English contract law, as Blackstone's scheme reminds us, had developed by treating breach of contract as a species of wrong, associated with injury to property. The nineteenth century produced a large number of treatises on English contract law,[40] and though the delictual and proprietary associations of the subject were neglected they were not altogether buried: the primary right of the promisee remained a right to compensation for loss