SOCIAL SECURITY AND SOME RECENT DEVELOPMENTS IN THE COMMON LAW

In a comparative study of the doctrine of abuse of rights,[1] Dr. Gutteridge has thus commented on the principles underlying the decision of the House of Lords in *Mayor of Bradford* v. *Pickles*:[2]

> Our law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism. . . . .

Whether the decision in that celebrated case quite deserves being thus singled out is a matter of some doubt. But the comment just quoted may well serve as a starting point for a discussion of some striking developments by which the courts in recent years have gone far to modify the unrestrained individualism of former years.

It is not possible to discuss here the manifold roots of this individualism: A sociological study would, I believe, have to start from the puritan philosophy of proving man's worth, in the eyes of God, by hard work and earthly gain, as a visible sign of grace, supplemented by the fierce spirit of individual enterprise and gain which marked the era of commercial expansion and the early industrial capitalism. The culmination of this, but, at the same time, the starting point for an antithetic development, is Benthamite utilitarian philosophy, and this philosophy as well as their social and economic background has strongly influenced successive generations of British judges.

It can scarcely be doubted that a strong and unabashed individualism permeates the period of *Pickles' Case*. The same decade is, indeed, marked by a number of notable decisions breathing the same spirit, such as the *Mogul Case*,[3] the *Nordenfeldt Case*,[4] and *Allen* v. *Flood*,[5] all of which, in different ways and with some reservations, affirm the principles of private enterprise and appear to give almost unlimited scope to the pursuit of private economic interests. Only a few years later, Dicey, in surveying the developments of the 19th century, struck a very different note.[6] He noted, not without alarm, the growing force of collectivism in public opinion as well as

[1] 5 Camb. L.J. 22.
[2] [1895] A.C. 587.
[3] [1892] A.C. 25.
[4] [1894] A.C. 535.
[5] [1898] A.C. 1.
[6] LAW AND OPINION IN ENGLAND DURING THE 19th CENTURY (1905).

an increasingly powerful trend of "socialistic" legislation. Yet, as will be shown presently, the individualistic orientation of the law courts continued for many years. It would be interesting to dwell on this time-lag between public and legislative opinion on the one hand and judicial ideology on the other, which has manifested itself so strikingly in American legal history, but is only less obvious in English legal history because of the absence of a supreme written law which embodies fundamental political principles. The present study has the more limited and more practical object of tracing the gradual adjustment of this time-lag and of attempting to define the point which it has reached, at the present time of a social crisis of vast and world-wide proportions. At a time when the issue of social security looms large in plans for a better world, it is a matter of some interest to assess the extent to which the English common law has absorbed such ideals.

This, as any study of ideological foundations of the common law, is bound to be restricted by the casual and haphazard character of the sources, The cases in which English courts openly reveal or discuss the principles on which they decide are very few; but the number of decisions which permits clear deductions of principles, is not very large either; for much of the development which might have infiltrated into the common law, has been absorbed by legislation, by administrative tribunals of a judicial or quasi-judicial character, or, as in the case of many economic and industrial disputes, by arbitration. But it is, perhaps, all the more interesting to analyze the remaining sphere which consists largely though not entirely of what is sometimes called "lawyer's law"; that part of the law which is not a manifest and direct embodiment of political, social and economic reforms, but comprises the bulk of those rules which has, for centuries, remained entirely or predominantly in the hands of lawyers and which, because of its technical complications or of the pressure of urgent and more obvious social reforms, often escapes the attention of the legislator.[7]

The division between "political" and "lawyer's law" is, however, far from absolute. Not only can an apparently technical problem, such as the doctrine of common employment or the valuation of an expectation of life, assume great political and social significance, but in many branches of the law, of which the relation of landlord and tenant is one of the most important, statutory social reforms and common law principles,

[7] *Cf.* Keeton, 58 L.Q.R. 249.

parliamentary or administrative law-making and judicial interpretation, interpenetrate each other in a manner which makes the separation of political and technical law very difficult.[8] It becomes all the more important to assess, as far as possible, the extent to which the administrators of the common law have embodied and applied the momentous development from an all but unmitigated emphasis on private right to the recognition of social duty and collectivism which is one of the major issues of our time. Such assessment is of twofold significance. It means, firstly, a kind of stocktaking and may well enable us to gain a clearer picture of the position of the common law between Legislature and Executive in the general urge for social reform. But it might also reveal the potentialities as well as the limitations of the collaboration of the common lawyer in the adaptation of the legal system to new social needs.

The topics selected for examination have been chosen with a view to illustrate what I believe to be a fundamental point: that, despite the vast theoretical discretion given by such instruments as public policy or general equity, English law courts, when faced with issues touching the foundations of society, have shrunk from an investigation of the issue and have clung to interpretations expressly or impliedly based on the status quo and the established social order; while, on the other hand, in the auxiliary function of interpreting social legislation or developing existing common law duties, they have infused though not without a considerable time-lag and much hesitation, the ideals of a changing society into the existing legal structure.

The first proposition may be illustrated by an investigation of the problems of the abuse of property rights and of public and private interest in economic issues; the latter by an examination of the interpretation of the relation between landlord and tenant, of the legal duties of employers and manufacturers towards employees and the public, and of the judicial attitude towards helpfulness in emergency.

In regard to none of these subject matters, is it possible to deduce, from decided cases anything like a complete philosophy. The scene is like a landscape at night which is only now and then illuminated by lightning; but the lightnings have illuminated the landscape sufficiently for the observer to detect the transformation.

[8] *Cf.* Jennings, 49 Harv. L.R. 426.

I. The Use of Property Rights

Bradford v. *Pickles* is famed mainly for the various passages in the leading judgments which emphasize the right to use one's property to another's detriment, regardless of motive, provided no specific right is injured. The most startling feature of the case is that neither the pleadings nor the judgments in the House of Lords or the Court of Appeal discussed the rights arising from pollution of water, though this was clearly established,[9] and that all the judgments turned entirely on the question of abstraction of water.[10] But since the question of nuisance was thus disposed of by silence, the emphasis—apart from the construction of a local statute—turned entirely on the extent of the legal liberty to do with one's property what one likes. The leading judgments in the House of Lords, have incurred the odium of an excessive consecration of egoism, in the eyes of modern observers more acutely conscious of the social duties attaching to property. But it is submitted that the decision differs in no way and is, indeed, a necessary concomitant of the right to use private property for gain which has been recognized throughout English Law. As Lord Macnaghten observed:[11]

> And it may be taken that his real object was to show that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish and grasping. His conduct may be shocking to a moral philosopher. But where is the malice?

Where, indeed? It would appear that the category of malice is altogether inappropriate to the question at what point the interest of the community is allowed by the law to restrain the interest of the private property owner. It is a matter of conflicting considerations of policy answered differently by different social philosophies. But if the digging of a hole in one's land, with the object of withholding water from use by someone else, is perhaps more visibly unsocial than other uses of property, it differs in no wise from the very widespread and recognized practice of taking "protective" patents which the patentee does not intend to use but takes in order to prevent the possible exploitation of a new invention by someone else. In its conse-

[9] [1894] 3 Ch. 60.
[10] *Cf.* Winfield, Law of Tort, p. 474(0).
[11] [1895] A.C. 600.

quences and dimensions, this practice is undoubtedly much more unsocial than Mr. Pickles' modest action; in either case private property—of land or of a process of manufacture—is withheld from use; but in the latter case the object is usually to safeguard an existing process, often a monopoly, against revolutionary innovations, regardless of the interest of the community which may be deprived of great benefits; in the former, Mr. Pickles merely intended to sell his priority right to the use of percolating water instead of presenting it as a gift. It would, indeed, have been improper to stigmatize Mr. Pickles' conduct as malicious or otherwise illegal, or even as more morally objectionable than that of any commercial or industrial undertaking in a capitalist society. Any different decision pre-supposes a different social valuation. Such social valuation of the extent of private property has, in modern conditions, very largely become a matter for the legislature. The right of private property, in contemporary Britain, is, indeed very much more restricted than at the time of *Pickles' Case*. But it is thus restricted not so much by a different common law theory, as by a multitude of legislative and administrative orders, by taxation, housing legislation, slum clearance orders, Planning Acts, statutory duties, let alone war legislation which, like the Emergency Acts of 1939 and 1940, put the use of property under government orders. How much of this legislative interference will become permanent, is still a matter of controversy; but it is not surprising that the vital changes should have almost entirely passed into the hands of the legislator and administrator rather than of the common lawyer. Little change can, indeed, be registered in judicial developments since *Pickles' Case*. The doctrine of "abuse of right" has recently claimed the attention of several distinguished English jurists,[12] and this bears witness of a largely changed attitude in legal and general opinion towards the respective spheres of private right and community interest. But the net result of the discussions is meagre.

Dr. Lauterpacht is mainly concerned with the use of the doctrine as an instrument for international jurisdiction, but he has not been able to extract from English law, in confirmation of the principle, more than a number of general and often inconclusive dicta.[13] In regard to the use of property, the decisions in *Christie* v. *Davey*[14] and in *Hollywood Silver Fox Farm* v.

[12] *Cf.* ALLEN, LEGAL DUTIES, pp. 95-118; Gutteridge 5 Camb. L.J. 22; LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, ch. XIV.

[13] Loc. cit., pp. 292-4.

[14] [1893] 1 Ch. 316.

Emmett[15] afford limited support to the proposition that an otherwise legitimate use of property may become an actionable nuisance if guided by the desire of annoying a neighbour. This principle becomes part of the rule of "give and take" (*Bamford* v. *Turnley*). Beyond that, English law, despite great changes in legal ideals, has progressed little towards a principle of abuse of right. This is not surprising. Dr. Guttridge has shown that, with the possible exception of the Swiss and the Soviet Codes, the doctrine has not achieved much in the systems which have adopted it. In French law — apart from the "affaire Clément-Bayard" and the theory of M. Josserand—"the view most widely held appears to be that . . . . all that is meant by the theory of abuse is that a man must regard a right which has been conferred on him as carrying with it a duty to refrain from doing any harm to others which can be avoided."[16]

In German law, the result is not very different, though a number of general clauses in the Civil Code vastly increase the judicial power to mould the law in line with changing political and social ideals (a power vigorously exercised by Nazi courts as faithful servants of the political executive).[17] Swiss law is more explicit, and, according to an English study[18] some authors thought of using the principle to outlaw a boycott "as soon as it tends to completely ruin the opponent, because the injury would be out of all proportion to the legitimate purpose of the boycotters." This raises a thorny problem well known to English law[19]; it is not surprising that Swiss judges, despite the modern and progressive character of Swiss law, should have been cautious in the use of the principle and invoked it chiefly "in cases where a defendant is technically liable to an action but the plaintiff is suing on unmeritorious ground."[20] This appears to be little else than a new version of the exceptio doli and is comparable to the discretion exercised, though in a

[15] [1936] 2 K.B. 468.

[16] Gutteridge, loc. cit. p. 35.

[17] Dr. Gutteridge think that, under the Articles 138 and 826, German Civil Code, outlawing actions against "gute Sitten", "Mr. Pickles . . . would have met with a short shrift at the hands of the German judges." I have not been able to discover a decision which would justify this assertion (apart from Nazi law under which any clause can be made to bear any interpretation). There is a decision closely corresponding to that in the *Hollywood Case*, and another which considers as abuse of right the refusal of a landowner to allow the use of a piece of his land which is of no independent practical value, simply to prevent a neighbour from using his property as a depot. But this is a different proposition from that in *Bradford* v. *Pickles* and also from the affaire Clement-Bayard.

[18] DR. IVY WILLIAMS, THE SWISS CIVIL CODE, 95 s.s.q.

[19] *See* Friedman in 6 Mod. L.R. 1.

[20] Gutteridge, at p. 41.

limited field, by English courts, in the grant of equitable remedies (He who comes to Equity must come with clean hands).

In practice, the judicial use of the principle is bound to boil down to the control of rather exceptional cases of people who want to use the law to vent personal grievances or whims. It cannot touch the root problem of the role of private property in society. For this depends on a fundamental social policy determined by the legislator. If, in Soviet Russia, the clause that "civil rights are protected by the law except in those cases in which they are exercised in a sense contrary to their economic and social purpose"[21] may have a more fundamental significance, this is due to the fact that the whole position of private rights in the political and economic structure of the Soviet Union has been completely altered and private rights are, in principle, subject to the overriding needs of the community. Where this is not the case, judges will be reluctant to use a formula that, like all general principles of justice, can gain meaning only in the context of a definite political and social system. In all legal systems, outside the Soviet Union and — in a different sense, the Fascist states — the legal system is still dominated by the recognition of private property and its unlimited use, subject to legislative restrictions. Therefore "abuse of right" cannot mean much more than the restriction of a certain extravagance, unless, as in Fascist countries, this and other general formulas become the instrument of complete judicial subservience to new political masters.

If the principle of abuse of rights were to gain a more comprehensive meaning, it would necessitate a clear definition of the respective limits of private and public interest. If English courts had developed or were to develop a principle that the exercise of private rights must stop where an overriding interest of the public is injured, the doctrine of abuse of right could become the lever for a profound reorientation of many branches of the law. But it is unlikely that English judges will do anything of the sort on their own account. They have certainly not done so in the past.

There is, indeed, one branch of the law where the antithesis of private and public interest has been clearly formulated. Since the *Nordenfeldt Case*[22] it is established law that a restrictive covenant to be valid law must be reasonable between the parties and consistent with the interests of the public.[23] It is equally

[21] Preface to Soivet Code of 1923.

[22] [1894] A.C. 535.

[23] *Cf.* Lord Birkenhead in *McEllistrim's Case*, [1919] A.C. 562 and Lord Macmillan in the *Vancouver Brewing Case*, [1934] A.C. 181.

certain that there is not a single decision of an English court which has invalidated a contract reasonable between the parties as being inconsistent with the public interest. This startling fact is explained by a conscious or unconscious reluctance of the courts to prove the implications of "the public interest." Whenever the problem presented itself, the judges concerned have, indeed, not refrained from some speculation on economic consequences of restrictive covenants, but have invariably resolved the question by adopting the convenient theory that: "the interest of the public is no doubt averse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue."[24]

Two cases in particular presented the problem in a direct form. In the *Adelaide Case*[25] the Judicial Committee had to construe an Australian statute concerned with the "repression of monopolies" and prohibiting, *inter alia*, contracts entered "with intent to restrain trade or commerce to the detriment of the public," and penalising "any person who monopolizes or attempts to monopolize or combines or conspires with any other person to monopolize, any part of the trade or commerce among the States with intent to control to the detriment of the public, the supply or price of any service, merchandise or commodity. . . ."

A number of coal owners had formed an association and concluded a series of agreements by which (a) the board of the association was to fix the selling price of all coal produced by the members, to allot the trade between the members and otherwise regulate conditions of production and marketing and (b) certain shipping companies were appointed sole agents of the associated coal owners for the purposes of their inter-state trade. The Crown prosecuted for infringement of the statute. The decision was in favour of the coal owners. Lord Parker's very elaborate judgment stressed the importance of the restraint of monopolistic price raising in English legal history and admitted the possibility that "a contract of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce. . . . a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent." He also conceded that "ceteris paribus low prices are of advantage to the consuming public, and. . . .

[24] Lindley L.J. in the *Nordenfeldt Case*, [1893] 1 Ch. 646, approved by Lord Haldane in the *Salt Case*, [1914] A.C. at p. 473.

[25] [1913] A.C. 781.

in default of anything to indicate that the prevailing prices were too low to afford the colliery proprietors a reasonable profit, having regard to the capital embarked and the risk involved in their trade, a combination to raise prices would from the standpoint of public interest require some justification." But "the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one."

The actual decision was based on the fact that prices before the agreement had been disastrously low, owing to "cut throat competition, and that the consumers of coal and the public in general had a common interest with the colliery owners in their making fair profits and the miners receiving fair wages and not being thrown out of employment". The actual decision is less open to objection than subsequent decisions, though one looks in vain for an investigation of what a "fair price" is, apart from the observation that too high prices would invariably lead to the trade of the members being lost to competitors outside the vend. But subsequent decisions have invariably applied Lord Parker's suggestion that reasonableness towards the public can normally be concluded from reasonableness between the parties,[26] and where they have embarked on economic speculations, have resolutely refused to go into the question of a fair price and turned the possibility that a restrictive agreement between producers or sellers might be beneficial to the public into a rule. This is most patent in the *Salt Case*.[27] The issue was the validity of an agreement between a combination of salt manufacturers in control of the inland household salt market, formed for the purpose of regulating supply and keeping up prices, and a company which had agreed to sell its output for four years to the combine, at a fixed price. The purchasing price for the combine was 8s.0d a ton, while the selling price to the public was partly 18s.0d, partly 23s.0d a ton. On the interest of the public, Lord Haldane made the following observations:

> It may well be that prices such as 18s. 0d. or 23s. 0d. which were to be charged for the appellant's salt, were fair prices. The fact that the manufacturer is only to receive 8s. 0d cannot, standing by itself, be treated as sufficient evidence to the contrary. For it may well be worth while for a firm like the respondents, which obviously had to

[26] The only notable exception is Lord Parmoor's dissenting judgment in *McEllistrim's Case*, [1919] A.C. 548, discussed in 6 Mod. L.R. 14 *et. seq.*

[27] [1914] A.C. 461.

> face much competition, to take a low price in order to secure a steady market, and the appellant's prices may have been no higher than a manufacturer might under ordinary circumstances have expected to get.

On the distributing arrangement—which in the judgment of of Farwell L. J. in the Court of Appeal[28] "was detrimental to the public who might be hoodwinked thereby," Lord Haldane merely observed that "such distribution arrangements are common in business" and that the business world was capable of taking care of itself. The public was ignored.

Lord Parker was content to observe that the agreement in question "may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by a cut-throat competition." Lord Summer said: "No doubt the difference between the selling price fixed for the producers, and the buying price open to the public is extreme, but we do not know enough of the conditions of competition or of the other elements in the ultimate selling price beyond bare cost of production to act upon it."

Their Lordships were, however, not anxious to acquire more knowledge on this point and largely relied on Lord Parker's suggestion in the *Adelaide Case* that the onus was on the plaintiffs to show that the contract was unreasonable towards the public though reasonable between the parties. Lord Parker relied on the insufficient nature of the facts pleaded by the plaintiff, and Lord Moulton, more specifically, on the point that the issue of illegality was not raised in the pleadings.

> If the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

It is obvious that the House was anxious, for a combination of reasons, not to go too deeply into the matter of "fair price" and "public interest". The issue has never since arisen in so direct a manner, though the formula of the public interest is invariably repeated.[29]

It is worth considering why a court composed of such eminent judges as Lords Haldane, Parker, Moulton and Sumner should have treated so vital a matter in an almost deliberately casual

[28] [1913] 3 Ch. 422, but this part of the judgment is not reported, though referred to by Lord Haldane.

[29] *Cf. Eng. Hopgrowers* v. *Dering*, [1928] 2 K.B. 174; *Vancouver Malt Brewing Co.* v. *Vancouver Breweries*, [1934] A.C. 181.

and, it may even be said, superficial manner. The belief in freedom of private trade and enterprise, hardly shaken before the first World War, certainly played a part. But I suggest that a deeper reason was a reluctance to go, in the course of a judgment, into some of the foundations of the national economic and social order. The alternative is not judicial neutrality towards conflicting economic theories, as Lord Finlay suggested in the *Crown Milling Case*,[30] but the assumption that private interests determine public interest. When faced with a conflict, the courts have always taken refuge in the presumed identity of public and private interest. But only the private interest is thoroughly examined and takes priority. The public remains a vague and unorganised shape.

It is revealing to contrast this attitude with the judicial vigour displayed in the differentiation of restrictive covenants concerning the sale of a business and those concerning restrictions on labour. Here the courts could confine themselves to the interest of the parties and balance, between them, such well-established but often conflicting principles as freedom of labour and freedom of contract. The line of cases which, from *Mason's Case*[31] onwards have invalidated contracts constituting "an embargo upon the energy and activities and labour of a citizen" (Lord Shaw in *Morris* v. *Saxelby*)[32] are indeed part of an increasing tendency, in the House of Lords, to protect the weaker against the stronger individual. This has, gradually, led the House of Lords, from the unqualified support given to the freedom of the stronger in the *Mogul Case*, or the discrimination against workmen's combinations apparent in *Quinn* v. *Leathem* to the recognition of organized groups of producers, employers, professions, traders and workmen as equal bargaining partners facing each other on equal terms, or, as in the *Harris Tweed Case*, even collaborating against an outsider.[33] A parallel development is the strengthening of the employer's legal duties towards the employee. The introduction of new social ideals may go far enough to make possible judicial observations on the "community of interest" between employers and workmen.[34] But the public remains outside. To evaluate the relations between any parties or groups, in the pursuit of their interest, and the community at large, is a task which law courts are unlikely to attempt except under legislative guidance.

[30] [1927] A.C. 394.
[31] [1913] A.C. 724.
[32] [1916] 1 A.C. 714.
[33] *Cf.* the analysis in 6 Mod. L.R. 1-21.
[34] Lord Wright in *Crofter Harris Tweed* v. *Veitch*, [1942] 1 All E.R. 766.

Without it, they will cling to an evaluation which has become established though it may be out of accord with contemporary society. This is a fact which one may welcome or deplore, but which indicates, fairly clearly, the limits of judicial activity.

The limits of the impact which even a strongly professed judicial idealism can make upon the economic foundations of society, is well illustrated by the decision of the House of Lords in *Nokes* v. *Doncaster Amalgam. Collieries.*[35] Does an amalgamation order transferring all the property and liabilities of the transferor company to the transferee company include a contract of service between a coalminer and the transferor company?

The interpretation of a section of the Companies Act, 1929, gave the majority of the House an opportunity of reaffirming, in strong terms, the importance of personal liberty as a principle of the English common law. Lord Atkin put this view forcefully: "I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf." He reinforced this view by pointing out that the amalgamation provisions were devised to simplify the procedure of transferring a multitude of rights, powers, liabilities, etc., but that to include personal contracts would mean to give one class of person, companies under the Companies Act, the power to shake off restrictions binding any other person.

At a time when the personal liberty and the elementary rights of millions of human beings are trampled under foot, this reaffirmation of the freedom of every citizen to decide for himself whom to serve should be treated with respect. But it is certainly powerless to shake the actual power of the modern industrial and commercial combine, nor does it restore to the humble worker — miner or clerk — the factual liberty of choice which he has lost under industrial capitalism. As Lord Romer's dissenting judgment pointed out, it is a matter of accident whether a company loses its identity through amalgamation or, while preserving its legal identity comes under some other company's control, through a change of directors, of managers, or of the controlling interest in the shares. Workers might well regard the question with some indifference. Yet the majority of the House rightly refused to carry the realistic approach to the length of giving its solemn approval to the treatment of a person's service as "property". The emancipation of the serf

[35] [1940] A.C. 1014.

has been the laborious work of centuries: it can get lost in a few months. The decision confirms, however, the powerlessness of the legal administrator to alter the economic foundations of society. Through the acceptance or rejection of certain legal ideals, he may mould and develop established principles in one direction or another; but the judgment of a law court can hardly aspire to challenge the factual power which modern capitalism has given to the big combine, or to give back to the worker a liberty of which the economic system has deprived him. What it can do is to emphasize this power or to tone it down, in the light of legal ideals.

The treatment of a very different problem by the House of Lords illustrates the same problem. In *Benham* v. *Gambling*[36] the House of Lords had to decide the value in terms of damages of the "expectation of happiness".[37] What, in terms of money, was the expectation of happiness of a normal healthy child of 2½, "living in modest but otherwise favourable circumstances in a village, the father having been in continuous employment for fifteen years"? The whole drama of life and of a world in turmoil might have been involved in this problem, and, indeed, Lord Simon's judgment included, among the considerations to be taken into account "the circumstances of the individual life . . . . calculated to lead, on balance, to a positive measure of happiness; the character or habits of the individual; the ups and downs of life, its pains and sorrows as well as its joys and pleasures"; the "settled prospects", etc. But, once again, judicial evaluation stopped at the more tangible tests of individual life. When it came to the foundations of society, to the differences between wealth and poverty, employment and unemployment, stability and insecurity, Lord Simon declared that "lawyers and judges may . . . . join hands with moralists and philosophers[38] and declare that the degree of happiness to be attained by a human being does not depend on wealth or status."

We need not assume that the learned Lord Chancellor, who, in this elegant but authoritative manner, chased away the storm clouds of disorder, strife and social cleavage from the horizon of judicial consideration, was unaware — any more than the other noble Lords who concurred — of the existence of these clouds. The fiction of happiness unaffected by difference in wealth and status was no doubt an outcome of a realiza-

[36] [1941] A.C. 157.
[37] *Cf.* Kahn Freund in 5 Mod. L.R. 81.
[38] Though many famous moralists and philosophers would strongly disagree.

tion of limitations which have, in different fields, prevented English judges from developing the potentialities of abuse of rights or of "public interest". Within an existing framework, the lawyer is well able to adapt the law to new ideals and needs. But when the foundations are reached, action can only be taken by those in charge of the destinies of the people.

It is this insight which has guided the judicial pronouncements of Justice Holmes and those of his colleagues who refused to follow the majority of the Supreme Court in their frequent attempts to superimpose their own social views on those of the legislator.

Most famous of all is Mr. Justice Holmes' dictum in the *Lochner Case* (1905) where the majority decided that a law which limited the working hours of bakers to ten was unconstitutional.

> The case is decided upon an economic theory which a large part of the country does not entertain . . . I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.[39]

If English courts have felt disinclined to use such wide formulas as "public policy" or "public interest" to probe the economic or other foundations of society, they have, in recent years, been much more active in developing and interpreting common law duties in the light of social responsibility as following from the control of property and thus modified, to some extent, the individualism of the common law.

Here, as always, the accidents of litigation have not permitted the full development of an alternative ideology; but the decided cases are sufficiently numerous and significant to give clear indications.

II. Helping Your Neighbour

In a general sense, the common law, until recently, was certainly marked by a robust if not cynical individualism. "Each for himself" meant that, in the eyes of the law, to help someone else in an emergency, was an extravagance which the helper indulged in at his own risk and expense. This applies to commercial as well as to human relations. The doctrine of *negotiorum gestio* is unknown to the common law, except for certain rules of commercial law. The latter has recognized certain cases of agency of necessity. Its most important example is the power

[39] 198 U.S. 75.

and duty of the master of a ship to sell goods in order to save their value, or some part of it.[40]

The only other recognized case is the acceptance of a bill of exchange for the honour of a drawer.[41] In *Hawtoyne* v. *Bourne*[42] Parke B., "archpriest of the legalistic school,"[43] refused to recognize a case of agency of necessity where the manager of a mine had borrowed money to pay wages in order to avert a threat by unpaid miners to seize and sell the machinery and tools of the mine. A decision more discouraging to initiative and resourcefulness can hardly be imagined, from the point of view of the private capitalist no less than of the owner. In *Prager* v. *Blatspiel*[44] McCardie J. pointed out that the doctrine had been repeatedly applied to land carriers. From this, and from the need to apply "existing principles to new sets of circumstances" the learned judge developed a wider principle.[45] An agency of necessity was generally justified where there was "an actual and definite commercial necessity for the sale" and the agent acted "bona fide in the interests of the parties concerned." But Scrutton L.J. poured cold water on this attempt in *Jebara's Case*[46] and denied that agency of necessity could be expanded, at any rate where there was no subsisting agency or a subsisting agency was void. But as Professor Chorley has pointed out,[47] the Privy Council has recently indirectly modified this narrow view.[48] It refused to recognize that commission agents who had accepted part payments from debtors in financial difficulties and given credit for the balance were liable to their principals for the unrecovered balance. The agents had done all they could to get cash, and, in such a case, the onus is on the plaintiff to prove the breach of duty and the damage. Though the decision is, primarily, concerned with the interpretation of a particular agency, it clearly repudiates the views which, in the previously quoted decisions, penalized the zeal and enterprise of agents by throwing the financial burden on them.

The same narrow view has been extended to assistance rendered by one member of the public to another. The unfortunate individual who renders assistance to someone else is

[40] CARVER, CARRIAGE BY SEA, 8 ed., sec. 297.
[41] *Cf.* Lord Esher in *Gwilliam* v. *Twist*, [1895] 2 Q.B. 87.
[42] (1841), 7 M & W. 595.
[43] Chorley, 3 Mod. L.R. 275.
[44] [1924] 1 K.B. 566.
[45] Bankes L.J. in *R.* v. *Electricity Commrs.*, [1924] 1 K.B. 171 at p. 192.
[46] [1927] 2 K.B. 254, 271.
[47] *Loc. cit.*, p. 277.
[48] *Firm of Yokal Chand-Jagan Nath* v. *Firm of Naud Ram Das-Atma Ram*, 55 T.L.R. 15, per Lord Wright.

either a trespasser if he acts on his own initiative,[49] or in common employment with the defendant's servant if he acts at his request.[50] In either case he cannot recover for injuries sustained. This state of affairs becomes all the more shocking when the helpers asked for assistance are youths,[51] or even children of tender years.[52] But it is still the law. It is, however, possible that the House of Lords, which is not bound, may find a way of mitigating this legal cynicism. This could be done by a further restriction of the doctrine of common employment, in pursuance of the restrictive interpretation adopted in *Ribble* v. *Radcliffe*.[53] If bus drivers employed by the same company are not in common employment because the safety of one does not in the ordinary course of things depend on the skill of the other, this reasoning would apply with even more force to the casual association of two people normally not in the same employment. It is unlikely that either the Court of Appeal or the House of Lords, as at present constituted, would be sorry to see the doctrine go. For, in a neighbouring field, the famous decision in *Haynes* v. *Harwood*[54] has already denounced the rigid individualism thus expressed by Scrutton L.J. :[55]

> A man is under no duty to run out and stop another person's horse, and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head.

A wife seeking to protect her husband from further injury,[56] a woman rushing on the road to protect a child of three in her charge from an approaching vehicle,[57] a policeman on duty stopping a runaway horse from injuring playing children[58] have been entitled to recover — provided there is a *prima facie* cause of action, such as negligence. In the absence of unlawful conduct, on the part of the defendant, there is no action. That this new spirit of encouraging instead of penalizing helpfulness will be extended to anyone who, in coming to rescue, acts reasonably and not rashly or does not undertake something quite beyond his powers, is likely. Whether it will be extended to the saving of property, is more doubtful.[59] Even if it were, it

[49] As in *Degg* v. *Midland Railway* (1871), 1 H & N, 773.
[50] *Bass* v. *Hendon U.D.C.* (1912), 28 T.L.R. 317; *Bromiley* v. *Collins*, [1936] 2 all E.R. 1061.
[51] *Bromiley's Case*, *supra*.
[52] As in *Bass' Case* and in *Heasmer* v. *Pickfords*, 36 T.L.R. 818.
[53] 55 T.L.R. 459.
[54] [1935] 1 K.B. 146.
[55] *Cutter* v. *United Dairies*, [1933] 2 K.B. 297, 303.
[56] *Brandon* v. *Osborne & Garrett*, [1924] 1 K.B. 548.
[57] *Morgan* v. *Aylen*, [1942] 1 All E.R. 489.
[58] *Haynes* v. *Harwood*, *supra*.
[59] *Cf.* on this point, Goodhart, 5 Camb. L.J. 192.

would not amount to a recognition of *negotiorum gestio*. The latter, if at all, would be more likely to develop from the extension of agency relations discussed above.

It seems certain that the experiences of war, which, through its extension to civilian life, has, in organized or spontaneous form, spread the idea of mutual assistance in the saving of life and property among millions of people, will, if anything, increase the desire of the courts to reduce as far as possible legal rules which perpetuate an outworn legal ideology.

III. The Duties of Employers Towards Their Employees

The recent development of the law of tort has been marked by a steady strengthening of the duties of employers towards employees. This has been done in various ways, and subject to the limitations of legal change by the development of case law; but the common feature of the various judicial developments is a struggle against the excessive individualism of 19th century doctrines which emphasized the right of property and private enterprise rather than the social responsibilities attached to these rights.

(a) Volenti non Fit Injuria

The doctrine of *volenti non fit injuria* is still part of the law; but the scope of its practical application has been severely reduced.

Firstly, *Smith* v. *Baker*[60] decided that the undertaking of work known to include dangers of injury does not "preclude the employed if he suffers from . . . . negligence (of the employer) from recovering in respect of his employer's duty." Sir F. Pollock has concluded "that the whole law of negligence assumes the principle of *volenti non fit injuria* not to be applicable."[61] In *Dunn* v. *Hamilton*[62] this rather sweeping conclusion was used to exclude the maxim even where a passenger knew the driver to be under the influence of drink.

Secondly, *volenti* is no defence against a breach of statutory duty cast upon an employer.[63]

In its pure form, the defence of *volenti* appears, therefore, to be largely theoretical, at least in actions by employees against employers.

[60] [1891] A.C. 325.
[61] Law of Tort, 14th ed. p. 131.
[62] [1939] 1 K.B. 509.
[63] *Wheeler* v. *New Merton Board Mills*, [1933] 2 K.B. 689.

(b) Common Employment.

The doctrine of common employment is all but universally condemned by present day English lawyers.[64] The House of Lords, though now clearly hostile to it[65] has felt unable to abolish it, but it has gone far in paralyzing it.

Firstly, the doctrine is inapplicable in the case of statutory duties,which are growing in number and importance.[66] Secondly, the decision of the House of Lords in *Ribble's Case* gives a very strict meaning to the test developed by Blackburn J. that "as a natural incident to that service the person undertaking it must be exposed to risk of injury from risk of negligence from other servants of the same employer." Neither two drivers of buses belonging to the same employer, assisting each other on a particular occasion,[67] nor the bus driver and tram conductor of the same employer[68] are in common employment.

Thirdly, the scope of the doctrine, where it remains applicable, is greatly restricted by the extension of the employer's personal duties to the "provision of a competent staff. of men, adequate material, and a proper system and effective supervision"[69], to which must be added the safety of premises.[70] Whenever any of these duties is in question, common employment cannot arise; for it is not the vicarious, but the original liability of the employer which is invoked.[71]

Wilson's Case definitely and explicitly overruled *Fanton* v. *Danville*[72] where the Court of Appeal had, in effect, restricted the employer's liability to that of choosing competent staff.

Fourthly, the defence of contributory negligence, which, in common law, defeats an action for negligence, instead of leading to apportionment, as in maritime law, and which, unlike *volenti*, is a good defence in actions for breach of statutory duties, has been considerably restricted in actions by workmen against their employers, through the test which the House of Lords adopted in *Caswell* v. *Powell Duffryn Assoc.*[73] Only where the plaintiff, "by the exercise of that degree of care which the ordinary prudent workman would have shown in the circumstances, could have

[64] For a recent defence, see Chapman, 2 Mod. L.R. 291.
[65] *Cf. Wilsons & Clyde Coal Co.* v. *English*, [1938] A.C. 57 and *Radcliffe* v. *Ribble*, 55 T.L.R. 458.
[66] *Groves* v. *Wimborne*, [1898] 2 Q.B. 402.
[67] *Radcliffe* v. *Ribble*, *supra*.
[68] *Metcafle* v. L.P.T.P., [1939] 2 All E.R. 542.
[69] *Wilson's Case* [1938] A.C. 57.
[70] *Cole* v. *De Trafford*, [1918] 2 K.B. 523.
[71] Chapman, *loc. cit.*
[72] [1932] 2 K.B. 309.
[73] 55 T.L.R. 1004.

avoided the result of the defendant's breach of duty", is his remedy barred. Fatigue, strain of work, etc., must be taken into account. A miner, after an underground shift, is not expected to show the same degree of care as in ordinary conditions.

(c) Extension of Statutory Duties

Whereas the liability imposed upon the employer by the Workmen's Compensation Act is independent of any breach of duty, an increasing number of statutes have imposed specific obligations for the safety of employees. The benefit of these obligations for the employees has been reinforced by the courts, through the refusal to entertain evidence on the question of negligence. The fact of the breach determines conclusively the standard of care.[74] "Statutory negligence" is thus a misnomer, at least for all those who, unlike the present author, consider strict and non-strict liability as still clearly distinct.[75]

IV. Duties of Property Owners to the Public

The greatest share in the huge expansion of the law of tort, in the last eighty years, is due to the growth of liability imposed upon mobile and static, productive and unproductive property. The development of the common law, in this as in other branches, has not touched the foundations of private property; but it has developed, in various ways, the social responsibilities attaching to the use of property in modern industrial and traffic conditions. A detailed survey of these developments would fill the greater part of a modern treatise on the law of tort. It is sufficient here to refer to some striking aspects of this growth.

The rule in *Rylands* v. *Fletcher*, as Prof. Bohlen in particular has pointed out[76] was designed to protect neighbouring property owners from the risks of industrial user of property.[77] As shown elsewhere[78] it had been developed so as to protect the public in general. Consequently it more and more overlaps with nuisance[79] and negligence which have been developed to meet similar needs. Three urgent social needs have been met by a development of negligence: the safety of the employee by the gradual building up of the employer's common law duties, as described above;

[74] *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A.C. 1.
[75] *Cf.* 1 Mod. L.R. 39.
[76] Studies in the Law of Tort.
[77] For a modern example, see *Western Engraving Co.* v. *Film Laboratories*, [1936] 1 All E.R. 106.
[78] 1 Mod. L.R. 45.
[79] For a modern use of nuisance in this sense, see *Andreae* v. *Selfridge*, [1938] Ch. 1.

the protection of the user and consumer against the risks of modern mass products by the rule in *Donoghue* v. *Stevenson;* and the protection of the general public against modern traffic by the general action of negligence. I have attempted to show elsewhere[80] how these different actions converge more and more towards a modern conception of social insurance which makes the older distinction between strict and non-strict liability largely irrelevant and is more and more based upon an idea similar to that of the French "risque créé". The control over manufacture, premises, the supply of utilities, such as water or gas, entails a legal responsibility commensurate with the risk created.

This trend is reinforced by the considerable expansion of statutory actions granting damages to those designed to be protected by the statute. These statutory remedies interlock with and are supplemented by common law actions granted to those not protected by the statute itself.

The persons protected by a statute in the sense that they are entitled to sue in damages for a breach, may be employees (as normally in cases of industrial safety provisions), or certain members of the public (as in *Monk* v. *Warbey*[81], where the third party whose insurance the Road Traffic Act of 1930 made compulsory on the car owner, was entitled to sue as a person protected by the statute). But where the statute fails either because it is held to provide no other remedy except a penalty[82] or because the plaintiff does not belong to the class of persons protected, a common law action for negligence may yet succeed: and the range of this action has been greatly widened by the rule in *Donaghue's Case*. Lord Atkin, in his powerful dissenting judgment in *East Suffolk Rivers Catchment Board* v. *Kent*[83] emphasised this distinction between specific statutory duties and general common law duties, while also deprecating the privilege granted by the majority to public bodies acting under discretionary statutory authority. In two recent cases of water poisoning[84] the authority responsible for the purity of the water was held liable in damages to persons who did not enjoy the specific protection of the statute.

V. The Landlord's Privileges and Statutory Duties

In many fields the common law is now supplemented by reforming statutes; but judicial interpretation largely decides

[80] *Cf.* 1 Mod. L.R. 39: 3 Mod. L.R. 309; 4 Mod. L.R. 139, 308.
[81] [1935] 1 K.B. 75.
[82] For a recent example, see *Square* v. *Model Farm Dairies*, [1939] 1 All E.R. 259.
[83] [1940] 4 All E.R. 527.
[84] *Read* v. *Croydon Corp.*, 55 T.L.R. 212, and *Barnes* v. *Irwell Valley Water Board*, 54 T.L.R. 815.

how far the statutory reform will modify the common law which it set out to reform.

The mutual rights and obligations of landlords and tenants are essentially a creation of the common law; but the reforming legislator has modified them by superimposing certain obligations, in protection of the "underdog." Prominent among the immunities conferred by the common law upon the landlord are: the absence of any implied warranty of fitness for habitations on the part of landlords of unfurnished houses[85] and the immunity of a vendor or lessor of houses from liability to a third party on the premises.[86]

The first has been qualified, for working-class houses, by an Act of 1925, re-enacted in the Housing Act, 1936, which implied a statutory warranty to keep the house "in all respects reasonably fit." But, in two respects, the spirit and ideology of the common law superimposed itself on this statutory reform. On one hand, a steady line of decisions has treated the statutory warranty as being of a contractual character. The result was that in *Dunster* v. *Hollis*[87] the rule which exempts from the landlord's covenant to repair any part of the house retained in his possession was extended to his liability under the statutory warranty; that, in *Morgan* v. *Liverpool Corporation*[88] the Court of Appeal unanimously held that no damages could be recovered for a defect unless notice as required by common law was given (through the Housing Act says nothing of this and though the defect may be latent); and that, in *Ryall* v. *Kidwell*[89] the tenant's daughter could not recover, because the statutory obligation was of a contractual character and therefore only enforceable between the the parties. Against settled habits of thought, "the spectacle of the contradictions and difficulties bound to result from treating as contractual, i.e. based on mutual consent, a term added to the lease regardless of the actual or presumed wishes of the landlord has been of no avail."[90]

On the other hand, the presence of numerous rats[91] did not appear, to Salter J., as making a working-class house unfit for habitation, while the proposition that a defective sash cord which made the window fall and crush the plaintiff's hand should come under the statutory fitness warranty appeared to Lawrence L.J.

[85] *Chappell* v. *Gregory* (1863), 34 Beav. 250.
[86] *Robbins* v. *Jones* (1863), 15 C.B. (N.S.) 221; *Cavalier v. Pope*, [1906] A.C. 428.
[87] [1918] 2 K.B. 795.
[88] [1927] 2 K.B. 131.
[89] [1914] 3 K.B. 315.
[90] J. Auger, in 5 Mod. L.R. 270. *Cf.* also, J. C. Williams, 5 Mod. L.R. 212.
[91] *Stanton* v. *Southwick*, [1920] 2 K.B. 642.

as "somewhat fantastic." The attitude underlying such decisions is that expressed by Salter J. when he observed[92] that "the standard of repair required by those Acts is naturally for those purposes" (of avoiding slums, overcrowding and herding together in conditions unsuitable for human habitation) "a humbler standard." Such interpretation which emphasises the depressed status of the poorer classes, will not today be widely accepted and it is also subject to Lord Wright's criticism,[93] quoted below. The House of Lords has already repudiated the approach to statutory reforms outlined above by its decision in *Summers* v. *Salford Corporation*.[94] The Court of Appeal, in this case, had restated, again by a majority, the view also held by a majority in *Morgan's Case* that the breaking of a sashcord which crushed the plaintiff's hand while she was cleaning the window in a house protected by the fitness warranty of the Housing Act, did not prevent the house from being "in all respects reasonably fit for human habitation." The House of Lords, however, followed the line considered as "somewhat fantastic" by Lawrence L.J. in *Morgan's Case* but substantially in accord with the view of Atkin L. J. who, on that point, had differed from the majority in *Morgan's Case*. It held that the standard of fitness could not be measured rigidly and purely quantitatively. Nor can the test be that of the magnitude of the repairs required. "A burst or leaking pipe, a displaced slate or tile, a stopped drain, a rotten stair tread may each of them, until repair, make a house unfit to live in, though each of them may be quickly and cheaply repaired" (Lord Atkin).

"In a place like Salford windows in a poor neighbourhood must be cleaned from time to time if people are to live in the rooms at all. These elementary needs must in my opinion be capable of being satisfied if a house is to be regarded as fit in every respect for human habitation. The section must, I think, be construed with due regard to its apparent object, and to the character of the legislation to which it belongs. The provision was to reduce the evils of bad housing accommodation and to protect working people by a compulsory provision, out of which they cannot contract, from accepting improper conditions. Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object . . . . 'In all respects' must mean in all respects material to the enjoyment of the tenant, and the unfitness of one room may be a most

[92] *Jones* v. *Green*, [1925] 1 K.B. 659.
[93] In *Rose* v. *Ford*, [1937] A.C. 826.
[94] (1942), 59 T.L.R. 78.

material detraction from that enjoyment. Human habitation is in contrast with habitation by pigs, horses or other animals, or with use as warehouses, and the like. But I think it also imports some reference to what we call humanity or humaneness" (Lord Wright).

These opinions are characterised by social evaluations different from those of Salter J. quoted above, or the majority in *Morgan's Case*. The tendency is to bridge and not to underline the gap between Belgrave Square and Bermondsey,[95] and a contributing factor to this development may be that, in the second world war, destruction from the air has visited Belgrave Square and Bermondsey alike. In another respect too, the decision indicates a significant change of outlook. Notice of the defect had, in this case, been given, and the principal point of the decision in *Morgan's Case* did not arise. But Lord Atkin observed on the necessity of notice "that different considerations may arise in the case of an obligation to repair imposed in the public interest, and I think that this question must be left open. I reserve to myself the right to reconsider my former decision if the necessity arises." Lords Thankerton and Romer also desired to reserve this question and left it open whether *Morgan's Case* was rightly decided.

These dicta seem to indicate fairly clearly an impending abandonment of the contractual interpretation of statutory obligations imposed for social improvement "in the public interest." This would, indeed, give a further impetus to the reorientation of the courts in their approach to statutory reform measures superimposed on the common law. In regard to the breach of statutory duties, the House of Lords has recently reaffirmed[96] its determination not to test a breach by the common law standards of negligence and strictly distinguished criminal guilt from civil liability. Statutory obligations must be considered on their own merits and with a view to the object of the statute in question.[97] While this implements the criticism expressed by Lord Wright of "a tendency common in construing an Act which changes the law, that is to immunise or neutralize its operation by introducing notions taken from or inspired by the old law which the words of the Act were intended to abrogate and did abrogate,"[98] it also marks another step in the gradual adoption, by the courts,

[95] *Cf. Sturges* v. *Bridgman* (1879), 11 Ch. D. 865.

[96] *Potts* v. *Reid* (1942), 111 Law Journal (L.R.) 65, reaffirming *Lochgelly* v. *M'Mullan*, [1934] A.C. 1.

[97] A very interesting parallel to this reduction of the domination of contract is the gradual freeing of quasi-contract from the misunderstandings caused by the "implied contract theory." *Cf.* now the *Fibrosa Case*, 58 T.L.R. 308.

[98] *Rose* v. *Ford*, [1937] A.C. at 846.

of the principle of social responsibility as the corollary of the control of property. Seen from this angle, the manufacturer's liabilities to the consumer, under the rule in *Donoghue* v. *Stevenson*, the landlord's liabilities to the tenant, under the Housing Act, the employer's liabilities to employees, whether imposed by statute or by common law (*Wilson's Case*) all seem to fit into a pattern. This development marks, incidentally, a return, from the principles of statutory interpretation prevalent in the 19th century, to those of *Heydon's Case*.[99]

By a variety of means, the common law has thus strengthened the responsibilities of those who, as manufacturers, employers, car owners, public utility providers, etc., are in a position to influence the lives and safety of their fellow citizens. It has not touched the rights of private property and enterprise as such; any change that has occurred in this respect has been the work of the legislator, but it has given recognition to the evaluation of public opinion and current conceptions of society in balancing the use of these powers and rights by a growing number of legal duties to those affected by it.

In political terms, the effect of this change might be summarised by saying that the common law has moved from an ideology of unrestricted property right as the corollary of the early phase of capitalism—to an ideology of social reformism, as the corollary of a tamed and controlled capitalism.

It has therefore paved the way for a further development in which the numerous types of legal duties devised for social protection may be co-ordinated into a comprehensive system of social insurance, which would be administered by the State. That, indeed, is the suggestion of the Beveridge Report on "Social Insurance and Allied Services," published in November, 1942.

The Report proposes the unification of social insurance under a Ministry of Social Security, including provision for industrial accidents and its extension to all persons in gainful occupations (including housewives) as well as to all causes of disablement—not only industrial accidents.

This means that for at least two important branches of the law of tort—general accidents caused by negligence, and industrial accidents in respect of which an employee has a common law claim against the employer—the question of alternative remedies arises. The regulation of the relations between common law remedies and social insurance is a matter of great complexity, and beyond the scope of this study. But we should realise that

[99] *Cf.* in further support, Scott L. J. in *The Eurymedon*, [1938] P. at p. 61.

the proposed change would be one of a quantitative extension, systematisation and a change in administration rather than of principle. The common law of today has, to a large extent, absorbed and incorporated the ideal of social security.

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