INTRODUCTION

This introduction explains the structure of this book. It is the scheme pioneered by Professor Peter Birks (inspired most by his beloved Gaius). He was anxious to stress that it is nothing more than 'the best currently available hypothesis as to the structure of our law'.[3]

The scheme is arrived at by first subdividing the whole law into private and public. English public law deals with constitutional law, human rights, administrative law, and criminal law. It is the subject-matter of the companion volume in this series and is outside our present concern.

English private law is best viewed as concerned with the rights which, one against another, people are able to realize in courts. There is then a threefold division corresponding to three questions that may be asked about realizable rights. Who can have rights? What are the rights? What are the means by which the rights are realized in court? We therefore arrive at a threefold subdivision between the *law of persons*; the law of rights; and the law of actions for the realization of rights, which in modern parlance can be labelled '*litigation*'. The trichotomy corresponds to, but is not identical to, the Roman proposition to the effect that the concerns of private law are persons, things, and actions.[4]

Two further adjustments are then made in order to arrive at the threefold division used in this book.

First, one needs a general introduction (applicable to both public and private law) as to what counts as law and that, more specifically and practically, identifies the *sources of law*. This is Part I.

Secondly, the law of rights, which requires the most detailed examination, can be helpfully divided according to who the rights can be enforced against (the question of 'exigibility'). Some rights can be demanded only from the person against whom they first arise or against someone who stands in that person's shoes and thus represents him. Some rights are by contrast, more widely demandable and, of those, some follow things and can be demanded from any person in whose hands the thing is found. When names are added, this makes a division between rights *in rem*—that is, proprietary rights—whose exigibility depends on the location of a thing (in Latin a *res*), and rights *in personam*—that is, personal rights—which are rights exigible only against the person against whom they originally arise or that person's representatives.[5] Rights realizable in court are therefore proprietary or personal. *The law of property* is

[3] Introduction to the First Edition, xxxv.

[4] Justinian, *Institutes* 1.1.4: 'there are two aspects of this study, public and private…Our business is private law'. And 1.2.12: 'All the law we use concerns persons, things, or actions'.

[5] It must not be allowed to escape notice that the subdivision of rights between *in rem* and *in personam* is not exhaustive. A category which is omitted is the category of rights which are good against all people but do not follow any *res*. All of these are superstructural rights which manifest themselves in the wrongs which infringe them. Thus the right to bodily integrity is protected through the torts which are committed against the body, and the right to reputation is protected by the torts of defamation. Such primary rights are 'superstructural' in that they provide the superstructure over the wrong: every wrong is the infringement of a primary right. Not every primary right is a right *in rem*. A primary right can be *in rem, in personam* (say, from contract), or, to give the residue a name, 'purely superstructural'. For the rights of a beneficiary under a trust, which are not easily classified using just the division between personal and proprietary rights, see 4.145–4.153.

the law of proprietary rights;[6] and, as personal rights correlate with obligations, the category of all personal rights is called *the law of obligations*. The law of property and the law of obligations are the two great pillars of private law.

The subdivision of rights between property and obligations brings us to our fivefold division. Private Law is about: I Sources, II Persons, III Property, IV Obligations, V Litigation.

Part IV is itself structured according to the main causative events of personal rights, namely contract, wrongs and unjust enrichment. So chapter 8 looks at contract in general and chapters 9–16 examine specific types of contract (agency, sales, carriage, insurance, banking, employment, and bailment). Chapter 17 then deals with torts and equitable wrongs and chapter 18 is on unjust enrichment.

No such straightforward 'causative events' division of Part III is possible because the focus has to be as much on the different types of proprietary right (which Birks referred to as the 'content question') as on the events by which proprietary rights arise. So a good deal of the general chapter on property (chapter 4) and the separate chapters on security and intellectual property (chapters 5 and 6) is concerned with kinds of property right. Chapter 7, on succession, is directed to a causative event, death, and the sub-species of that event, death intestate and death testate.[7]

Birks summarized his explanation of the structure of this book as follows:

> Our business is with the rights which a claimant can if necessary realize through the courts. Part I, with its single chapter on sources of law, is an essential introduction. Part II separates out the study of persons who hold rights. At the other end, Part V deals with the realization of rights. Part III and IV are about the rights themselves. Part III is about property rights. Part IV is about personal rights, called from their negative end, obligations. Property and obligations divide in response to the question which asks against whom rights can be demanded. At lower levels within Part III the treatment of property rights is ordered primarily by two questions, the content question and the causative event question: To what is the right-holder entitled? And, From what events does the right arise? Within Part IV the treatment of obligations is dominated by the latter question: From what events do obligations and their correlative rights arise?[8]

In conclusion, however, it is important to emphasize that Birks was not suggesting, and nor are we, that this structure should be rigidly followed. On the contrary, there are various 'concessions to convenience' as Birks labelled them.

> It does not follow from the need for a structural overview that in its application there can be no concessions to convenience. The important thing is to know what the scheme is, when it is being departed from, and why. Rigorous purity would have brought the whole project to the ground. A more liberal attitude has been adopted. There are a number of places where such concessions have been made, whether to avoid affronting expectations based on longstanding practice or simply because of the extreme inconvenience of separating two consequences of a single causative event. For example, the contract of sale is treated in the law

[6] There is a constant tension between the law of property in the strict sense—the law of proprietary rights—and a loose sense in which 'property' means nothing more than 'assets' or 'items of wealth', hence cars, clothes, money, land, and so on. In this latter sense 'property' engulfs most of the law of obligations, since personal rights can also be regarded as assets. My claims against others are valuable, and many of them can indeed be sold for money—ie, they can be assigned. 'Factoring' or 'debt-factoring' is a business based on buying up, at a discount, the debts owed to others.

[7] Chapter 7 (Succession) co-ordinates with that part of the general discussion of property in ch 4 concerned with acquisition *inter vivos* but also with the acquisition of security rights (part of ch 5) and intellectual property rights (part of ch 6).

[8] Introduction to the First Edition, xliii.

of obligations, where it properly belongs. Obligations arise from contracts and from other events, and sale is a specific contract. A rigid interpretation of the scheme would say that the passing of property under a sale could not be mentioned at this point. The reader should simply be remitted to the law of property. Nevertheless, the chapter on sale does include its own discussion of the proprietary effects. The same is true of the chapter on bailment. Similarly, the chapter on unjust enrichment is considered within the law of obligations, but the effects of unjust enrichment in generating proprietary rights are also considered at some length and are not remitted to the law of property. Again, personal security, though it rests entirely on obligations, is treated alongside mortgages in Chapter 5 within the law of property, and obligations arising from entering into family relationships are considered in Part II on the law of persons and are not postponed to Part IV on obligations. Too many such concessions would dissolve the scheme, but a limited number can be tolerated.[9]

[9] Introduction to the First Edition, xlix–l.