HARVARD

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DIVISIONS OF LAW.

IT is not possible to make any clear-cut division of the subject-matter of legal rules. The same facts are often the subject of two or more distinct rules, and give rise at the same time to distinct and different sets of duties and rights. The divisions of law, as we are in the habit of elliptically naming them, are in truth divisions not of facts but of rules; or, if we like to say so, of the legal aspects of facts. Legal rules are the lawyer's measures for reducing the world of human action to manageable items, and singling out what has to be dealt with for the time being, in the same way as number and numerical standards enable us to reduce the continuous and ever-changing world of matter and motion to portions which can be considered apart. Thus rules of law can no more give us a classification of human acts or affairs than the rules of arithmetic can give us a classification of numerable things. In scholastic terms, the divisions of law are not material but formal. Practising lawyers do not concern themselves much with divisions of a high order of generality. They have to think, in the first place, of speedy and convenient reference, and the working arrangements of professional literature are made accordingly. So the types in a printing-office are arranged not in order to illustrate the relations of spoken sounds or the history of the alphabet, but so that the compositor may lay his hand most readily on the letters which are oftenest wanted. Ambitious writers have sometimes gone to work as if it were possible to reduce the whole contents of a legal system

to a sort of classified catalogue where there would be no repetitions or cross references, and the classification would explain itself. Ambition on that scale is destined to disappointment by the nature of things.

Some general divisions in the science of law have been made classical by the method adopted in the Institutes of Justinian, and by the subsequent development given to the Roman ideas by commentators and modern jurists. One such division, which has been explicitly prominent only in recent times, is now commonly marked by the terms *in rem* and *in personam*. Some duties and rights consist in a claim of one certain person upon another; the duty and the correlated right are alike determinate. In these cases the duties and rights are said by modern writers to be *in personam*. Other duties and rights do not import any such definite correlation. When we put ourselves in the position of duty, we find no certain person having the right; when we put ourselves in the position of right, we find no certain person owing the duty. These impersonal rights and duties, regarding all one's fellow-subjects or a class of them, are said to be *in rem*. We have already seen something of this in endeavoring to fix the conception of legal right. The reason why we cannot well use the English adjectives "real" and "personal" for this purpose is that they are already appropriated to special technical uses with which this would clash. It would be free from objection, however, to speak of personal and impersonal duties or rights.

The most obvious and typical example of an event creating rights *in personam* is a contract. John and Peter agree that John shall sell his house to Peter on certain terms. This gives John and Peter certain rights against each other; they are bound to each other by a tie of mutual claims existing between them and between them only. This definite relation of claim and duty was called an *obligation* by the Roman lawyer, and is still so called everywhere, save that in English-speaking countries an unfortunate habit has arisen of using "obligation" in a lax manner as co-extensive with duties of every kind.[1] Now let Peter pay John the purchase money, and John do all proper acts for completing the sale. Suppose, to simplify the illustration, that John has re-

[1] In English law the word formerly had a much more restricted meaning; namely, the special kind of contract also called a bond. But the English name "bond" is now always or almost always used for this, and it is convenient to restore "obligation" to its Roman sense, for which there is no synonym.

ceived the money in coin, and Peter has entered into the house and occupies it. Peter is owner of the house, and John and all other persons are under the duty of respecting his rights as owner, that is, of abstaining from trespass and the like. The money is John's, and Peter and all other persons must respect John's ownership of the money by not stealing it or otherwise meddling with it in any unauthorized way. These rights have no determinate corresponding duties, only the general duty of all men not to trespass, steal, and so forth. That duty in turn is not correlated to Peter's or John's rights more than to those of any other owner. *Dominium* is the Roman term for the rights of an owner against all the world: and the contrast of *dominium* and *obligatio* is the nearest approach that can be made, in classical Roman language, to the distinction marked by the modern terms *in rem* and *in personam*.

Let us now take a further step. Robert, a stranger, wantonly, or out of spite, breaks a window in Peter's house. He has disregarded the general duty of respecting other men's property, and he incurs a new duty, that of making compensation to Peter. It may be that he is also liable to fine or imprisonment for the disturbance of public order involved in his wrongful act, but that is a distinct and different matter. On the other side Peter has a personal and determined right against Robert. A legal bond of liability and claim has been created; that is to say, there is an obligation. If Peter comes out of the house at the moment when Robert breaks the window, loses his temper, and knocks down Robert, he has in turn broken in Robert's person the general duty of not assaulting one's fellow-subjects: for the right of action he has acquired against Robert is a right to redress by lawful means only, of which means knocking down the wrong-doer on the spot is not one in this case. Robert may not be held entitled to much compensation, but he is entitled to some. Here is yet another obligation, the liability being on Peter and the claim with Robert; and it results from a breach of the most general kind of duty, a duty corresponding to a so-called "primitive" right.

Obligation does not, however, include the whole of duties and rights *in personam*. There are personal relations recognized by law and having important legal consequences, but outside the legal conception of obligation. Peter, let us assume, lives in the house with his wife Joan, and they have children. Peter and Joan owe duties to each other which they cannot owe to any one else; and the same may be said (omitting minor distinctions in this place) of the duties

existing between Peter and his children. But these duties are not reckoned as obligations: for they cannot be expressed as definite claims, and their performance cannot be reduced to any definite measure. They are fully discharged only when the relation out of which they arise has come to an end: in the case of marriage by death, or, in systems of law where divorce is allowed, by divorce. In the case of parental relations, the normal mode of determination is the attainment of full age by the child (which, however, often has not that effect in archaic systems, and had not in the classical Roman law); to which many systems add marriage in the case of daughters, and adoption.

Relations of this kind, moreover, are intimately associated with moral duties which are not capable of legal definition and perhaps not of precise definition at all. Lying thus on the borderland of morality and law, they give rise in law to duties and rights which resemble obligations in being personal, but differ from obligations, and resemble duties and rights *in rem*, in not being capable of exhaustion by definite assignable acts, or by any number of such acts. The resulting duties are determinate as to persons, but not determinate as to contents.

Duties which are impersonal or *in rem* answer, as we have seen, partly to particular and acquired rights of other persons, such as owners, partly to the so-called primitive rights which are universal. They may be duties to all one's fellow-subjects or only to some of them.

Impersonal duties and rights are always attached by rules of law to some condition or state of facts. Whether the conditions are to any extent under the control of the parties or not, the legal consequences are what the law declares them to be. By the mere fact of being a citizen or subject one is entitled to a certain measure of personal security, freedom to follow one's lawful calling, and so forth. By the fact of becoming an owner one acquires the rights and faculties of an owner, such as the law declares them to be. One may choose to avail oneself of them or not, but one cannot alter them. If one could, one would be able to impose new duties on one's fellow-citizens without their consent, in fact, to make new law for one's own benefit. But this would contradict the fundamental purpose of law and justice. It is exactly what they aim at preventing.

Personal duties and rights, on the other hand, may not only arise from acts of the parties, but be directly created and deter-

mined by their will. The parties to an agreement not only confer and assume duties by their voluntary act, but by the same act prescribe what the duties shall be.

The same remark applies to transactions involving agreement and obligation, though not usually included under the name of contract, such as the creation of trusts in English law. The parties can make a law for themselves just because their dispositions are personal to themselves and do not impose or affect to impose any new duties on their fellow-subjects at large.

Personal duties are also prescribed by rules of law attached to acts or relations of parties. Sometimes they are contemplated by the parties, though not within their control, and sometimes not. Thus in the case of marriage and other family relations the legal consequences are contemplated and accepted, but cannot be framed and varied at the will of the parties, like the duties created by a commercial contract.[1] In many cases where duties resembling those created by contract are imposed by law (where, in Roman terms, there is obligation *quasi ex contractu*), they are such as it is considered that a just man, on being fully informed of the facts, would in the circumstances willingly assume. The most familiar example in this kind is the duty of returning a payment made by mistake.

Where obligation arises from a merely wrongful act, the liability is of course not desired by the wrong-doer, and is contemplated, if at all, as an evil (from his point of view) to be endured only so far as it cannot be avoided.

We have not yet mentioned another way in which personal duties and liabilities arise, namely, from the breach of antecedent personal duties created by agreement.

Every such breach of duty is in some sense wrongful; and it is contrary to the original intention of the parties. Agreements are made in order to be performed, not to be broken. It is even possible to regard the breach of a promise as a wrong in the strictest sense, a trespass or deceit.[2] Still, there is a good deal of difference. Duties under agreement may easily be broken without any wrongful intention. Performance may be prevented by misadventure (which is not always an excuse even if the party

[1] This does not apply to incidental dispositions of property such as are made by marriage settlements. These may well be treated, as in our law they are, as matters of agreement largely within the control of the parties.

[2] This is fully exemplified in the history of the common law.

be not in fault), or there may be honest and serious diversity of opinion as to what is really due. Then, although parties do not desire their agreements to be broken, it would be incorrect to say that they never contemplate it; for they often make special provision for such an event, and even fix beforehand the amount or scale of the compensation to be paid. Thus it appears that the duty of compensation in case of non-performance is fairly regarded as incident and supplementary to the primary duty of performance. In practice and practical exposition it would not be convenient, indeed it would hardly be possible, to separate the legal results of breach of contract from the rules determining what are the duties and rights of the parties before any breach.

From the point of view of a modern lawyer conversant with modern habits of life and business it may well seem that the distinction between duties and rights prescribed by the parties themselves, and those prescribed by the law, is really of greater importance than that which looks only to their impersonal or personal character. The relations recognized by law can be divided, with no great apparent inequality as to quantity or value in human affairs, into those which arise from contract (or voluntary dispositions analogous to contract) and those which are independent of contract. And the distinction is at first sight so clear as to seem unmistakable. But the history of the law shows us that an absolutely clear-cut division is not to be had, even so, between the facts and relations to which our rules apply. The description of legal duties and rights as being *in rem* or *in personam* is usually and correctly said to be unauthorized by classical Latin usage. Roman lawyers spoke of "actiones," not "jura," being *in rem* or *in personam*. But it should be remembered that in Roman usage "action" included what we now call a "right of action," any determinate claim to some form of legal redress. "Action" was defined as a man's right of obtaining by process of law what is due to him, not as the process itself. "Nihil aliud est actio quam jus quod sibi debeatur iudicio persequendi."[1] Hence the modern usage is not so wide apart from the Roman as it appears at first sight to be.

A classical division accepted by almost all systematic writers is that of public and private law. No rule of law can be said, in the last resort, to exist merely for the benefit of the State or merely for the benefit of the individual. But some departments of legal rules

[1] Celsus, D. 44. 7, De Obl et Act. 51.

have regard in the first instance to the protection and interests of the commonwealth, others to those of its individual members.

In the former case the public interest is immediate ; it can be directly represented by the proper officers of the State, and vindicated by them in the name of the State, or of its titular head: in the latter the interest of the individuals whose rights are affected comes in the first line; it is protected by the law, but the parties interested are left to set the law in motion. Rules of private law may be said to have remained in a stage where all rules of law probably were in remote times: that is to say, the State provides judgment and justice, but only on the request and action of the individual citizen; those who desire judgment must come and ask for it. Accordingly, the special field of such rules is that part of human affairs in which individual interests predominate and are likely to be asserted on the whole with sufficient vigor, and moreover no public harm is an obvious or necessary consequence of parties not caring to assert their rights in particular cases. In the law of contract and its various commercial developments these conditions are most fully satisfied ; though even here considerations of "public policy," to use the accustomed English term, are by no means absent. In the law of family relations and of property motives of legitimate private interest have a considerable part, but they are not so uniformly operative that they can be treated as adequately guarding the interest of the commonwealth. Hence, we find that theft and certain other forms of misappropriation and fraud, and even certain kinds of breach of contract, are punishable as public offences. The general security of property has to be considered as well as the chances of restitution in each case, which often are so slender that the person robbed or defrauded has no sufficient motive of self-interest for vindicating the law. When we come to bodily safety, public interest balances, or in some cases even outweighs the private. Wrongs of violence are in all civilized legal systems dealt with as offences against the commonwealth, in addition to the rights to redress which may be conferred on the individual injured. Wrongs which are personal but not bodily—such as defamation—afford a kind of neutral ground where the rights of the State and of individuals have about equally free play in modern law.

There fall more specially under rules of public law the duties and powers of different authorities in the State, making up what is usually known as the law of the Constitution; also the special bodies

of law governing the armed forces of the State, and the administration of its other departments; laws regulating particular trades and undertakings in the interest of public health or safety; and, in short, all State enterprise and all active interference of the State with the enterprises of private men. We say active interference. For there are many dispositions in particular departments of private law which are founded on reasons of public policy, but are left for the parties who may profit or be relieved by them to bring to the notice of the courts. Of this kind are certain special restrictions on freedom of contract. In countries under the common law the State does not interfere of its own motion to prevent an agreement from being enforced on the ground that it is "in restraint of trade." On the other hand, there are many legislative enactments which expressly or by necessary implication forbid certain kinds of contracts to be made. Such enactments appear to belong to public law, though it is often convenient or necessary to consider them in connection with the rules of private law whose usual operation is excluded or limited by them.

To public law, too, belong all the minor penal enactments incident to constitutional and departmental legislation. But public law does not even here hold the field alone, for the same legislation which creates new public duties and imposes penalties may well, under specified conditions, also confer new rights to redress on individuals either expressly or as a consequence of principles recognized by the courts. The extent and effect of any such principles cannot be laid down beforehand: it depends on the forms, methods, and history of the particular system of law which is being administered. In our law the violation of a public duty may often give a right of action to a citizen who has thereby suffered damage, but this is by no means a universal or necessary result.[1]

It will be seen, therefore, that the topics of Public and Private Law are by no means mutually exclusive. On the contrary, their application overlaps with regard to a large proportion or the whole mass of acts and events capable of having legal consequences.

Sometimes the distinction between public and private law is made to turn on the State being or not being a party to the act or proceeding which is being considered. Only dealings between subject and subject, it is said, form the province of private law. But this does not seem quite exact; unless, indeed, we

[1] Ward *v.* Hobbs (1878), 4 App. Cas. 13.

adopt the view, which has already been rejected,[1] that the State is wholly above law and legal justice, and neither duties nor rights can properly be ascribed to it. Many valuable things, both immovable and movable, are held and employed for the public service, — palaces, museums, public offices, fortifications, ships of war, and others; in some countries railways and all the various furniture and appurtenances of these. Whether they are held in the name of the State itself, or of the Head of the State, or of individual officers of the State or persons acting by their direction, is a matter of detail which must depend on the laws and usages of every State, and may be determined by highly technical reasons. In substance the State is and must be, in every civilized community, a great owner of almost every kind of object. Now the rights attaching to the State in this respect, or to the nominal owners who hold on the State's behalf, need not differ from those of any private owner, and in English-speaking countries they do not. They can be and are dealt with by the ordinary courts in the same way as the rights of any citizen, and according to the ordinary rules of the law of property for the preservation and management of the kind of property which may be in question. Again, many persons have to be employed, and agreements to be made with them; and these transactions are judged, so far as necessary, by the ordinary rules of the law of contract. Now the rules mentioned not only belong to private law, but are at its centre; they are the most obvious examples of what private law includes. It would be strange to say that they become rules of public law because the property and undertakings in question are public. The true view seems to be that the State, as an owner and otherwise, can make use of the rules of private law, and become as it were a citizen for the nonce, though ultimately for public purposes.

Sometimes the Law of Nations is brought under the head of Public Law; this is plausible according to the test of the State being a party, which, however, we have not accepted. It is enough to say here that the duties of independent States to one another, whatever may be the extent of their analogy to legal duties, are not legal duties or the subject of legal rules in the sense now under consideration. On the other hand, there is in modern law a body of principles and rules by which the courts are guided in deciding,

[1] In an earlier chapter of the work in preparation of which this is a part.

on occasion, how far they are bound to take notice and make application of rules belonging to foreign systems of law; as where different stages of a transaction have taken place in different jurisdictions. These rules apply largely to matters of private law, and the principles are not confined to any particular local system. Differences of opinion exist among the learned, and the opinions of different writers or schools may prevail with the tribunals of different countries; but it is recognized on all hands that uniformity is desirable and is to be aimed at as far as possible. Hence the sum of such rules is now commonly called Private International Law. This term has been much discussed, and by some competent persons vehemently disapproved;[1] but it would not be to the present purpose to enter upon the controversy, which assumes an advanced knowledge of law. What is here sought is merely to make a common modern term intelligible.

Another classical division adopted by the Institutes of Justinian from Gaius is that which treats the whole body of law (that is, legal rules) as relating either to Persons, Things, or Actions.[2] "Omne autem jus quo utimur vel ad personas pertinet vel ad res vel ad actiones."

To a certain extent this division coincides with the division already noted of Substantive and Adjective law. The law of Actions is the body of rules determining the modes and processes of legal redress; it is equivalent to what modern writers call the law of Procedure, but with some additions of the law of Remedies; for, as pointed out above, the Romans hardly distinguished the right to a certain kind of redress from the process of obtaining it. So far there is nothing calling for fresh explanation. It is to be remembered, however, that, as Maine has pointed out, the distinction of substantive from adjective law must in ancient times have involved a much higher effort of abstraction than we can easily realize now. When we consider the further division of substantive law into law of Persons and law of Things, we are struck by the fact that the division, though not in terms confined to private law, has in fact been so confined by the usage of both ancient and modern expounders. It will appear shortly that there is good reason for this.

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[1] See Holland, Jurisprudence, ch. 18. Some of the objections would be removed by substituting "Law of Nations" for "International Law."

[2] Cp. Maine, Early Law and Custom, ch. 11, and Dr. Moyle's introduction to the First Book of the Institutes.

Like the other divisions we have been considering, this is a division of legal rules, not of the facts to which they apply. It seems to be closely related to the practical questions which arise or may arise when a man feels agrieved and thinks of seeking redress. Persons between whom there is a dispute; a thing which is the subject of dispute; some form of action for resolving the dispute by process of law: these are the common elements of litigation between parties. This evidently does not apply to crimes, or to all private wrongs; but the application is quite wide enough to support a classification which in truth is only a rough one. Do the persons concerned fall under any rules of law limiting or specially modifying their capacity or liability? What rights are recognized by law with regard to the subject-matter in question? Can it be owned, or exclusively enjoyed? One of the parties, perhaps, claims by sale or bequest; could the thing be given by will? could the sale invest him with the rights he claims to exercise? What, on the whole, is the resulting duty or liability? Then, supposing the rights of the parties to be settled, what are the available remedies? What is the active form, so to speak, of the legal result? Or in English legal phrase, what is the cause of action? Can compensation be recovered in money, or is there any other and what form of redress?

The distinction between law relating to persons and law relating to things may seem to the modern reader, perhaps, not to be a real one, or not one of the first importance. For things (whatever we include in the conception of a thing,[1] which we are not yet considering) can plainly have no place in legal rules except in connection with the duties and rights of persons. The material world, as such, is absolutely irrelevant to jurisprudence. Every rule of law must to this extent have to do with persons. And in modern Western law we find that one person is very like another, and differences between persons tend to be reduced to a minimum. In fact we can nowadays be tempted to regard the law of persons as identical with the law of family relations, in which the irreducible differences of persons, as we may call them, resulting from the conditions of sex and age, are of necessity most prominent. But in archaic societies it is not at all to be assumed that persons are alike. Nowadays we presume every man to have the full legal rights of a citizen in the absence of apparent reason to the contrary. If any man is not capable of buying and selling, suing and being

[1] See my paper "What is a Thing?" in the *Law Quarterly Review* for October, 1894, X. 318.

sued, in his own name and on his own responsibility there must be something exceptional about him. Undischarged bankrupts, for example, are not a very large proportion of our adult population. But at Rome in the time of Cicero, or even of the Antonines, a prudent man could not presume anything about a stranger's legal capacities. A person of respectable appearance who spoke Latin was not necessarily even free. We know that serious doubt whether a man was free or not was quite possible. If he was a slave, he had no legal rights; he was not a person at all in the eye of the law. If he was free, he might still be a freedman, or a foreigner (not to speak of minuter distinctions). If he was a Roman citizen he might still have a father living, and be under that father's power; again, he might have been emancipated or adopted. He might belong in short to any one of several conditions of men, each having its distinct and proper measure of legal capacities. For a Roman of the Republic, and even of the Empire down to Justinian's time and later, the question, "With what kind of person have I to do?" had a very clear and prominent legal meaning, and no question could be more practical.

Modern authors have not arrived at any general agreement either as to the precise meaning of the law relating to persons in the Roman classification (if indeed the meaning ever was precise), or as to what topics are conveniently included under such a head at the present day. There is, however, a general tendency to regard the law of persons as supplementary to the general body of legal rules. We are apt to ask first, not what are the respective capacities of the parties in the matter in hand, but what are the rights of the matter assuming all parties to be of full ability. Then we consider, as a possible accident in the case, whether anyone is under any disability, or to any extent exempt from responsibility, by reason of some special personal condition. In books meant for practical use this method is commonly followed, the disabilities and immunities of infants, married women, and so forth, being explained with reference to the department of law or class of transactions which is the subject of exposition.

Another principle of division frankly based on convenience of exposition is that by which, in dealing either with a whole body of law or with a substantial department thereof, those principles and rules which are found in all or most portions of the subject, so that they may be said to run through it, are disposed of before the several branches are entered upon. Such principles and rules may relate to the nature of duties and rights in themselves, to the con-

dition of their origin, transmission, and extinction (*title*, as we have already used the word [1]), or to the remedies applicable. The setting forth of these matters in advance, so as to avoid repetitions and awkward digressions in the subsequent detailed treatment, is called, after the modern German usage, the General Part of the work in hand. In the Special Part the several topics are dealt with in order, and, the general principles having already been stated, only those rules are discussed which are peculiar to the subdivision in hand, or are in some peculiar way modified in their application to its contents. Thus Savigny's great work on Roman law is only the "General Part" of his projected system. Well framed legislative acts on large subjects usually proceed in some such manner from the general to the special, — thus the Indian Penal Code has chapters of "General Explanations," "Punishments," and "General Exceptions" (that is, the causes for which acts, otherwise criminal, are justified or excused), which come before the definitions of particular offences. The "preliminary" part of Sir James Stephen's Digest of the (English) Criminal Law is a well marked General Part. Again the first six chapters of the Indian Contract Act contain what a Continental writer would call the General Part of the law of contract; namely, rules of law by which the formation, validity, and effect of all kinds of contracts alike are governed in British India. The other chapters, which deal with sale, agency, and other species of contracts, might be called the Special Part of the Act. Notwithstanding the obvious advantages of this method, it has only gradually and of late years come into use among English lawyers, — I do not say in name, which is of little moment, — but in substance. The late Mr. Leake's excellent and accurate "Digest of the Principles of the Law of Contracts" is, however, a complete and systematic General Part for that subject. Where a wide field has to be covered, the method may well be applied on a smaller scale to subdivisions within the general scheme. It is hardly needful to remark that it is by no means necessarily confined to legal exposition; but it is specially appropriate for legal writings, including legislation, by reason of the number of technical ideas and rules of various degrees of generality which, in working out any topic, have to be constantly assumed as within the reader's knowledge.

Frederick Pollock.

[1] In a preceding Chapter.