CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

LEGAL ESSAYS AND ADDRESSES

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

LEGAL ESSAYS AND ADDRESSES

by

THE RIGHT HON.
LORD WRIGHT OF DURLEY

CAMBRIDGE
AT THE UNIVERSITY PRESS
1939

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107452701

© Cambridge University Press 1939

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 1939
First paperback edition 2014

A catalogue record for this publication is available from the British Library

ISBN 978-1-107-45270-1 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

To
MY WIFE

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

CONTENTS

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

PREFACE

THE function of this Preface is to explain and if possible to justify the issue of this book. It is obvious that I am breaking the old rule that the shoemaker must not go beyond his last. It is my business as a judge to decide cases and write judgments. The work of writing judgments is in a sense the work of the miniaturist in law. He works with limited and definite facts and with limited and definite authorities and legal rules. Everything is directed to the particular result and everything not directly relevant should be excluded. The theory of economy forbids digressions into cognate rules of law or the enunciation of wider principles than are necessary for the particular case, or the attempt to reconcile and synthesize rules and achieve a more abstract and overriding principle. There is the further difficulty that the judge speaks with authority. He is a magistrate. He must look into the future and consider how the words he uses are susceptible of being applied to other facts and conditions, and he must guard against tying the hands of a future court which may have to determine what extensions are proper and what distinctions should be drawn. Thus the judge must neither speculate nor theorize. The essayist or writer on legal topics is in a position of greater freedom and less responsibility. In our Common Law system he is still bound to regard the course of the decided authorities, but he is not concerned with the determination of a particular issue. His horizon is wider.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

He can criticize and theorize, he can analyse and classify. The legal writer may work on a large canvas; he make take for his theme the complete treatment of one of the great divisions of common law or equity, e.g. contract, tort, restitution, trusts. Or he may as an essayist work to a more limited objective and examine some restricted, though perhaps fundamental, topic, such as consideration or contributory negligence or mistake of law. Thus the essayist may seem to approximate to the judge, because he, like the judge, is working within narrow limits. But there is a real difference between the two types of work. The essayist is not concerned with the decision of a case, but with general problems of law, however limited the actual topic, whether that topic is a special rule or an authority, or whether it is some abstract but still limited question.

In these extra-judicial writings I deal in the main with limited objectives, or, if the objective may at times appear to be of wider import, only in a limited fashion. These writings are occasional. They have been produced in odd moments of leisure, outside my proper work; they are essentially *parerga*. I can in each case point to the occasion, or particular personal request. Thus the essay on *Sinclair* v. *Brougham* was originated by the request of Professor Winfield that I should give an address to his Cambridge University Law Society, the Review of the American Restatement of the Law of Restitution was written at the request of Professors Scott and Seavey, the Reporters for the American Law Institute of the branch of that law. Then came four lectures which I delivered at Harvard at the request of Dean Landis: the idea of the essay on the Common Law

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

in its Old Home was due to Dean Roscoe Pound. Professor Goodhart must take responsibility for the review of Williston on Contracts and for the "In Memoriam" article on Sir Frederick Pollock, which on my side was a labour of pious affection. The essay on Ought Consideration to be Abolished? came from a promise lightly given at the *Law Quarterly Review* Jubilee dinner to the young and persuasive student editor of the *Harvard Law Review* of that day. I had to keep my word, though with some present cost of labour and subsequent reproach from the legal world. The paper on Commercial Law was for the Holdsworth Society at Birmingham University (which bears the honoured name of my friend, Sir William Holdsworth), and was delivered because I was asked to do so by Professor Smalley-Baker. The slight review of Dean Wigmore's important work on Judicial Proof was done at the request of the literary editor of the American Bar Association. The other addresses explain their origin. But the friends on whose suggestion I wrote the essays contained in this book must not be taken to be in the least degree responsible for what I have written, or even to agree with it. The errors, whether of omission or commission, are my own and must be visited on my head.

It is clear that the articles are somewhat of a mixed bag. I should not, I think, of my own motion have thought of collecting and publishing them. But my friends Professor Goodhart and Professor Winfield advised me that it might be useful to do so, and I yielded to their judgment and experience. Professor Winfield has rendered me the great service of seeing the book through

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

the press and has entirely taken that labour off my shoulders. I have to thank Mr G. V. Carey, M.A., for preparing the Tables of Cases and Statutes and the Index of Matters.

In this miscellaneous collection of disconnected fragments are there any central or nodal ideas? Let me first refer to two topics, that of quasi-contract or restitution and that of consideration. It did not occur to me at first that I was to some extent aligning myself after a long interval of time in these matters with that great judge, Lord Mansfield, perhaps the greatest of the English judges. Nor did I appreciate what criticism and opposition my humble extra-judicial expression of opinion would provoke. On the subject of quasi-contract I went so far as to say that in England it was generally accepted that there were three principal categories, contract, tort, and quasi-contract. I was perhaps misled by the views which I found or thought I found in Pollock and other English writers of eminence. It may also be that such acquaintance as I had with the Common Law as understood in the United States made me look at the question through distorted glasses. In the review which I wrote of the Restatement of Restitution, I sought to explain to English lawyers that not only was restitution (or quasi-contract) a separate main category of the Common Law, but that it was one capable of as strict analysis and constituted a logical whole as susceptible of integrated exposition as any other branch of law. For the proof of the statement I refer to the Restatement itself. And I may here digress to make a passing observation on the Restatements of different branches of law which have been prepared and

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

published under the auspices of the American Law Institute. The work in each case is that of a body of distinguished United States lawyers and is an admirable survey of the branch of law which forms its subject. Each Restatement has taken years of study and consultation. Each Restatement forms a sort of code though it has not the force of law. I cannot say that the actual sections are light reading, any more than are the sections of any other code, but the explanations and discussions and the illustrations which form the larger part of each volume are admirably written and are most illuminating. The whole series is not yet complete, but so far as they are published the volumes should be in every English Law library so that use can be made of them with the help of the excellent indexes which they contain. I am satisfied that English lawyers will never fail to get help from the Restatements on any problem with which they have to grapple.

No doubt on some points American Law is not in accord with English Law, though there is in the main a close unison. But the time is past for English lawyers to pride themselves on an insular self-sufficiency. In Blackstone's day the Common Law was the law of a few million people in England and Ireland, and, if the colonies, plantations and settlements were added, perhaps a quarter of a million more. Now in these islands there may be perhaps forty millions living under English Law, but the Common Law has long passed its old boundaries. Under its sway live the teeming millions of the United States, the greatest nation living within a ring fence that the world has ever seen. Then there are Canada, Australia, New Zealand, great now but with

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

unforeseeable potentialities. The enormous sub-continent of India has adopted, except for family and other racial or religious law, the Common Law which there regulates the great mass of dealings between man and man. In each of these great collections of mankind there are judges enunciating the law and schools teaching it, and professors meditating upon it, seeking to criticize and reform it. England cannot have a monopoly or even a primacy in this great and widespread development. Indeed it is a commonplace that the United States from very early days were in advance of the English in their legal education and study. Nor can any English common lawyer pretend to underrate the great work which has been achieved in legal thought in Canada, Australia and New Zealand.

I was led into this digression by observing that in the United States, as I understand, it is generally accepted that quasi-contract, or restitution as the Restatement calls it, is a separate category in the law. Williston in his great work clearly so treats it, almost indeed as a matter of course. Why, I wonder, is the view so strongly held in England that in the Common Law there are not three but only two categories of civil liability, contract and tort? That view has recently received its most complete expression in a recent article by Sir William Holdsworth in the *Law Quarterly Review*, but, with all the respect that I feel for that great lawyer, I cannot in this matter agree with his arguments. I do not repeat what I have said in these essays. But I sometimes wonder when I read some discussions if there was ever a Judicature Act, or even a Common Law Procedure Act. And I am tempted to ask if the law ceased to grow

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

after the third edition of Bullen and Leake, which was published in 1868. That excellent digest was my constant companion when I was a Junior Counsel, though after I became a leader I found it of little help in the wider questions with which I then had to deal. But not only has there been the Judicature Act, but there have been the formative labours of judges like Esher, Bowen, Blackburn, Macnaghten, Watson and a host of others, dealing with the new conditions of the last seventy years, a period of extraordinary development on all sides. But I ought not to be too hard on Bullen and Leake, who could not foresee what was going to happen; and even they stated that the fictitious *assumpsit* was become obsolete. I hope that English Law will, before many years have passed, forget about the forms of action and about contracts implied in law and will evolve, as America has done, a reasoned exposition of quasi-contract or restitution.

I have perhaps unduly emphasized this matter because it illustrates an attitude of mind which perhaps more than anything else it was the object of these essays to exorcise or at least discourage. I mean a devotion to form, and to antiquated form, rather than substance. But then it is said that the continuity of English Law must be preserved. Let us however be careful what we mean by continuity. We sometimes personify our English Common Law, and picture her as a lady. If we do, we must also picture her as old in years, many centuries old, but ever young and vital in spirit. "Jam senior, sed cruda deae viridisque senectus." Might we not hear her say "It is not in implied *assumpsits* that my continuity is to be sought. That was a brief and

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

evanescent phase. Holt, one of my devoted servants, protested against the introduction of the idea about 1700, when I was many centuries old; it lasted only until it was abolished about a century and a half later. As well foist upon me as part of my essential being that excrescence, imposed from without after the Restoration, the Statute of Frauds. I was quite capable of evolving a reasonable theory of when a transaction should be embodied in writing. But the continuity of which I boast is something much more vital and essential, as you all well know. It is furthermore a continuity which subsists in the midst of constant change, because of an inherent capacity of adaptation to changing conditions"? So our lady, though in less stilted language, might speak.

> cedit enim rerum novitate extrusa vetustas
> semper, et ex aliis aliud reparare necesse est.

This is as true of the Common Law as of every other good thing. I have often wondered how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*. Without this latter, it is difficult to see how our law, in the sense of a body of binding rules, could, outside the now extensive portion covered by statutes, exist at all. Yet if we compare the body of Common Law to-day with that of a century ago, it might well seem that it has changed beyond recognition. Still more so, if we go back to Blackstone's day, or Coke or Edward I. Yet we claim and truly claim that all these centuries the Common Law has had a continuous existence. In fact the process of change is so gradual as to be almost imperceptible to the contemporary observer. There is a

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

perpetual erosion of authorities. The system of case law may in one aspect tend to militate against change, but in another aspect it favours change. A judge, intent on deciding the dispute before him, is able to see where exactly the cases cited differ from that present to him, and where that difference may be taken to point to a different conclusion, which he then can adopt, at least if that conclusion accords with what justice requires. In addition there is the constantly recurring *novitas rerum*, as conditions of life change and as moral and social conceptions change. For all this novelty precedents have to be modified. We are all legal historians now, since we have at our service the great works of Pollock and Maitland and of Holdsworth and others. The history of law tends on the whole to develop an open-mindedness in regard to change rather than the reverse. When we examine the accidents of procedure or judicial or social intolerance or prejudice out of which so many dogmas and rules originated, and see to what different conditions and circumstances they were adapted, we are less likely to view them all with superstitious veneration; we are freer to consider how far, with modern conditions of life and thought, they fit in with reason, justice, and convenience. This last term "convenience" I use as meaning not a mere opportunism or narrow practicality, but a wise regard to practical consideration, as contrasted with a cramped or formalistic logic. Perhaps it was something like this which Holmes had in mind when he said that experience and not logic was the life of the law, or when he said that judges must think facts, not words. He may have meant that law is not a self-contained system of rules

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

and concepts, "bombinans in vacuo", but a function of human life, only capable of justifying itself in so far as it meets the requirements of men and affairs. It often helps in the application of this pragmatic test to see how a particular rule first arose. The working lawyer is generally too much concerned with the task of ascertaining the actual scope and implications of a rule to have opportunity to examine its origin. But however excellent the logic which has developed the process, the excellence of the logic will not justify the rule if that is based on a fundamental premiss which is bad. Probably to-day no one would defend the doctrine of contributory negligence. The modern Admiralty rule which apportions the liability in accordance with the degrees of blame is surely juster and more logical than the Common Law rule of "all or nothing". The Common Law was logical enough in a sense in originating its rule. It said that the defendant must be guilty or not guilty; the plaintiff cannot be like the curate's egg, good in parts. But a wider and more equitable view sees how imperfect the rule is. It is characteristic of the history of such a rule that it has led to constant technicalities and refinements in order to mitigate its inequities. Only the other day the question arose in the House of Lords which at one place in these essays I said was problematic. It was whether the defence of contributory negligence applied in a claim for breach by the employer of statutory duty causing injury to a workman. The Australian High Court held that it did not. They held that the breach was the breach of an absolute or strict obligation and that though a man who had been guilty of improper conduct of so serious a nature that it could be treated as sub-

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

stantially causing the injury could not recover, the rule of contributory negligence did not apply. I feel that this ought to be the rule in England also, but I feel constrained by the course of English authorities to hold that an English Court must apply the rule of contributory negligence, though the rule must be suitably adapted to the peculiar facts of a case of that type. Again, the rule of common employment originated in the prejudices of Lord Abinger and in the narrow view of public policy taken by Shaw C.J. And the distinction between mistake of law and mistake of fact, which has led to so many unsatisfactory distinctions, originated in a hasty and ill-considered utterance of Lord Ellenborough. In these and in so many like instances the dead hand of the past fastens on the living present. What I have often wondered at is the reverence and even affection with which such old rules are regarded. Let me give an instance. The rule in *Shelley's Case* was abolished in 1925. Most people now perhaps remember it for the sake of the wit and wisdom of Lord Macnaghten's judgment in *Van Grutten* v. *Foxwell* [1897] A.C. at p. 668. Some time after that judgment was delivered, the editor of a well-known text-book was asked why he had not referred to *Van Grutten* v. *Foxwell*. He replied that he could not bear to think of a judgment which spoke disrespectfully of the rule in *Shelley's Case*. I wonder if some such feeling does not lurk in the minds of many lawyers when reform of any familiar legal rule is mooted.

But whatever merit may be ascribed to judicial courage in interpreting and applying the law and thus developing it, and whatever scope may be attributed

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

to the flexibility and adaptiveness of the Common Law, there are definite limits beyond which no judge would go. Not only is a definite decision of the House of Lords final in every English Court as to its *ratio decidendi*, but in addition there are rules which have not been definitely affirmed by the House of Lords which that tribunal would not be likely to alter because of the prolonged and consistent judicial practice of following them. This was the case recently of the instance I have given in connection with breaches of statutory duty and contributory negligence. I do not mean that the members of the House who sat on that appeal would necessarily, if not bound by authority, have come to a different decision. In such cases the law is taken to be finally fixed, just as in the case of a direct decision of the House of Lords; the law so fixed can be changed only by Parliament. From time to time the legislature does intervene in this way. Recent cases of such intervention have followed recommendations of the Law Revision Committee. But the recommendations of that Committee in reference to the rule of consideration have not received any effect from Parliament, either in respect of the general rule or of the particular defects to which I drew attention in the article which is published in this volume. Perhaps this matter is not considered of sufficient practical importance to deserve the attention of Parliament. It may be regarded as concerned rather with theory. Or it may be that any change in so inveterate a rule may be more than legal conservatism would endure. Yet both the general principle and the ancillary and subsidiary rules which I ventured to criticise do frequently work injustice. The origin of the

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

rule is haphazard. It is said that the bargain theory is the true theory of contract. It is true that consideration is present in most cases of contract. But I venture to criticize such a term as the "bargain theory of contract", if that means, as I suppose it does, that every simple contract is based, in fact or in theory, on consideration. There can be only one true theory of contract, and that is the theory which defines the conditions of deliberate mutual consent. To substitute for such a theory a bargain theory is to substitute an ancillary or concomitant or evidentiary matter for the element of consent, and to substitute matter of inducement for the contract itself. I dare say it will be long before either in England or in the other regions where the Common Law prevails consideration is rejected as being the sole and universal condition of a valid simple contract, but I question not that in due course this and various other like adventitious imperfect ideas will pass away. Meantime judges, as in duty bound, will enforce the law as they find it, whatever they may think.

In my paper on the Common Law in its Old Home I mentioned various matters where the law might be improved, though I made no attempt to be exhaustive in my summary. I gave examples. I do not resent it if it should be said that I merely instance "sundry reforms". The main body of the law consists of sundry rules, and the main object of the lawyer is to make these rules as perfect as he can, both in respect of harmony and consistency among themselves and of fitness to subserve the requirements of individuals and society. I also commented on and criticized what may be called the many instances of "make believe" in English Law,

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

or fictions. One very prevalent fiction, perhaps more prevalent in comparatively modern times though recently somewhat discredited, is that of implying a term or an intention in contracts, in order that the court may decide what justice requires in circumstances which the parties never had in their contemplation when they made the contract and still less had they any intention about them. It may be said that such criticisms go merely to the theoretical accuracy of the law and have no practical value. Then it may be said that the implied *assumpsit* in quasi-contract is harmless, because it merely shifts back the real question, which is in what circumstances the implication may be made; and similarly in cases of the repudiation or frustration of contracts which are said to depend on implied terms or intentions. The court however has to decide on the facts what the legal position is. The implication is merely a fashion of speech. But its absence is preferable to its presence.

Except very briefly in the paper on "Some General Aspects of Law" I have said nothing about the modern development of administrative or public law, in particular the system of tribunals which decide the questions arising under the many administrative statutes now in operation. Questions of this sort arise in many, if not all, the countries in which the Common Law prevails. No doubt there is involved to a great extent the supersession of the ordinary public tribunals. Parliament may authorize a body to legislate by means of rules which have statutory force, to act as prosecutor in respect of rules which it has thus promulgated, and sometimes to act as judge, though more often the judges

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

are some specially designated persons, but in any case not the King's Courts. Some such procedure is inevitable in these days of social, industrial and commercial legislation and control. The questions to be decided are such as in general are not suited to adjudication by the ordinary process of the King's Courts, which are, except to a very limited extent, ousted. But I think the good sense of the English people will see that the system which is clearly convenient is fairly and properly worked.

The most lengthy review in this volume is that on Williston's Contracts. When I contemplated the massive volumes, in serried array, which constitute that great work, I was somewhat appalled and disposed to decline the task. I had however met Professor Williston at Harvard and conceived a great regard for him. But primarily I was impressed by the complete and comprehensive scale on which the work was planned and the ability with which it was executed. I felt that it should be introduced to English lawyers beyond the circle of those who already knew of it. Not only would this promote the study of that branch of law in England, but in addition it would advance the mutual interchange of ideas and affinity of sentiments between English and American lawyers to the advantage of the Common Law. I observe that the only three book reviews which I include in this volume are by American lawyers. Dean Wigmore's treatise on Judicial Proof I have so far merely mentioned. It is, as it were, a supplement to his classical work on Evidence. It deals with one side of the judicial process, the evaluation of evidence and the logical principles which underlie it. I found it very

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

interesting to understand the principles which I have been unconsciously applying all my working life in dealing with issues of fact. It made me wonder whether some day some ingenious and learned writer would not seek to lay bare the logical processes implicit in judicial reasoning when it deals with the law of the case. It is, I think, clear that English or Common Law legal reasoning has its own special methods. These inevitably follow from the empirical methods of the Common Law and its reliance on a mass of authoritative decisions, according to which the judge must proceed. Sir Frederick Pollock has referred to what he calls "judicial valour". That may mean courage in distinguishing earlier cognate decisions and thus extending a rule so as to decide the particular case. A judge can seldom, if ever, concern himself with the broadest generalisations of jurisprudence. These are not calculated to aid in the decision of the particular problems in the case. Such generalisations as those in the judgment of Lord Macnaghten (to take them as examples) in the *Nordenfelt Case* or in *Lloyd* v. *Grace, Smith & Co.* merely supersede by a simpler rule a mass of detailed narrower and often conflicting rules to be found in earlier decisions. A judge in coming to his decision will be influenced by what may be called the subconscious effect of his long experience of fact and law. It is this mental background, often implicit rather than explicit, which leads to the comment which has sometimes been made in regard to able judges that they were less conversant with some branches of law or equity than were other judges equally able. Again, it would be interesting to analyse important decisions in order to ascertain how far they were the result of

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

mere logic and how far the result of temperament or social predispositions. It has also been recognized that commercial cases are best decided by those judges who have practised in such matters and who are familiar with the processes of business and its requirements. This specialization illustrates the practical and concrete character of the judge's work. I have already noted the importance of tracing back to their ultimate motivization some of the fundamental rules of law which later generations have simply used without further question as the basis of logical development. Another problem which has often exercised my mind is how it comes to pass that there have been from time to time cases of marked divergences of opinion between distinguished and competent lawyers. To take a few recent illustrations, let me refer to the differences of opinion which emerged in the decisions in the House of Lords in *Bell* v. *Lever*, *Banco de Portugal* v. *Waterlow*, *Donoghue* v. *Stevenson*. This could scarcely happen if law were a science. But judging is a practical matter, and an act of the will. Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice. Many currents of thought and feeling may determine how he decides the choice. The higher the court, the less is the decisive weight of authority and the freer the choice. This may explain what has often been said, I hope with some truth, that the House of Lords does generally or frequently take a broad and common-sense view of the law. I may refer as one striking instance of this to the general course of the decisions of the House in the Workmen's Compensation Act. But I must not proceed farther in what is only a series of marks of interrogation

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

on the subject of the logical and psychological characteristics of the judicial process in matters of law. Some day work analogous to what Dean Wigmore has done in regard to matters of fact and proof may be done on this other aspect of judging.

I do not intend here to say much of the four lectures which I delivered last year at the Harvard Law School. These represent extra-judicial attempts to focus attention on some cardinal problems of the Common Law. Thus I discussed the scope in modern times of that dispensing power which judges have exercised or may exercise under the name of public policy, which I regard as something within the general principles of the Common Law, not something outside and above them. Then I touched on one aspect of the extremely difficult and interesting topic of damages. Then I had something to say on the relations of *culpa* and liability. The lecture on the Gold Clauses may be regarded as a study based on a rather special instance of the methods of interpretation of commercial documents. These lectures are neither pontifical nor comprehensive nor exhaustive. They will have served their purpose if they stimulate enquiry and further study.

My address on the Study of Law had for its main theme a plea for "the scientific and systematic study of law", to quote again Pollock's words. Thus that essay closely connects with the brief "In Memoriam" notice of Sir Frederick Pollock. That was not merely a labour of esteem for a man for whom I personally felt the highest regard, but a tribute of admiration to a great man who devoted his life and his powers to the study of law and, both as professor and writer, did great service in its

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

teaching and advancement. Incidentally also he was a living example of that intimacy and co-operation which should exist, and I hope does and will increasingly exist, between the English and American lawyers. I refer to his lifelong association of close friendship with that other great lawyer, Mr Justice Holmes. The careers of the men were in many ways different. Both were professors, but Holmes, when comparatively young, left the professor's chair for the judicial bench, first as a judge and later Chief Justice of the Supreme Court of Massachusetts and then as an Associate Justice of the Supreme Court of the United States. It is a proof of the correlation between the theoretical study of law and its practical pursuit in America that such transitions from College to Bench are not uncommon there. A recent instance is the universally applauded appointment of Mr Justice Frankfurter from the Harvard Chair of Public Law to the Bench of the Supreme Court of the United States. Both Pollock and Holmes lived to overpass the age of ninety years. Holmes's *Common Law* is known wherever the Common Law is known. But the greatest part of his work is embodied in his judgments, which in the Supreme Court he delivered during more than thirty years of service there. Pollock, though a man of wide and diverse experience and interests, devoted himself to study, teaching and writing on law. He is a great modern instance of a life devoted to law as a matter of theory, not as a practical pursuit. His work remains in his writings, in many respects epoch-making. He is also an outstanding illustration of how the study of law may have value and importance as a career and as the occupation of a highly gifted life.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

Preface

The advancement of legal studies in a country must depend, not on machinery or, as I have heard it called, "educational plant", but on the quality of the men who make that advancement the object of their life work and of their ambition. It may be true that England has fallen behind America for a century or more in legal education and study. But it seems to me that England has advanced in these respects and is advancing, and when I think of my friends who have made the pursuit of legal learning the occupation of their life, and of the work which they have done and are doing, I have pride in the present and hope for the future.

WRIGHT

August, 1939

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

TABLE OF CASES

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-45270-1 - Legal Essays and Addresses
Lord Wright of Durley
Frontmatter
More information

Table of Cases

© in this web service Cambridge University Press www.cambridge.org