



Articles

LAW REFORM IN ENGLAND

CLIVE M. SCHMITTHOFF*

I

In a series of lectures entitled *The Challenge of Law Reform* the late Chief Justice of New Jersey, Arthur T. Vanderbilt, spoke these memorable words:¹

Over the centuries, what we call Anglo-American freedom for the individual, has been won partly on the field of battle, partly in legislative halls, but for the most part in the courts of law. It constitutes the great contribution of lawyers and judges to our civilization and to human happiness.

That the common law has been able to make this great contribution to the happiness of the individual, is due to a remarkable attitude of its judges and legislators to the concept of law and its function in society. They have never regarded law as an unalterable monument but have always recognized that it is a living force which is subject to continuous change and growth. Consciously or subconsciously, they have been alive to the need for the law to adapt itself to the changing social and economic circumstances of the time, if it is to perform its function of providing a just and generally acceptable regulation of conflicting interests within the community. The law, said McCardie, J., in a case decided in 1924:²

. . . must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law.

In that sense the reform of law is a continuous process.

The normal techniques of law reform are the enactment of new legislation and the evolution of case law. The contribution of the former to the rejuvenation of the law is obvious, although it is given to few reformers to realize their vision of what the law ought to be to the same extent, down to matters of detail, as was the case with F. E. Smith. It will be remembered that in 1895 Smith, after having obtained a First in the Honours School in Jurisprudence in Oxford, took his B.C.L. in that

*Principal Lecturer in Law, the City of London College. An address given on the occasion of the fiftieth anniversary of Manitoba Law School, Winnipeg, on October 17, 1964.

1. Arthur T. Vanderbilt, *The Challenge of Law Reform*, Princeton, 1955, p. 36.

2. *Per* McCardie, J., in *Prager v. Blatspiel, Stamp and Heacock Ltd.*, [1924] 1 K.B.566, at p. 570.

University only with a Second because he gave a wrong answer to a question founded on the rule in *Shelley's* case;³ his reaction was typical: "When I am Lord Chancellor," he said, "I shall abolish that rule," and exactly thirty years later, when, as Lord Birkenhead, he placed the great reform of land law on the statute book, he did so.⁴ The deliberation with which judges, within their province, accept the challenge of law reform, is clearly expressed by Scrutton, L. J., who once said:⁵ "If there is no authority for this, it is time that we made one."

II

While the processes of law reform are continuous, the pace of law reform varies. There are times in which progress is slow; the waters of law reform appear to be stagnant and an air of Blackstonian complacency appears to envelop the thinking of the legal profession. There are other periods in which the tide of reform flows fast, in which the bold spirits prevail over the timorous souls and a spark of Benthamite zeal inspires the legal profession. It is a curious coincidence that these periods of rapid and radical change appear to occur in English legal history approximately every hundred years and at the end of the century. Thus, the second half of the eighteenth century witnessed the incorporation of the law merchant into the common law by Lord Mansfield and his special juries, a bold and unprecedented innovation which was the expression of England's aspiration to become the leading mercantile nation of that time. The epitome of that age of law reform was spoken by Buller, J., in his famous panegyric upon Lord Mansfield in *Lickbarrow v. Mason*.⁶

Within these thirty years the commercial law of this country has taken a very different turn from what it did before . . . Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury; and they produced no general principle. From that time, we know, the great study has been to find some certain general principle which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the understanding.

In the second half of the nineteenth century a radical and unprecedented law reform was carried out by the Victorians. In the retrospective, we may say that the two most important measures of that reform were the merger of the courts by the Judicature Act, 1873, and the general admission of the limited liability company. The former reform was the work of two great lawyers, Lord Selborne and Lord Cairns, who,

3. (1582) 1 Rep. 88b, 1 Rep. 936.

4. A. L. Goodhart, "Law Reform," in *Law Reform and Law Making*, Cambridge, 1953, p. 19.

5. In *Ellerman Lines Ltd. v. Read*, [1928] 2 K.B. 144, at p. 152.

6. (1787) 2 T.R. 63, at p. 73.

although political opponents, were agreed on the need for a reform of the administration of justice which may be expressed in the words of King Lear:⁷

Thou robed man of justice, take thy place, and thou, his yoke-fellow of Equity, bench by his side.

The latter reform was the merit of Gladstone but the suggestion that the last word of the company's name should be "Limited" was made by the later Lord Bramwell; he was an enthusiast for that word and when the Limited Liabilities Act, 1855, was passed said: "Write the word 'Limited' on my tombstone."⁸ No legal reform has contributed so much to the wealth of Great Britain by releasing enterprise and initiative, as the general admission of the joint stock company, and none has been so widely imitated. However, at the end of the nineteenth century it was not yet evident that these were the outstanding features of the Victorian law reform. This can be seen from the twelve lectures arranged by the Bar Council in 1900 and 1901 under the title *A Century of Law Reform*.⁹ The features of Victorian reform which then were regarded as outstanding, were described by W. Blake Odgers, Q.C., as follows:¹⁰

All this is now changed . . . Parliament passes 150 Acts a year, which an ungrateful country leaves religiously unread. A policeman stands at every corner, except when we want him. One government official kindly analyses our food and drink for us, and tells us how unwholesome it is. Another makes us nervous by explaining that milk is a marvellous fertile matrix for diphtheritic germs. A third kindly mentions that the death rate was higher than usual last week in our parish, while a fourth obligingly publishes what the weather will or will not be tomorrow.

III

As we are advancing into the second half of the twentieth century, the scene appears again to be set for comprehensive law reform in England. The purpose of my observations is to indicate briefly the key points likely to be affected by that reform.

First, however, let me mention the sociological factors which have made the mind of the English lawyer again receptive for a general re-appraisal of his legal system. They are two in number: at home, social progress and abroad a reawakening of the international conscience. At home, the England of the fifties and sixties presents a picture of material affluence which has not been matched yet by spiritual renaissance. The England of the fifties and sixties has continued her march towards the realization of the ideal of social justice and the welfare state, but the relatively crude call of the forties for social security, for national health and legal aid, has given way to the more sophisticated demand for social

7. *King Lear*, Act III, Scene VI.

8. *Palmer's Company Law*, 20th ed., p. 8, n. (17).

9. London, 1901.

10. *Ibid.* p. 4.

protection. Protection of all kind, consumer protection, extensive protection of the hire purchaser, protection against monopolies and restrictive practices, protection against resale price maintenance, protection of the depositor and the small investor, all these types of protection have one feature in common: a further evaporation of the nineteenth century concept of freedom of contracting, not only for reasons of economic inequality of the bargaining power of the contracting parties but also because some sections of the population are unwilling or unable to make use of their remaining bargaining power and to negotiate the terms of contract; in that sense the law has now to intervene to protect the public against its own improvidence. In that situation the eternal modern conflict between individual freedom and state intervention is as acute as ever and the vigilance of the courts to hold the balance between the state and the individual must be as unrelenting as before. On the international level, a new attitude is discernible as the result of technical progress. Man has lost his sense of distance and, in the true sense of the word, the world has become his parish. Nations can no longer live an introvert life but have to take notice of the realities of the international situation. Indeed, the reconciliation of the concept of the national state with the responsibilities towards international society is one of the great challenges of our time. The trend towards internationalism has led to the creation of two regional organizations in Europe, the European Economic Community and the European Free Trade Association. The European Economic Community has as its aim the economic unification of Europe as a preliminary step to the political union of its members in a United States of Europe. The European Free Trade Association, a looser organization of purely economic character, does not aspire at a general limitation of sovereignty in its constituent members. It is, in particular, the European Economic Community, with its aim of "laying a material foundation for a European renaissance,"¹¹ which has made a profound impression on European legal thought, an impression which has radiated beyond the frontiers of the Common Market and has had its influence upon traditional common law thinking.

The following examination of the topics in which great changes in English law, comparable to those that took place at the end of the eighteenth and nineteenth centuries, might be expected is naturally selective. It will exclude a discussion of topics that are not within my particular field of interest, such as Criminal Law, Family Law and the Law of Property.

IV

1. *The Appointment of Law Commissioners in Britain.* The first topic which calls for attention is the suggestion that we in Britain should have a Ministry of Justice, as exists in many other countries. That

11. Emile Benoit, *Europe at Sixes and Sevens*, New York, 1961, p. 1.

suggestion is not new. The creation of such a Ministry was proposed not only by Bentham, but also by Lord Langdell, M.R., in 1836,¹² by Lord Westbury, L.C., in 1857,¹³ and by Lord Haldane, L.C., in 1918.¹⁴ This suggestion has acquired topicality because it has been taken up again in a book of which Lord Gardiner, the present Lord Chancellor, is the joint author.¹⁵ We read there:¹⁶

It is difficult to think of a rational argument against re-naming and re-organizing the Lord Chancellor's Office as a Ministry of Justice; the argument based on tradition is purely emotional and the further argument that the independence of the judiciary is imperilled in the countries which have a Ministry of Justice is ill-founded.

With great respect to the learned authors of that book, I cannot agree with them. First, although they refer to some of the distinguished jurists who have expressed themselves in favour of the suggestion to create a Ministry of Justice in Great Britain, they have failed to give the catalogue of the equally distinguished lawyers who have raised their voice against that suggestion. These opponents include Lord Birkenhead, L.C.,¹⁷ Lord Hewart, C. J.,¹⁸ Lord Schuster,¹⁹ for many years Permanent Secretary to the Lord Chancellor, and Professor A. L. Goodhart.²⁰ Secondly, the view that the independence of the judiciary would not be imperilled if there were a Ministry of Justice, cannot be accepted without reservation. While it is not denied that in countries which have Ministries of Justice, such as, for example, France, judges are independent, it may be stated, paraphrasing George Orwell's famous saying, that all judges are independent but some are more independent than the others. In brief, it all depends on what is understood by the independence of the judiciary. In an article published in 1935, an American scholar, H. S. Bacon, points out²¹ that although on the surface the French judiciary is independent, this is not true in fact due to the powers exercised by the French Minister of Justice which are:

. . . so extraordinary . . . and openly and covertly used by it that a bare statement of them could hardly be made plausible without first giving some idea of the curiously ductile medium in which these powers work.²²

That concept of judicial independence is, of course, entirely different from that traditionally accepted in England where judicial independence is, in the last resort, founded on the fact that the legal profession is self-

12. *Hansard*, 3rd series, vol. 34, cols. 447-450.

13. Nash, *Life of Lord Westbury*, vol. 1, p. 190.

14. *Sixth Report on Evidence* (Cmd. 7832 and 8130).

15. Gerald Gardiner and Andrew Martin, *Law Reform Now*, London, 1963.

16. *Ibid.*, p. 7.

17. Lord Birkenhead, *Points of View*, London, 1922, vol. 1, pp. 108-109.

18. Lord Hewart, *The New Despotism*, London, 1929, pp. 110-111.

19. Lord Schuster, "Problems of Legal Administration," *II Política* (1937), p. 239.

20. In an address entitled "Law Reform" delivered before the Holdsworth Law Club, Birmingham, on March 7, 1952.

21. H. S. Bacon, "On a Ministry of Justice," 22 *Virginia Law Review* (1935), pp. 175-176.

22. This is a reference to the *procureur* (representing the *Ministère Public*) in the ordinary French courts and the *commissaire du gouvernement* in the French administrative courts.

governing. Thirdly, and most important, the main question is what could a Ministry of Justice do in Britain that is not done already by the Lord Chancellor's Department? It could certainly perform one function which would be of the greatest merit: it could initiate and promote proposals for law reform until they are placed on the statute book. In that respect administrative judicial machinery is sadly inadequate in Britain but, as will be indicated later, it is not necessary to constitute a Ministry of Justice to remedy that defect.

We have had in England from time to time excellent suggestions for the modernisation of our law presented in the reports of the various committees to which particular questions were referred but only too often these proposals remained buried in the Reform Reports or were carried out only after inordinate delay. In 1937 the Law Revision Committee suggested the repeal of the Statute of Frauds, 1677;²³ it took seventeen years for the proposals to be carried into effect by the Law Reform (Enforcement of Contracts) Act, 1954. In the same Report the Law Revision Committee suggested a drastic amendment of the doctrine of consideration; today, twenty-seven years later, these proposals have not been adopted yet; characteristically, we read in the latest edition of *Cheshire and Fifoot on Contracts*:²⁴

The doctrine of consideration was reviewed as a whole and critically discussed by the Law Revision Committee in 1937. Its Report was examined at some length in previous editions of this book. But in view of the time that has now elapsed since the publication of the Report and the slender chance of its belated adoption, this examination has now been omitted.

The doctrine of common employment was established in 1837 in *Priestley v. Fowler*;²⁵ in 1939 Lord Atkin said²⁶ that it "is looked at askance by judges and text-book writers," and MacKinnon, L. J., said in 1943²⁷ that "lawyers who are gentlemen have long disliked it" but the doctrine was abolished only in 1948.²⁸ Better fared the recommendations of the Mocatta Committee on Cheque Indorsement which proposed the abolition of indorsement of cheques, subject to certain conditions. They were published in November 1956,²⁹ and given legislative effect by the Cheques Act, 1957,³⁰ but, one suspects, only because Mr. R. Graham Page, a distinguished lawyer and member of Parliament, was able to introduce that measure as a Private Member's Bill.

The indifference to well-considered recommendations of Law Reform Committees discloses a real defect in the British machinery of reform. To remedy it, we may expect the appointment of Law Commissioners in

23. *Sixth Interim Report of the Law Revision Committee, 1937*, Cmnd. 5449.

24. *Cheshire and Fifoot, Law of Contract*, 6th ed., 1964, p. 92, n. (2).

25. (1837) 3 M. & W. 1.

26. In *Raddiffe v. Ribble Motor Services Ltd.* [1939] A.C. 215 at p. 223.

27. In *Speed v. Thomas Swift & Co. Ltd.* [1943] K.B. 557, at p. 569.

28. By the Law Reform (Personal Injuries) Act, 1948.

29. Cmnd. 3.

30. See J. Milnes Holden, "The Cheques Act, 1957," in [1957] *Journal of Business Law*, p. 357.

Britain.³¹ They will be lawyers holding a permanent position who will be charged with the duty of initiating and promoting measures of law reform.³² These Law Commissioners should co-operate closely with specialist practitioners and academic lawyers, preferably through the medium of a law institute or law centre at which research can be carried out. The Law Commissioners should have power to initiate reform measures and to supervise their promotion in Parliament and, where the measures are of minor and non-political order, a simplified procedure, such as reform by delegated legislation, should be admitted.

2. *Creation of Commonwealth Institutions.* The second domain in which we may expect a profound change in English legal thinking concerns the organization of Commonwealth relations. That requires some explanation. The English lawyer, as is well known, has an innate distrust of institutionalism. He is reluctant to create institutions unless he is compelled by events to do so. In constitutional law our disinclination to have a written constitution and our preference for constitutional conventions expresses that pragmatic approach. True, the common law has not fared badly by adopting that often misunderstood passive attitude. Maitland truly observed that "stumbling forward in their empirical fashion, [English lawyers] blundered into wisdom." Even in modern times the pragmatic approach has stood us in good stead. It has enabled us to transform the Commonwealth from a colonial empire into a free association of independent nations, founded on invisible though no less strong bonds, particularly of a common language, a common way of life, a common ideal of freedom, and a common concept of justice. But in the second half of the twentieth century we are beginning to wonder whether our reluctance to institutionalize has not gone too far and our inclination to stumble forward in an empirical fashion—which, after all, is merely a euphemism for "muddling through"—has not on occasion left us behind the advance made by others. If we look at the imposing institutions set up by the European Economic Community in advance of the proper operation of that organization we have to admit that that institutional zest has served the Community well. Its institutions, the Council and the Commission, the Assembly and the Court, and the numerous Committees, have generated an atmosphere in which the Community spirit was nourished and it was that will to succeed that has enabled the Community to survive in the face of great vicissitudes. The European development has demonstrated the value of institutions as such and, in particular, their self-perpetuating tendency. We in Britain have begun to understand that, particularly in relation to Commonwealth affairs.³³ We have begun to realize that the precious treasure of the legal

31. This prediction has become a reality by the passing of the Law Commissioners Act, 1965.

32. See Gerald Gardiner and Andrew Martin, *Law Reform Now*, pp. 8-10.

33. This prediction has likewise proved to be correct: the Prime Ministers' Conference of June, 1965, has constituted a Commonwealth Secretariat.

tradition which we share with the countries of the Commonwealth calls for adequate institutions to preserve that heritage for the benefit of future generations. I understand that the British Institute of International and Comparative Law is contemplating the issue of a series of *Commonwealth Law Reports* in which the main decisions of the Commonwealth countries will be collected. There are plans for the long overdue transformation of the Judicial Committee of the Privy Council into a Supreme Commonwealth Court. I should further like to see the formation of a permanent Commonwealth Law Commission which could render valuable service in maintaining the coherence of the various legal systems applied in the Commonwealth. A Commonwealth Law Commission could perform services similar to those performed in the Scandinavian countries by the Nordic Council that has done so much for the unification of Scandinavian Law. The Commonwealth Law Commission need not be sponsored by the governments of the Commonwealth countries; it could be founded and supported by professional bodies and law schools in the Commonwealth. It would provide a valuable medium for research into the comparative law of the Commonwealth and enable Commonwealth lawyers to maintain close personal contact.

3. *The Codification of the Common Law.* The perennial, though somewhat theoretical, question whether the Common Law should be codified, is being discussed again in England. Since Bentham, from his premises of rationalism and utilitarianism, argued the case in favour of codification, it has been raised from time to time. We read in *Law Reform Now*,³⁴ to which reference has been made earlier:

There is an extremely strong case for the progressive codification of English Law in the sense of reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject.

With great respect to the learned authors of that admirable book, their argument appears to miss a fundamental point, *viz.* the basic conception which the common lawyer has of the relationship between law and life, and which has been discussed earlier. The differences between the purposes of codification in the civil law and the common law are well known:³⁵ speaking generally, the codes of the civil law, aim at "a carefully arranged and closely integrated compilation of general principles";³⁶ the codes of the common law attempt to consolidate case law or statute law of past years which has become too cumbersome or contradictory to be administered easily. In that sense, a good deal of English law has already been codified. Lord Wright, in his lecture on "The Common Law in

34. Gerald Gardiner and Andrew Martin, *Law Reform Now*, p. 11.

35. See the observations of Rudolf B. Schlesinger in his *Comparative Law*, 2nd ed., Brooklyn, 1960, pp. 172 *et seq.*, in particular, on p. 177: "The very meaning of the word 'code' depends on whether it is used by civilians or by lawyers brought up in the common law tradition."

36. Joseph Dainow, "The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems," in 37 *Indiana Law Journal* (1961), p. 39.

its Old Home," given on occasion of the Tercentenary of Harvard University,³⁷ pointed out that the parts of English law which at present are still uncodified are: contract, tort, quasi-contract, some general common law maxims or principles, rules of interpretation, rules of evidence, rules of equity, and the conflict of laws. He then continued:³⁸

I do not think a codification of what is left uncodified in the common law and equity would be of much service in England. I should prefer to see the law of contract, tort, quasi-contract, equity, *et cetera*, develop on its own lines as before. When I think of the enormous development of the common law in the last one hundred years, I am glad to think it was not then codified; still more so, if I go back to Blackstone's day or Coke's day.

In my view, these words, spoken in 1937, still hold good today. They provide the answer to those desirous of seeing the whole body of the common law codified. Only in one respect has the passage of time wrought a qualification on Lord Wright's view. The law of tort has become so unwieldy and complicated that its codification might be the only way of reducing it to a logical and workable instrument of practice. However, considering recent developments in that branch of law, such as *Gourley's* case,³⁹ the *Wagon Mound*,⁴⁰ and *Hedley Byrne v. Heller*,⁴¹ it might well be a matter of controversy whether it is already ripe for codification.

4. *The Reform of Stare Decisis.* Another fundamental tenet of English law likely to undergo considerable change is the rule of the binding force of precedent. The crux of the problem is that the House of Lords considers itself to be bound by its own decisions and thus denies itself the elementary function of judicial law reform possessed by most other supreme courts in the world. It is sometimes said that the reason for that attitude of the House of Lords is to make the law certain. That explanation is as unsatisfactory as the pious fiction that the judge does not make law but only applies it. The law of the United States or of France is not less certain than that of Great Britain although the Supreme Court in Washington and the *Cour de Cassation* in Paris are not bound to follow their own precedents. The true reason for the strict adherence to *stare decisis* by the House of Lords, as far as its own decisions are concerned, is political. The rule is not older than seventy years; it was first established in 1898.⁴² At that time there still lingered in the minds of the judges the memory of the great clash between Parliament and the judiciary that came to a head in *Stockdale v. Hansard*⁴³ and in the case of the *Sheriff of Middlesex*.⁴⁴ To avoid such conflict in future the notion that the courts

37. In *The Future of the Common Law*, Harvard Tercentenary Publications, Cambridge (Mass.), 1937, p. 76.

38. *Ibid.*, pp. 77-78.

39. *British Transport Commission v. Gourley*, [1956] A.C. 185.

40. *The Wagon Mound*, [1961] A.C. 388.

41. *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

42. In *London Street Tramways Co. v. L.C.C.* [1898] A.C. 375. See Clive M. Schmitthoff, "The Growing Ambit of the Common Law," in 30 *Canadian Bar Review* (1952), pp. 51 *et seq.* Further, see G. Dworkin, "Stare Decisis in the House of Lords," in 25 *Modern Law Review* (1962) 163.

43. (1839), 9 Ad. and E. 1.

44. (1840), 11 Ad. and E. 273.

must not usurp the function of the legislature was taken to its logical—and absurd—conclusion: it was laid down by the House of Lords that that court, at the apex of the judicial pyramid, was absolutely bound by a previous ruling of its own even if, as the result of changing circumstances, that ruling had become manifestly unjust. Change in the law, even though entirely non-political, had to be carried out invariably by the legislature. The political implications of *stare decisis* were clearly expressed by Mr. Justice H. H. Davis, of the Supreme Court of Canada:⁴⁵

We in Canada hold firmly the doctrine of the sovereignty of Parliament and deny the theory of the supremacy of the Courts. This, I take it, is an impressive contribution of the Common Law of England to the power of parliamentary institutions in Canada. The will of the people, expressed by their elected representatives in Parliament, governs unfettered by judicial interference or restraint.

That statement correctly represents not only the Canadian but the English point of view.

The strict application of the rule of *stare decisis* was breached by the great decision of the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.*⁴⁶ I characterized the effect of that decision in 1952 as follows:⁴⁷

The qualifications which had been placed on the principle of *stare decisis* in the Court of Appeal have completely changed the character of that rule in modern English law. The rule of precedent has now become infinitely more realistic and relative but performs still its function of being a stabilising factor in the case law system. It will be seen that nowadays the strength of the rule is relative. It varies in the various courts; it is strongest on the top and weakest at the base of the judicial hierarchy. The full strictness of the rule is thus asserted only after the legal proposition and issue has, in the law courts, gone through the laboratories of judicial experience and its value has been tested by the process of trial and error. That relativity of strength is the principal feature of the qualified rule in the post-war period; it justifies the statement that *the modern rule of precedent is a rule of relative strength*.

This early recognition that the strict form of *stare decisis* has given way, in the post-war period, to the *relative rule of precedent* has been amply justified in the twelve years which have passed since those words were written. Indeed, the relative character of the rule of *stare decisis* has become more pronounced because the 1898 doctrine itself has been attacked in the House of Lords with increasing frequency. In 1959 Lord Denning said in a dissenting judgment:⁴⁸

It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedents at the expense of fundamental principle.

45. "The Common Law in Canada", in *The Future of the Common Law*, Harvard Tercentenary Publications, Cambridge (Mass.), 1937, p. 173.

46. [1944] K.B. 718; aff'd. [1946] A.C. 163.

47. In "The Growing Ambit of the Common Law", *loc. cit.* in n. (42), *ante*, on p. 58.

48. In *London Transport Executive v. Betts*, [1959] A.C. 213.

And in 1962 Lord Reid observed:⁴⁹

Unlike most supreme tribunals, this House holds itself bound by its own previous decisions . . . I have on more than one occasion stated my view that this rule is too rigid and that it does not in fact create certainty . . . I would certainly not lightly disregard or depart from any *ratio decidendi* of this House. But there are at least three classes of case where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision.

Out of court, great English judges have argued even more strongly in favour of the relative form of *stare decisis*, amongst them Lord Wright,⁵⁰ Lord Evershed, M.R.,⁵¹ Lord Denning⁵² and Lord Reid.⁵³

There is no doubt that before long the relative rule of *stare decisis* will be fully admitted even in the House of Lords. If the highest court is unable to effect that change itself, it will be necessary for Parliament to pass a brief statute to that effect. I should like to see the following solution adopted: the House of Lords, sitting as a full court, should have discretion to alter its own decisions. By way of practice or convention it should exercise that discretion only if satisfied that the alteration does not involve a political or controversial issue, *i.e.* it should do so only in the *Priestley v. Fowler*⁵⁴ or *Elder Dempster & Co. Ltd. v. Paterson, Zochonis & Co. Ltd.*⁵⁵ type of cases, but not in the *Rookes v. Barnard*⁵⁶ type of cases. It can safely be left to the discretion of the highest court to find the delimitation between the functions of judicial and parliamentary law reform.

5. *The Interpretation of Statutes.* In this field we might expect a great change in the judicial attitude in England in the second half of the twentieth century. The common law judge, at least in England, adopts a strict attitude to statutes when interpreting them: the wording of an enactment must be construed according to its literal and grammatical meaning; if the legislator has failed to express his intention clearly in the statute itself, let him enact another statute which, it is to be hoped, will make clearer what the first statute failed to do. That attitude of disinclination, if not unconscious hostility, to statute law, has its root in history, as Professor Joseph Dainow explains:⁵⁷

Since an Act of Parliament was a law that had to be applied, every statutory enactment constituted that much restriction of what was otherwise the domain of the common law . . . The courts sought to minimize the infringement of "their" common law, and this resulted in the establishment of a very strict interpretation of statutes.

49. In *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446, at pp. 475-476.

50. "Precedents," in 4 *University of Toronto Law Journal* (1942) 247, at p. 249, and in 8 *Cambridge Law Journal* (1943), 118, at p. 144.

51. *The Court of Appeal in England*, London, 1950, p. 17.

52. *From Precedent to Precedent* (Romanes Lecture, 1959), Oxford, 1959, pp. 22 *et seq.*

53. Hansard 1956-57, 203 H.L. Deb. col. 262 (Second Reading of the Occupiers' Liability Bill).

54. (1837) 3 M. and W. 1.

55. [1924] A.C. 522. In *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446, the House of Lords did not consider that its decision in that case involved an alteration of the *Elder Dempster* principle, but *quæres*.

56. [1964] A.C. 1129. Here again, the House of Lords did not think that an alteration of previous decisions, *i.e.* the conspiracy cases, was in issue.

57. Joseph Dainow, *op. cit.* in n. (36), *ante*, pp. 40-41.

In recent years the strict maxims of interpretation have already been relaxed in the English courts. The Canadian scholar G. V. V. Nicholls observed rightly that:⁵⁸

The convention that living authors should not be cited [was] dead in England even if it [was] not yet completely buried.

As far as the interpretation of statutes is concerned, it is noteworthy that in a recent decision, *Scottish Co-operative Wholesale Society Ltd. v. Meyer*,⁵⁹ the House of Lords unanimously agreed to give "a liberal interpretation"⁶⁰ to s.210 of the Companies Act, 1948, a section designed to provide a remedy against the oppression of shareholders by other shareholders. Viscount Simonds, a judge who cannot be accused of judicial heresy, rejected the argument that s.210 had to be interpreted in a strict, grammatical manner.⁶¹

If this section is inapt to cover such a case, it will be a dead letter indeed. I have expressed myself strongly in this case because, on the contrary, it appears to me to be a glaring example of precisely the evil which parliament intended to remedy.

In the next few years we shall probably witness the disappearance of the last vestiges of exaggerated strictness in the interpretation of statutes in the English courts and a greater willingness, in harmony with the intentions of Parliament, to adopt a liberal and, on occasion, even extensive interpretation of statutes. That does not mean that the English courts will be prepared to take notice of *travaux préparatoires* and speeches in Parliament, like the courts of the European continent. It means that the last, slight, subconscious antagonism towards statute law will go, and a more trustful interplay will develop between the functions of judicial and parliamentary law-making. Only in two fields of law the restrictive and limiting interpretation of statute law must firmly be preserved: in criminal law and in the law of taxation.

6. *The Rise of the Concept of Public Interest.* I further wish to draw attention to a new concept in English law which is likely to be developed and refined in the remaining decades of this century. That is the concept of the public interest. That notion must be distinguished from the familiar connotation of public policy which we meet, for example, in the rule that a contract which infringes public policy is illegal. Unlike public policy, the term "public interest" does not carry an inherent element of opprobrium. The new concept of public interest is used to indicate the wide—and growing—area in which Parliament has regulated certain activities of private persons in the social and economic sphere because it considers such regulation to be desirable for the common weal. Arrange-

58. G. V. V. Nicholls, "Legal Periodicals and the Supreme Court of Canada", 28 *Canadian Bar Review* (1950) pp. 48, 61.

59. [1959] A.C. 324.

60. *Per* Lord Denning, *ibid.* p. 369.

61. *Ibid.*, p. 343.

ments which are contrary to the public interest, in that sense, are normally prohibited by Parliament, but the courts are entrusted with jurisdiction to grant exemption from the general prohibition in certain more or less closely defined instances, referred to in modern legal terminology as "gateways". By that technique the application of the judicial process has been extended, with great promise, from the traditional, purely legal problems to the economic and social sphere.

A typical illustration of this development occurs in the anti-trust legislation of Great Britain. Britain, like other European countries, is a latecomer in the field of anti-trust legislation. Her attitude to monopolistic and restrictive practices differs from that of American and Canadian law. Whereas in those legal systems every monopoly and trade combination is regarded as an evil, the essence of British legislation is to distinguish between good and bad combinations, to separate the wheat from the chaff. To achieve that end, the British Restrictive Trade Practices Act, 1956, provides that, on principle, a restrictive trading arrangement to which the Act applies shall be contrary to public interest,⁶² but that it may be justified before the Restrictive Practices Court. If it passes through one of the gateways defined in s.21(1)(a) to (g) of that Act and, at the same time, is not unreasonable, the court will uphold it. The British restrictive trade practices regulation has been described by leading American authorities⁶³ as representing "a most ingenious and to date surprisingly effective amalgam of registration and judicial procedures."

A similar interaction of parliamentary prohibition and judicial justification of individual agreements has been adopted by the Resale Prices Act, 1964. That Act provides that certain contractual terms establishing minimum resale prices shall be unlawful as being contrary to the public interest, but gives the Restrictive Practices Court jurisdiction to exempt certain goods from the general prohibition if those who wish to retain the minimum price arrangement can justify it on one of the grounds carefully defined in s.5(2) of the Act.

The notion of the public interest has further been invoked with respect to the contemplated control of mergers. It has long been evident that some mergers which have taken place in recent years in British industry may not have been justified on economic grounds and may have had harmful results. A government White Paper⁶⁴ proposes a re-constituted Monopolies Commission which should be empowered to investigate proposed or recently completed mergers and states⁶⁵ that "the Government contemplate directing the Commission's attention to certain considerations to which it should have regard in particular cases in assessing where the public interest lay."

62. Unless excepted by the Act.

63. W. S. Surrey and C. Shaw, *A Lawyer's Guide to International Business Transactions*, Philadelphia, 1963, p. 650.

64. *Monopolies, Mergers and Restrictive Practices*, Cmnd. 2299 (March, 1964); for comment and criticism see [1964] *Journal of Business Law*, 102-105. The suggestions of the White Paper have not been followed by the Monopolies and Mergers bill, 1965: see [1965] *Journal of Business Law* 89.

65. *Ibid.*, para. 24.

7. *Miscellaneous Reform Suggestions.* The categories of law reform, to paraphrase Lord Macmillan's famous words,⁶⁶ are never closed. I will restrict myself to mention a few further topics in which we may expect important changes in the law.⁶⁷

(a) In the *law of contract*, we may expect the abolition or, at least a considerable modification, of the doctrine of consideration⁶⁸ which, in the words of *Alice in Wonderland*, has become curiouser and curiouser with the passage of time. In 1881 Sir George Jessel, M.R., commented thus on that doctrine:⁶⁹

According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19s.6d. in the pound.

He then went on to say:

As every debtor had not a stock of canary birds or tomtits, or rubbish of that kind, to add to his dividend, it was felt to be desirable to bind the creditors in a sensible way.

In commercial practice the doctrine of consideration is often disregarded, as is evinced by the rules governing confirmed bankers' commercial credits which are commonly used as a mechanism of payment for export sales;⁷⁰ by no stretch of imagination can it be argued that consideration moves from the seller to the confirming bank, and nevertheless no English court would countenance the defence of the confirming banker that there was absence of consideration, as far as his obligation was concerned.⁷¹ Generally speaking, however, the doctrine is still an active force in English law, as was recently shown by *Scruttons Ltd. v. Midland Silicones Ltd.*^{72a} A change in the doctrine of consideration would also remove the anomaly of English law that a man is not bound by his offer, even though he made it expressly "firm" unless the offer is contained in a deed or he received consideration for it. In modern commercial practice, "firm" offers have become very frequent, as is recognized by the American Uniform Commercial Code which contains provisions regulating them.⁷² Of course, in Great Britain, as in all other countries of the world, no honourable business man would avail himself of that loophole in the law but nevertheless it is still there and a liquidator or trustee in bankruptcy might, on occasion, regard himself bound to revoke a "firm" offer. A reform of the doctrine of consideration would likewise affect the rule that, on

66. *Donoghue v. Stevenson* [1932] A.C. 562, at p. 619.

67. For further details see the Editorial on "An Era of Law Reform?" in [1964] *Journal of Business Law* 196.

68. *Cf.* p. 230, *ante*.

69. In *Couldery v. Bartrum* (1881) 19 Ch. 394, at pp. 399, 400.

70. Clive M. Schmitthoff, *The Export Trade*, 4th ed., London, 1962, pp. 211 *et seq.*

71. *Hamzeh Malas & Sons v. British Imex Industries, Ltd.* [1958] 2 Q.B. 127.

71a. [1962] A.C. 446.

72. Uniform Commercial Code (1962 Official Text), s. 2-205.

principle, acceptance by post speaks from the date of posting and not from that of receipt.⁷³

Further, it appears to be likely that the proposals of the *Report of the Law Reform Committee on Innocent Misrepresentation*, published in 1962,⁷⁴ will be enacted. If that is done, the effect of misrepresentation in English law will be this: there will be three types of misrepresentation, *viz.* fraudulent, innocent but negligent, and innocent but not negligent; in the former two cases damages can be recovered but in the third case the sole remedy will be, as before, the rescission of the contract, if that is still possible. The need for that reform is particularly pressing, since *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*⁷⁵ has admitted, in some instances, an action in tort for negligent statements resulting in financial loss, and it is desirable that the contractual remedies be brought into line with the tortious ones.

Thirdly, English lawyers have long felt that where two innocent persons have suffered loss as the result of the fraud of a third person, the solution offered at present is inadequate.⁷⁶ The present solution is founded on the concept of property: the owner is protected and the other innocent party is the loser. The answer to that question often depends on the highly technical⁷⁷ and sometimes fortuitous consideration whether property has or has not passed to the fraudulent person. Devlin, L.J. (as he then was) in *Ingram v. Little*⁷⁸ referred to the "modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law" and continued:⁷⁹

I believe it would be useful if Parliament were now to consider whether or not it is practicable by means of a similar act of law reform to provide for the victims of a fraud a better way of adjusting their mutual loss than that which has grown out of the common law.

Fourthly, a major unsolved problem in the English law of contract is the treatment of exception clauses⁸⁰ by which manufacturers, dealers, or other suppliers of goods or services exclude or limit their common law liability. The wide-spread use of these exception clauses represents in many instances an abuse of economic bargaining power. The Molony Report on Consumer Protection⁸¹ felt compelled:⁸²

. . . to view the practice as a general threat to consumer interests, in the sense that heavy and irrecoverable loss may fall on the consumer who is unlucky enough to get a defective article.

73. *Cf. The Sources of the Law of International Trade*, ed. by Clive M. Schmitthoff, London, 1964, p. 15.

74. *Tenth Report of the Law Reform Committee (Innocent Misrepresentation)*, Cmnd. 1782; see Philip S. James, "Innocent Misrepresentation: An Unanswered Challenge," in [1963] *Journal of Business Law* 207.

75. [1964] A.C. 465.

76. This applies, in particular, in the case of the "kited" car, *i.e.* of the car obtained from the owner by a fraudulent buyer and resold by the latter to a *bona fide* purchaser, see [1964] *Journal of Business Law* 194.

77. That technical aspect has not been made more easy by *Car and Universal Finance Co., Ltd. v. Caldwell*, [1964] 2 W.L.R. 600, although many lawyers will welcome the result at which the Court of Appeal arrived in that case, from the point of view of substantial justice.

78. [1961] 1 Q.B. 31.

79. *Ibid.*, at p. 74.

80. See Brian Coote, *Exception Clauses*, London, 1964.

81. *Final Report of the Committee on Consumer Protection* (July 1962), Cmnd. 1781.

82. *Ibid.*, para. 427.

The courts have not freed themselves sufficiently from the nineteenth century interpretation of the principle of freedom of contracting to deal with that threat satisfactorily. They grant relief in some instances, for example, if the exception clause is repugnant to the main object of the contract or if the party who wishes to rely on it has committed a fundamental breach of contract, and they interpret these clauses restrictedly, but they have not developed a general principle relating to them, such as Lord Denning suggested extra-judicially when saying:⁸³

The only way which I can see to remedy this state of the law is for the courts to treat these conditions as they would bye-laws: and to hold them valid if they are reasonable but invalid if they are unreasonable.

If the courts—regrettably—feel unable to develop such a general principle, statutory law reform will have to give the community the protection it needs.

(b) In the *law relating to the sale of goods* we shall witness considerable alterations. Modern developments have produced a fission of sales law into two parts: the law of sale of goods in the home market and the law of international sales. In the former sphere the requirements of consumer protection, to which I have already alluded, will have to be given statutory force. It will, in particular, be necessary to prohibit, as the Molony Committee suggests,⁸⁴ the “contracting out” of the conditions implied by the Sale of Goods Act, 1893. In the latter sphere, on April 25, 1964, a Convention on the Unification of Law governing the International Sale of Goods was concluded at the Hague; the United Kingdom and the U.S.A., but not Canada, have signed that Convention. Its introduction into the municipal law of the signatory powers would be a welcome first step to the unification of the international law of sales, in spite of the imperfections of the Convention which has failed to deal adequately with the trade terms commonly used in international sales transactions.⁸⁵

These two diverging tendencies in sales law will mean an amendment of that masterpiece of parliamentary draftsmanship, Sir MacKenzie Chalmers' Sale of Goods Act, 1893. The insufficiency of the Hague Convention on International Sales may further require the creation of a British Export Sales Act which will consolidate the case law of our courts on trade terms and related matters in a manner similar to the relevant provisions of the American Uniform Commercial Code.⁸⁶ When Chalmers drafted the Act of 1893, these matters were not ripe for consolidation but the position is different in the second half of the twentieth century.

83. Sir Alfred Denning, *The Road to Justice*, London, 1951, p. 91.

84. Molony Report (see n. (81), ante), paras 440-460; Recommendations Nos. 97-100, 102.

85. See Clive M. Schmitthoff, *The Unification of the Law of International Trade*, (Gothenburg School of Economics and Business Administration Publications No. 5 of 1964), Gothenburg, 1964, p. 19.

86. Uniform Commercial Code (1962 Official Text), Art. 2, particularly ss. 2-319 to 325.

(c) In *company law* we hope to see a far-reaching reform comparable to the reforms which eventually found expression in the great Companies Acts of 1862 and 1948. The view is widely held by British lawyers that the suggestions of the Jenkins Committee on Company Law Reform⁸⁷ are too tame and have failed to measure up to the challenge of our times.⁸⁸ The next British Companies Act will not only extend the requirements for disclosure of accounts and protection of minority rights but it may introduce two innovations: first, the statutory distinction between public and private companies may be abolished, subject, however, to the power of the Board of Trade to grant companies exemption from the obligation to file their accounts. Secondly, I believe that eventually we shall have a Companies Commission which, like our Monopolies Commission, will be the guardian of the public interest. That Commission will be different from the American Securities and Exchange Commission but, like the latter, its main object will be to operate as a watchdog of investors and other persons who might be affected if the facilities given by company law to promoters or managers are abused. There is still much opposition in Britain to the idea of a Companies Commission in as much as our Stock Exchange exercises a strict supervision over quoted companies but I believe that in the end the need to protect the public against abuse will become so cogent that the duty to protect it will have to be entrusted to a public body and a separation of the marketing and supervisory functions of the Stock Exchange will become unavoidable.

In addition we hope that the next Companies Act will be a thoroughly simplified code from which the dead wood encumbering the present enactment will be ruthlessly removed. The excellence of our company law will become more evident when its formal presentation will be simplified.

V

These few indications of the fundamental changes which we may expect of the great reform of English law in the second half of the twentieth century may suffice. These changes will modernize and develop the common law but they will not alter its spirit and substantive fabric. They will be necessary to enable the common law to continue its great task of being a bulwark of individual freedom and an instrument of impartial justice. Nobody saw the need for continuous and vigilant law reform clearer than the greatest of all common lawyers, Sir Edward Coke. He concluded his *Institutes* with the words with which I will end this talk:

I shall heartily desire the wise-hearted and expert builders (justice being *architectonica virtus*) to *amend* both the method or uniformity and the structure itself . . . and we will conclude with the aphorism of that great lawyer and sage of the law—Edmund Plowden—which we have heard him often say):
"Blessed be the amending hand."

87. Cmnd. 1749 (1962).

88. "The Aims of Company Law Reform", in [1964] *Journal of Business Law* 296.