

## LAW, JUSTICE AND EQUITY \*

I take it to be axiomatic that the law is concerned at all times to promote justice. What is justice, and how it is to be discerned, are questions which have exercised the minds of civilised men for centuries, and I do not propose to add my small voice to what has been said by others more learned than I in examining those questions; rather, I intend to consider the extent to which it is possible for the law, at any given moment in time, to accord with justice, i.e. to produce a result which would be generally regarded as sensible and fair.

It is readily apparent, as I believe any lawyer will admit, that law and justice do not always coincide. In *National Provincial Bank Ltd. v. Ainsworth*<sup>1</sup> the House of Lords held that a wife deserted by her husband does not by virtue merely of his desertion acquire any proprietary interest in the matrimonial home, so that, if the home is owned by the husband alone, he may sell it to a purchaser or mortgage it to a mortgagee, who may in either case recover possession against the wife, however distressful may be her personal situation.<sup>2</sup> Two members of the House of Lords<sup>3</sup> were only too painfully aware that the decision might be regarded as unjust, and suggested amending legislation, which in fact soon followed. Why can this divorce of law from justice come about? Why are the two notions not synonymous?

There are, of course, instances of perverse decisions by the judges. For example, in England it seemed for some time that the rational working of the breathalyser test would be frustrated by decisions which required extreme technical perfection and speed in administering the test on the part of the police;<sup>4</sup> happily, later decisions seem to have struck a more even balance.<sup>5</sup> Of Canadian cases, if an Englishman may be so bold, I would point to the melancholy line of cases holding that once by an instrument, such as a will, a gift has been made absolutely in favour of a person, that gift cannot be cut down, for example, to a life interest, by subsequent clauses in the instrument;<sup>6</sup> these decisions, in my view, fail to give effect to the principle that an instrument be construed as a whole, and manifestly fail to give effect to the intention of the donor. I wish to suggest, however, that there are a number of perfectly valid, or at any rate unavoidable, reasons for the partial separation of law from justice, all of which can be subsumed under the general observation, probably a cliché, that we live in an imperfect world in which absolute justice cannot be achieved. In the first place, it would be idle to deny that luck (or what Bertrand Russell calls "contingency") plays a part in law as it does in other walks of life. The personality of the judge hearing a particular case, or of the advocate arguing his client's case, or even the state of his or their digestion that particular day, are fortuitous

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1 [1965] A C 1175

2 The decision is obviously inapplicable in those Canadian provinces which have homestead legislation which protects a spouse against unilateral disposition by the other spouse (the veto power) see, for example, the Dower Act, R.S.M. 1970, c.D100, s.3. But in Ontario, where the right to dower in inchoate until the owner spouse's death, the decision in *Ainsworth* has been followed: see, for example, *Stevens v Brown* (1969), 2 D.L.R. (3d) 687; *Re Smyth and Smyth* (1969), 3 D.L.R. (3d) 409.

3 Lords Cohen and Upjohn, [1965] A.C. 1175, at pp. 1228F and 1241B, respectively. The consequent legislation is the Matrimonial Homes Act 1967, considered further at pp. 4 and 39, *post*.

4 For example, the decision of the House of Lords in *Rowlands v Hamilton*, [1971] 1 All E.R. 1089.

5 For example, the decision of the House of Lords in *Reg. v Sakhuja*, [1973] A.C. 152.

6 For example, *Re Hornell*, [1945] O.R. 58; [1945] 1 D.L.R. 440; *Re Robinson*, [1931] 1 D.L.R. 289; [1930] 2 W.W.R. 609; *Re Kane*, [1934] 3 D.L.R. 637; [1934] 2 W.W.R. 202; *Re Dawson Estate*, [1941] 1 D.L.R. 790; [1941] 1 W.W.R. 177; cf. *Re Schumacher* [1971], 20 D.L.R. (3d) 487, *affd.*, [1974] 38 D.L.R. (3d) 320, and consider also *Hancock v Watson*, [1902] A.C. 14.

circumstances which may well influence the result in a borderline case.<sup>7</sup> Again a statute changing the law will seldom have retrospective effect, so that a person with a problem dealt with by the statute but arising after its coming into force will, rather capriciously from one point of view, be treated more favourably than a person with a similar problem before the statute. For example, the Matrimonial Home Act 1967, which was enacted as a result of the decision in *National Provincial Bank Ltd. v. Ainsworth*,<sup>8</sup> and which gives a spouse with no other interest in the matrimonial home a proprietary right to occupy, came into force on January 1, 1968,<sup>9</sup> with only prospective effect, and therefore did nothing to remedy the grievance of Mrs. Ainsworth.<sup>10</sup>

Secondly, the law is not infrequently faced with situations, dilemmas, in which one of two innocent persons must undoubtedly suffer. The classic case is the sale induced by fraud, where A, by representing himself to be a person of known integrity and standing, fraudulently induces B to sell valuable property to A, and to allow A to take away the property in return for A's worthless cheque; meanwhile, A re-sells the property to an innocent purchaser, C, and A disappears. B. and C. are both victims of A's activities, and one of them must suffer the loss; justice cannot be done to both, unless in the future we succeed in devising some universal form of social insurance, which would require a political decision and a massive injection of public funds.<sup>11</sup>

Thirdly the law is prevented from reaching ideal solutions of human problems by the very multitude of conflicting human desires and interests. The point is well stated by Roscoe Pound when he says that the task of the law is to achieve "such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and to do things, go round as far as possible with the least friction and waste."<sup>12</sup> Or again: "What we have to do in social control, and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can."<sup>13</sup> This balancing of conflicting human and social interests inevitably leads to compromise,<sup>14</sup> value judgments and a degree of arbitrary line-drawing. Take the Rule against Perpetuities as an example. The purpose of the rule is to maintain a balance between the desire of a person owning property now to control the devolution of his property in the future, and the same desire of future owners of the property; in other words, to maintain an even hand between the living and the dead.<sup>15</sup> The law has chosen a period of control which, in the normal

7. For example, the decision of Denning, J., in *Central London Property Trust Ltd. v. High Trees House Ltd.*, (1947 K.B. 130: it is doubtful if any other judge of the time would have reached so bold or so welcome a decision. The principle has been applied and refined in numerous Canadian decisions. Another example is the present disagreement among English, and Canadian, trial judges as to whether failure to use a seat-belt constitutes contributory negligence; the latest case appears to be *Drage v. Smith* (1974 *The Times*, Nov. 14. So far as England is concerned, a clear ruling by the Court of Appeal is necessary to resolve the doubt: cf. pp. 25-26, *post*. The science of jurimetrics is predicted upon the relevance of such fortuitous circumstances.

8. *Supra*.

9. Matrimonial Homes Act (Commencement) Order 1967, S.I. 1967 No. 1790.

10. An attempt to anticipate the effect of a prospective statute was rightly held to fail in *Wilson v. Dagnall*, (1972) 1 Q.B. 509. But cf. *Hill v. Parsons*, (1972) 1 Ch. 305.

11. The possibility of apportioning the loss is discussed at pp. 17-18, *post*.

12. *Social Control Through Law*, pp. 64-65.

13. *Justice According to Law*, p. 31.

14. On the value of compromise, see the doubtless exaggerated statement by Edmund Burke: "All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter": 2 Works, 8th edn. (1884), p. 101.

15. See Morris and Leach, *The Rule Against Perpetuities*, 2nd edn., ch. 1; Simes, *Public Policy and the Dead Hand*, chs. 2 and 3; *Report on the Rule Against Perpetuities* (Report no. 6) by the Institute of Law Research and Reform, The University of Alberta, pp. 2-3.

case, adding together the length of a life in being and twenty-one years, will not usually exceed one hundred years in all. There is no magic in the period chosen, and it is in a sense arbitrary, but it is widely regarded among lawyers as being about the right length, and therefore as achieving a satisfactory compromise between the two conflicting interests.<sup>16</sup>

This brings me to the fourth limitation, which is, I believe, inherent in the notion of law itself. A developed system of law seeks to do justice by laying down in advance rules and principles, conducive to sensible solutions of problems and couched in general categorised terms, by reference to which the answer to a particular legal problem may be sought. As Devlin, L.J., put it,<sup>17</sup> "The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval." The law does not, in general, say to the judge, "In deciding a particular case, exercise your own discretion as a man of common sense and decide between the parties as you consider will be just in all the circumstances";<sup>18</sup> rather, the law addresses itself primarily to the individual citizen, laying down, for example, that he commits a criminal offence if he acts in a particular way, or that his will, in order to be effective, must be in a particular form, and directing the judge to apply the same rules to an issue raised before him. It is in this sense that it is true to say "hard cases make bad law"; the maxim should never be used by a judge as an easy way out, where it is possible for him to devise a satisfactory principle which would cover a hard case before him, but neither should a judge distort or refuse to apply a satisfactory principle merely because the hard case before him lies just on the wrong side of the line.<sup>19</sup>

I do not wish in any way to deny that judges exercise a creative role and make law; the crude Blackstonian fiction that the judges merely declare the law and do not create it was exploded long ago. But I do assert that the legislative function of judges is limited by the essentially rule-based character of law. "I recognise without hesitation," said Holmes, J.,<sup>20</sup> "that judges must and do legislate, but they do so only interstitially." In general

16 Although the perpetuity period may be satisfactory, that is not to say that all aspects of the common law rule are to be defended, in particular, the present writer regards the absence of "wait and see" as an unjustified trap for the unwary, although others argue that the certainty of the unwary, although others argue that the certainty of the common law rule is a benefit that outweighs the disadvantages see the discussion in the Alberta report, *supra*, at pp 6-7. In England, Ontario and Alberta, as well as in Western Australia, New Zealand and many jurisdictions of the United States, a full wait and see principle has been introduced by legislation and the same is proposed in Bill I at present before the Legislative Assembly of British Columbia. Again, it must not be assumed from the argument in the text that a period of lives in being plus twenty one years is necessarily appropriate for all purposes, see the discussion of commercial interests in the Alberta report, Section XIV, and ss. 16-18 of the Perpetuities Act, S.A. 1972, c. 121. There are, too, differing opinions as to whether amending legislation should permit the selection of a perpetuity period in gross not exceeding, say, 80 years: this is permitted in England: Perpetuities and Accumulations Act 1964, s. 1, and under clause 3 of the British Columbia Bill, but not in Ontario or Alberta.

17 In *Ingram v Little*, [1961] 1 Q.B. 31, at p. 73.

18 There are, of course, exceptions, for example, the discretionary jurisdiction to make adequate provision for dependants out of a deceased's estate, under Testator's Family Maintenance Act, R.S.M. 1970, c. T50, and even in such a case the courts strive to develop principles to assist in achieving a measure of consistency. That is essential, if the courts are to continue to enjoy the confidence without which a discretionary jurisdiction would be socially unacceptable. On this latter point, see also Freeman, *Standards of Adjudication, Judicial Law-Making and Prospective Overruling*, (1973) 26 C.L.P. 166, at pp. 204-207.

For an illustration of the point in the text consider the distinction between the private rights of inheritance created by The Devolution of Estates Act, R.S.M. 1970, c. D70, and the right to apply to the court under the Testator's Family Maintenance Act, *supra*, the former right but not the latter may be released, see, for example *Re Rist Estate* [1939], 1 W.W.R. 518, [1939] 2 D.L.R. 644 (Alta. D.). *Lieberman v Morris* (1944), 69 C.L.R. 69 (Aust. High Ct.).

19 Cf. *Re Vandervell's Trusts (No. 2)*, [1974] Ch. 269, at p. 322, where Lord Denning, M.R., expresses the view that the maxim "should be deleted from our vocabulary." The philosophy which the Master of the Rolls shortly expressed in that passage is contrary to the whole thesis of the present article.

20 *Southern Pacific Co. v Jansen* (1917) 244 U.S. 205, at p. 221.

terms, this has two consequences; firstly, that once a rule is firmly established and relied on, the judges cannot change it,<sup>21</sup> and secondly, that a new rule being devised by a judge in the exercise of his creative role must be consistent and harmonious with the general structure of the other rules applicable in that particular area.<sup>22</sup> Put shortly then, the judge has a limited creative role, which merely qualifies and in no way undermines the character of law as a system of rules and principles. This is always, I believe, in danger of being forgotten by the academic lawyer (and therefore his pupils in the law schools) who learns his law from the textbooks, the journals and the reports of decided cases. It is easy to forget that in the vast majority of contested cases, while the facts may be in dispute, once the facts are ascertained the application of the law to those facts is beyond dispute, which is as it should be.<sup>23</sup> The academic, by training and inclination, directs most of his attention to the difficult, the border-line, the argumentative, the interesting case, where the law is in question and the judge can exercise a creative choice; but this is to concentrate on, as it were, the pathology of the law, not its normal state.

I would assert, further, that these rules constituting the law must be systematic, comprehensive, to a considerable extent internally self-consistent, and workable. I should like to discuss with illustrations the virtues of self-consistency and workability. On self-consistency, my example is a line of cases concerned with co-ownership of land in England. Since 1925, all such land owned by two or more persons concurrently has been subject, so as to facilitate its sale, to a trust for sale, *i.e.*, the legal estate is vested in not more than four persons as trustees, who are directed to sell the land and hold the proceeds on trust for the beneficial co-owners, however many there may be.<sup>24</sup> There were very good conveyancing reasons for introducing in 1925 the somewhat elaborate and artificial device of a trust for sale,<sup>25</sup> but it has been evident for some time now that this change in conveyancing machinery has brought about a number of consequential problems which were probably not foreseen in 1925. For instance, it is well established that under the doctrine of conversion a beneficiary under a trust for sale of land has an interest not in the land itself but in the cash proceeds into which the land is by the trust directed to be converted. This is a perfectly sensible rule in most situations, but in this particular context is capable of producing harsh results. In *Re Kempthorne*<sup>26</sup> Mr. Kempthorne by his will made in 1911 gave all his freehold property to his brother Charles, and all his personal property to his other brothers and sisters. Mr. Kempthorne died in 1928, entitled as a tenant in common to certain freehold property, but the Court of Appeal held that, as the land had become subject to a trust for sale on January 1, 1926, the testator's share had been converted into personal property and therefore passed not to Charles but to the other brothers and sisters. In my view, the Court was bound to reach that conclusion, even if (which is not clear) the result was contrary to the testator's intention: a statute provided that the land should

21. See, for example, *Van Grutten v. Foxwell*, [1897] A.C. 658, at p. 669, where Lord Macnaghten said of the notorious rule in *Shelley's Case* (1581), 1 Rep. 93b, that "Its feudal origin was a disgrace. Its antiquity was a reproach", but nevertheless had no hesitation in applying it. Cf. *Re Simpson*, (1927) 4 D.L.R. 817; *Re Budd* (1958), 12 D.L.R. (2d) 783 (rule in *Shelley's Case* not law in Alberta).

22. See the discussion by MacGuigan at (1967) 45 Can. Bar Rev. at pp. 663-665.

23. See Megarry, *Law as Taught and Law as Practised* (1966), 9 Jo. S.P.T.L. (N.S.) 176.

24. Law of Property Act 1925, ss. 34-36.

25. See Cosway, 15 Conv. (O.S.) 83; Cheshire's *Modern Real Property* (11th edn.), pp. 339-340; Megarry and Wade, *Law of Real Property* (3rd edn.), p. 419.

26. [1930] 1 Ch. 268

be subject to a trust for sale; the consequence of a trust for sale, so another rule established, is that the land is deemed to be converted into personal property; no provision in the statute excluded this latter rule; therefore, Mr. Kempthorne's share was personal property. This decision was applied in subsequent cases,<sup>27</sup> although the courts were naturally not slow to escape from it where possible by, for example, giving a liberal interpretation to different language used in other wills.<sup>28</sup> Then came the case of *Bull v. Bull*,<sup>29</sup> where a mother and her son both contributed to the purchase of a house, which was conveyed to the son alone. Subsequently, the son married, and the mother failed to get along with her daughter-in-law. The son then gave his mother notice to quit, she refused to go, and he sought an order for possession. The Court of Appeal, without any reference to *Re Kempthorne*,<sup>30</sup> held that the mother, as a co-owner in equity by virtue of her contribution, was entitled to stay, and held generally that until the land is actually sold the rights of co-owners remain as they were before 1926. Now this decision does not, in my submission, make any legal sense, however sympathetic one might be to the mother's position. She is not entitled to an interest in the land, therefore how can she be entitled to possession of the land? Since her son is by statute directed to sell the land, how can she claim possession as against him?<sup>30</sup>

The next case to be considered is *Barclay v. Barclay*.<sup>31</sup> Prior to his death, Mr. Barclay lived in his bungalow with his son Allan, the defendant. By his will he directed that the bungalow and the rest of his property should be sold by his trustee and the proceeds divided into five equal shares, one of which was given to his son Allan. Allan refused to move out of the house, and the trustee brought this action against him for possession. The County Court judge applied *Bull v. Bull* and gave judgment for the defendant, but that decision was reversed by the Court of Appeal, which distinguished *Bull v. Bull* on the ground that in the present case, unlike the former, the primary object of the trust for sale was that the bungalow should be sold, and therefore the defendant had an interest only in the proceeds of sale. I would suggest that that is far to thin a distinction on which to make so much turn, and it will be extremely difficult, it not impossible, to determine on the evidence this question of the primary intention.<sup>32</sup>

Then in *Robson-Paul v. Ferrugia*<sup>33</sup> the situation was much like that in *Bull v. Bull*, except that one of the co-owners had granted to a third party a licence to occupy the premises. The other co-owner brought an action for possession against the licensee, and the Court of Appeal held that the action succeeded. The result appears to be that although, under *Bull v. Bull*, a co-owner may be entitled to possession, he cannot confer that right to possession upon anyone else, and that is extremely difficult to understand.

27. For example, *Re Newman*, [1930] 2 Ch. 409.

28. For example, *Re Mellish*, [1929] 2 K.B. 81n. ("all my share and interest"). *Re Kempthorne* is also held to be inapplicable where the will is expressly or implied confirmed by a codicil executed after 1925: *Re Warren*, [1932] 1 Ch. 42; *Re Harvey*, [1947] Ch. 285.

29. [1953] 1 Q.B. 234.

30. *Cf. Williams v. Holland*, [1965] 1 W.L.R. 739.

31. [1970] 2 Q.B. 234.

32. The only clear distinction between the facts of the two cases is that in *Barclay v. Barclay* the trust for sale was express, but statutory in *Bull v. Bull*; but reliance on that factor would lead to unfortunate and capricious consequences, since the expression of a trust for sale is common, but not universal conveyancing practice in dispositions to co-owners.

33. (1969), 20 P. & C.R. 820.

Finally, in *Irani Finance Ltd. v. Singh*<sup>34</sup> it was held that a beneficial co-owner does not have an interest in land which could be the subject of a charging order in favour of a judgment creditor. This decision followed the *Re Kempthorne* line of cases, and is, I suggest, plainly correct, even though it has the result of preventing the interest of any beneficial co-owner from being attached by way of a charging order. It has since become clear that the *Singh* case does not apply if the debt is a joint debt owed by all the trustees in who the legal estate is vested.<sup>35</sup> The resulting situation is one that does not reflect very much credit on the law, but cannot be avoided because of the statutory imposition of a trust for sale which carries with it the corollary of the doctrine of conversion.

The result of all this is technically to confine *Bull v. Bull* to a very small category of its own, but in reality the decision is simply not consistent with basic principles, and must ultimately be overruled. But one moral which emerges is that it is not enough for a judge, instinctively feeling the justice of one party's case, to reach a decision in defiance of established principles; if those principles can be adapted, if an exception can be made, well and good, but the technical means must be at hand to reach that desired result. The other, and much narrower moral, is that we can now see, with the benefit of hindsight, that the introduction into co-ownership of the artificial device of a trust for sale was unfortunate though well-intentioned. It would have been enough, in order to solve the very real conveyancing problems, to create a trust with a power of sale, and that would have avoided *Re Kempthorne* and its concomitant problems: this is a reform which, I am glad to see, the Law Commission has already tentatively suggested.<sup>36</sup>

So much for self-consistency; now to illustrate the virtue of workability, and I propose to take two examples. The first is from the law relating to restrictive covenants affecting land. The well-known principle is that if A covenants with B to refrain from some activity on A's land, and the covenant both touches and concerns A's land and benefits B's land, the burden of the covenant may run with A's land and the benefit B's. But the existence of the land to be benefited is crucial if the burden is to run.<sup>37</sup> It is essential that any subsequent purchaser of the burdened land should be able to discover the existence of this restrictive covenant, and satisfy himself whether or not he will be affected by it; therefore, he, or his solicitor, will examine the deed by which the covenant was created or, as the case may be, the record of the covenant in the register of title. Now what if the words of the covenant made no reference at all to any benefited land? The purchaser could, and probably would, conclude, quite reasonably, that the covenant was personal to A and incapable of affecting his successors in title. Yet there are two decisions in the English High Court<sup>38</sup> holding that in such a case extrinsic evidence can be given to show that the covenant was in fact intended to benefit adjacent land: This creates a quite unworkable

34. [1971] Ch. 59. *Bull v. Bull* was explained, at p. 80D, as a case where the mother, pursuant to the arrangement with the son, was "a person whose consent to a sale with vacant possession is necessary, so that the jurisdiction of the court under S.30 of the Law of Property Act 1925 (a jurisdiction to waive any necessary consent) cannot be side-stepped by treating her as a mere trespasser." With respect, however, it is very difficult to see how that requirement of consent arises: there was no such stipulation in the arrangement between mother and son, and s.30 does not create the requirement.

35. *National Westminster Bank Ltd. v. Allen*, [1971] 2 Q.B. 718.

36. In its working paper entitled "The Review of the Land Law", para. 28.

37. *Formby v. Barker*, [1903] 2 Ch. 539; *L.C.C. v. Allen*, [1914] 3 K.B. 642; *Noble and Wolf v. Alley*, [1951] S.C.R. 64, 1 D.L.R. 321; *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639, 29 D.L.R. (2d) 153.

38. *Newton Abbot Co-operative Society Ltd. v. Williamson and Treadgold Ltd.*, [1952] Ch. 286, followed in *Marten v. Flight Refuelling Ltd.*, [1962] Ch. 115.

situation, for it may be many years before the issue arises, A's land may have changed hands many times, and yet, if extrinsic evidence, from neighbours and so on, is available, a purchaser who has made all reasonable inquiries may find himself subject to the covenant. The evident anxiety of the judges to avoid technical difficulties is not therefore justified.<sup>39</sup> It is pleasing to see that the "extrinsic evidence" rule has been expressly rejected by the Ontario Court of Appeal in *Re Sekretov and City of Toronto*.<sup>40</sup>

My second example is taken from the difficult situation referred to earlier, where property fraudulently obtained from one person is ultimately bought by another innocent person, the fraudulent intermediary disappearing. Here, as the law stands, one of two innocent persons must suffer the whole loss. Some years ago, Devlin, L.J., suggested<sup>41</sup> that this all-or-nothing rule was unsatisfactory, and that the judges should be given statutory power to apportion the loss between the two victims, in amounts proportionate to their relative blameworthiness. The Law Reform Committee advised, however, that attractive though the idea may appear, it was impracticable, because there might be many situations in which the property had changed hands several times; the task of apportionment would then be extremely difficult, if not impossible,<sup>42</sup> and, it may be added, the result would certainly not be predictable. In any event, the proposal ignores the fact that what we are concerned with here is essentially a technical question, who is entitled to the property? I do not believe that it would be acceptable to say that an owner of property who has been deprived of it without fault should be penalised to the extent of 50 % of its value in recovering it from an equally innocent third party.<sup>43</sup>

In formulating rules for the regulation of conduct, the law is seeking to create a system within which each person can, by reference to the law, run his own life with a reasonable degree of certainty and predictability as to what the law requires and empowers. This inevitably creates a tension between certainty and justice, because the precision and the line-drawing inevitably involved in rule-formulation is bound cause hard cases. It is impossible to state in general terms how precise should be the legal rule applicable to a particular situation. Property law, law of taxation and criminal law are traditionally areas where precision rather than flexibility is the *desideratum*, and the decision of the House of Lords in *Shaw v. D.P.P.*,<sup>44</sup> that it is an offence to conspire to corrupt public morals, and that it is for the jury in a particular case to decide, in the light of changing circumstances, what conduct should be proscribed, is therefore particularly surprising.

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- 39 See *See Elphinstone* (1952), 68 L.Q.R. 353. The decisions are defended by H. W. R. Wade at (1972) C.L.J., 167-171. It is significant that the Law Commission have rejected the reasoning in *Newton Abbot and Marten*: see their Report on Restrictive Covenants (1967: Law Comm. No. 11), and Working Paper No. 36 on Appurtenant Rights, proposition 7 (i). See also the Report of the Committee on Fostive Covenants Affecting Land (1965: Cmnd. 2719), para. 17.
- 40 [1973] 2 O.R. 161, following statements in earlier Canadian cases which were not, however, primarily directed at this issue. This strict, but correct, ruling on restrictive covenants gives rise to two strange paradoxes when compared with other branches of the law: (i) it is possible to create an easement without specifying any dominant tenement: *Laurie v. Winch*, [1953] 1 S.C.R. 49, [1952] 4 D.L.R. 449; *City Meat Market (Sault) Ltd. v. Hagen*, [1970] 3 O.R. 682, 13 D.L.R. (3d) 698; *Aspotogan Ltd. v. Lawrence* (1973), 30 D.L.R. (3d) 339 (to the same effect, English Court of Appeal decisions in *Johnstone v. Holdway*, [1963] 1 Q.B. 601; *The Shannon Ltd. v. Venner*, [1965] Ch. 682; (ii) in the case of personal property, a restrictive covenant may be attached even though it does not protect other property of the covenantee: *Lord Strathcona S.S. Co. v. Dominion coal Co.*, [1926] A.C. 108; *Canadian Brotherhood of Railway Transport and General Workers v. B.C. Air Lines Ltd. and Pacific Western Airlines Ltd.*, [1971] 1 W.W.R. 39.
41. In *Ingram v. Little*, [1961] 1 Q.B. 31, at pp. 73-74
42. Law Reform Committee, 12th Report, *Transfer of Title to Chattels*, paras 8-12
43. The views of the Law Reform Committee are criticised by Sutton at (1969), 7 Alberta Law Review, p. 185.
44. [1962] A.C. 220; followed in *Kneller (Publishing, Printing and Promotions) Ltd. v. D.P.P.*, [1973] A.C. 435. See the further discussion at pp. 29-31 *post*. Cf. *R v. Bhagwan*, [1972] A.C. 60, and *D.P.P. v. Withers* (1974). *The Times*, November 20th.

Now I yield to no-one in my respect for the jury as a means for bringing everyday common sense into the administration of the criminal law; but the rule laid down in *Shaw* is so elastic that it is small wonder that it has been consistently criticised.<sup>45</sup>

In general, statutory rules tend to be precise and detailed. For example, speed restrictions specified under the Highway Traffic Act<sup>46</sup> have numerical precision, so that once a 30 m.p.h. restriction has been validly established, it is an infringement to drive in the restricted area at 31 m.p.h.; fortunately, the police do not clog up the courts with such trivial cases, the offender in such a case would probably be given an absolute discharge, and the court might even mark its disapproval of the trivial charge by ordering the police to pay the defendant's costs.<sup>47</sup> Or again, take the various statutory periods of limitation for the commencement of civil actions, all expressed not as "a reasonable time" or any such flexible formula, but in terms of years: one year for an action to recover damages occasioned by a motor vehicle,<sup>48</sup> two years for an action for defamation,<sup>49</sup> six years for an action grounded on fraudulent misrepresentation,<sup>50</sup> ten years for the recovery of land,<sup>51</sup> and so on. Common law rules, on the other hand, tend to be formulated in less precise and more flexible terms, for example, the notions of foreseeable area of risk and the standard of conduct of the reasonable man in negligence, or the concept of substantial performance in the law of contract. My distinguished predecessor in this Chair suggested in his Inaugural Lecture,<sup>52</sup> and I agree with him, that there are areas in which Parliament should be content to lay down only general principles, leaving the detail to be filled out by the courts in the light of experience of actual problems arising for decision. In recent years, a number of English statutes have been drafted in this way. For example, the Race Relations Act 1968 makes it unlawful to discriminate on racial grounds in providing for the public, or a section of the public, goods, facilities or services. Section 2(2) of the Act gives examples of facilities and services within the Act's ambit, leaving the judges to add others by analogy.<sup>53</sup> It cannot be said, however, that the courts have been particularly successful in working out the general principles of this legislation. It was foreseeable that the phrase "public or a section of the public" would give rise to difficulties of interpretation, but I doubt if many foresaw the very narrow interpretation adopted by the House of Lords in *Charter v. Race Relations Board*<sup>54</sup> where it was held that the screening and selection process for election to a Conservative club excluded a public element, and a *Race Relations Board v. Dockers' Labour Club and Institute Ltd.*,<sup>55</sup> where the

45. For example, by Seaborne Davies at (1961), 6 Jo. S.P.T.L. (N.S.) 104. For cogent criticism of *Kneller*, see Finch at (1973), 51 Can. Bar Rev. 523, pointing out that in the United States even the statutory embodiment of an offence of conspiracy to corrupt public morals or of openly outraging public decency would fail on constitutional grounds. See also Jerome Hall, *General Principles of Criminal Law*, Ch. II. In Canada, it would appear that the courts could adopt *Shaw* and *Kneller* under S. 423(2) of the Criminal Code; cf. *Wright, McDermott and Feeley v. R.*, [1964] S.C.R. 192, 43 D.L.R. (2d) 597.

46. R.S.M. 1970, c. H60, ss. 92-98.

47. *Pace* Lord Denning, M. R., in *Buckoke v. Greater London Council*, [1971] Ch. 655, at p. 668G, it is inaccurate to describe this situation as one where "by administrative action, backed by judicial decision, an exemption is grafted on to the law." Cf. the statutory exemptions in favour of emergency vehicles created by the Highway Traffic Act, R.S.M. 1970, c.H60, s.99.

48. Limitation of Actions Act, R.S.M. 1970, c.L150, S.4 (1).

49. *Ibid.*, s. 3 (1)(c).

50. *Ibid.*, s. 3 (1)(h).

51. *Ibid.*, s. 26.

52. J. C. Wood, *Contact with Reality* (University of Sheffield), pp. 14-15.

53. A similar drafting technique is employed in The Privacy Act, R.S.M. 1970, P125, ss. 2 and 3.

54. [1973] A.C. 868, reversing the Court of Appeal. [1972] 1 Q.B. 545.

55. [1974] 3 W.L.R. 533, reversing the Court of Appeal, [1974] Q.B. 503.



same reasoning was applied to a working men's club, one of about 4,000 affiliated organizations, with some one million associate members all of them entitled to use the 4,000 clubs. It can hardly be doubted that that interpretation, in the latter case at least, is contrary to the intention of Parliament, elusive though in many circumstances that concept may be; the 1968 Act was promoted as a measure of social reform, to mitigate the growing evil of racial discrimination, and given that "mischief" it is a most unfortunate result that a colour bar operated by a club with effectively a million members should be regarded as outside the "public" domain.<sup>56</sup> A second example of the "general principle" style of drafting is the English Divorce Reform Act 1969,<sup>57</sup> which contains the following provisions: the marriage may be dissolved, where (a) "the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent,"<sup>58</sup> or (b) "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent."<sup>59</sup> and the court may refuse a decree of divorce where the respondent would suffer "grave financial or other hardship."<sup>60</sup> These provisions have, of course, given rise to problems of interpretation,<sup>61</sup> but the field is by no means new to the judges, and they are in the process of creating more detailed sub-rules which, by and large, command respect.

There are situations in which it is better to have almost any rule for solving a problem than to have no rule at all. For example, if chaos is to be avoided on the road, there must be a rule requiring traffic to keep to one particular side; it matters very little which side is chosen, though Canada is perhaps fortunate in having chosen the right thus placing itself in a large world majority (Britain, on the other hand, finds itself in a very small minority). Another example is the problem of deciding which of two people who died almost simultaneously, for example in a road accident, survived the other. This may be crucial in the case of a testamentary gift, because of the general rule that a gift to a person who predeceases the testator lapses. It might well be that, in the example given, no proof of the order of deaths would be forthcoming. Section 2(1) of the Manitoba Survivorship Act<sup>62</sup> solves the problem by laying down the quite arbitrary rule that in such a situation "the younger is deemed to have survived the older."<sup>63</sup> As a final example, I take the question of the time at which a person attains a particular age: is it the beginning of the relevant birthday, the end of that day, or some other time? The curious common law rule was, and is to the extent that it has now been altered by statute, that a person attains a

56. See also the decision of the House of Lords in *Ealing London Borough Council v. Race Relations Board*, [1972] A.C. 342, that discrimination on the grounds of a person's nationality is not unlawful, because nationality is not within the phrase "national origins" as used in s.1(1) of the Act. The majority of the House of Lords, in the present writer's view, adopt techniques of linguistic analysis more appropriate to a taxing statute; cf. the broader approach of Lord Kilbrandon, dissenting. To be fair to the House of Lords, it should be pointed out that in *Race Relations Board v. Applin*, [1974] 2 W.L.R. 541, parents fostering children in the care of a local authority were held to be providing a "public" service. For illuminating comment, prior to these decisions, see generally Lester and Bindman, *Race and Law*, especially Part 2.

57. On substantially the same lines as the Canadian Divorce Act, R.S.C. 1970, c. D-8.

58. S. 2(1)(a).

59. S. 2(1)(b).

60. S. 4(2).

61. For example, whether the availability of supplementary benefits should be taken into account in considering grave financial hardship: see *Reiterbund v. Reiterbund*, [1975] 2 S.L.R. 375.

62. R.S.M. 1970, c.S250; similarly, s.184 of the English Law of Property Act 1925.

63. S.2(2) makes provision for substitute gifts contingent, *inter alia*, on coincidental deaths, thus solving the problem left by *Re Pritchard, decd.*, [1962] Ch. 913. The whole of the Survivorship Act is subject to the Insurance Act, R.S.M. 1970, c. 140, s. 193, which has entirely different provisions: see *Re Cane and Cane* (1968), 66 D.L.R. (2d) 741, 63 W.W.R. 242, and cases there cited.

specified age on the day next before the relevant birthday.<sup>64</sup> In England, this has now been changed so that, where the relevant birthday falls after 1969, the crucial time is the commencement of that birthday.<sup>65</sup> In Canada, the general rule laid down by the Canadian Interpretation Act,<sup>66</sup> s. 3(1), provides that a person reaches a given age when the relevant birthday "is fully completed." Accordingly, a person may properly be convicted of having sexual intercourse with a female under fourteen when the act takes place on the complainant's fourteenth birthday.<sup>68</sup>

The other point which I wish to mention as bearing on this tension between justice and certainty is the hierarchical system of courts and the doctrine of precedent operated in our two countries, Canada and England, both of which have a two-stage system of appeals. Such a hierarchy presupposes in the common law system that the decision of the higher court is binding on the lower court. Take, for example, the judgment of the Court of Appeal in *Reg. v. Anderson*,<sup>69</sup> where it was held that expert evidence had been wrongly admitted on an obscenity issue: "In the future," said Lord Widgery, L.C.J.,<sup>70</sup> "the issues 'obscene or no' must be tried without the assistance of expert evidence on that issue, and we draw attention to the failure to observe that rule in this case in order that that failure may not occur again." That is the language of authority; it is quite clear that the Court of Appeal is there giving a direction as to how future obscenity trials are to be conducted, and it is essential, if the judicial system is to work, that all lower courts should loyally regard themselves bound to follow that direction. Our doctrine of precedent, which in fundamentals is really no more than an institutionalised application of the maxim that like cases shall be treated alike, *requires* those lower courts to follow the direction.

The Supreme Court of Canada and the House of Lords, at the top of their respective hierarchies, have a special duty to formulate, and where necessary, re-formulate legal rules in clear and rational terms. This may necessitate the sinking of minor differences among the judges or those forming the majority, so as to speak with a united voice, so long, of course, as they are in substantial agreement. The Supreme Court of Canada does this frequently, the House of Lords rather infrequently. In *Boys v. Chaplin*,<sup>71</sup> for example, on the very important question of the choice of law to be applied by an English court in adjudicating on a tort which took place on Maltese soil, the House of Lords, while unanimously arriving at the same result on the facts, left the law in a confused and uncertain state by expressing reasons as far apart as the erstwhile political differences between England and Malta. The *reductio ad absurdum* of this situation,

64 *Re Shurey*, [1918] 1 Ch 263

65 Family Law Reform Act 1969, s 9

66 RSC 1970, c 123

67 RSC 1970, c C 34

68 *Reg. v. Balaberda* [1972], 5 CCC (2d) 242

69 [1972] 1 QB 304

70 *Ibid.*, at p 313D. See also *Broome v Cassell & Co. Ltd.*, [1972] AC 1027, especially per Lord Hailsham of St Marylebone, 1 C., at p 1054 "In the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers." At the risk of labouring an obvious point, it may be worth pointing out that Lord Denning has never doubted his authoritative role as an appellate judge - see, for example, his comments on judicial control over administrative tribunals in *Freedom Under the Law*, pp 87 *et seq.*, drawing on his own experience as a judge hearing appeals from pension tribunals. Consider also the point made by Ruth Krindle in *The Law Making Process* (1966 67), 2 Man L J 167, that judicial creativity in law depends for its effect on a doctrine of authoritative precedent, a new rule achieves that status and the necessary generality by being followed.

71 [1971] AC 356

however, was reached in *Re Harper v. National Coal Board (Intended Action)*,<sup>72</sup> where the Court of Appeal was unable to discern any *ratio decidendi* common to the majority of the House of Lords in *Smith v. Central Asbestos Co. Ltd.*,<sup>73</sup> and therefore applied previous decisions of their own. Lord Diplock has on a number of occasions pointed out the undesirability of multi-reason decisions, but has not apparently made any impression on his colleagues, for the best that he has so far been able to do is to suppress his own views, so that a clear majority may be reached.<sup>74</sup>

While this role of the appellate courts in making authoritative statements of law binding upon their inferior brethren is crucial to certainty in the law, I believe that the equally important element of justice and flexibility must be secured by the willingness of those appellate courts to re-examine their own previous decisions. The reversal of the practice of the House of Lords in July, 1966,<sup>75</sup> was therefore more than welcome, and it may be confidently expected that the Supreme Court of Canada will adopt a similar position<sup>76</sup> (It is interesting to note, in parenthesis, that in 1952 Lord Denning, the arch-critic of the doctrine of *stare decisis*, concluded<sup>77</sup> that it was then too late for the House of Lords to alter the previous rule; at least the judges have been flexible enough to upset that prediction). The present indications are, however, that the House will use this new found power very conservatively, in my view too much so. In *Jones v. Secretary of State for Social Services*<sup>78</sup> seven Lords of Appeal (rather than the usual five) convened in order to consider whether a previous decision of the House<sup>79</sup> should be overruled. The result was that, although a majority of four<sup>80</sup> thought the previous decision wrong, only three<sup>81</sup> were prepared to overrule it. The question whether or not to overrule was indeed nicely balanced, for there were persuasive arguments on both sides as to the correct construction of the statutory provision in issue, and it was by no means clear that the previous decision, even if wrong, was productive of injustice.<sup>82</sup> What concerns me, however, is that several members of the House expressed the view that only in rare cases should questions of

72. [1974] Q.B. 614.

73. [1973] A.C. 518.

74. See *National Dock Labour Board v. Bland*, [1972] A.C. 222, at p. 236; *Albert v. Motor Insurance Bureau*, [1972] A.C. 301, at p. 334; *Todd v. Davison*, [1972] A.C. 392, at p. 413. Lord Reid had defended the practice of multiple and divergent judgments at [1972], 12 Jo. S.P.T.L. at p. 29, but his argument has been justly stigmatised as "we dare not be clear, in case we are wrong": see Gower (1973), 23 Univ. of Toronto L.J. 257, at p. 259.

75. *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234.

76. At present, the signs are that the Supreme Court will automatically follow its own previous decisions, at any rate in civil cases: see, for example, *Murdoch v. Murdoch*, [1974] 1 W.W.R. 361, where the majority was much influenced by *Thompson v. Thompson* [1961] S.C.R. 3, 26 D.L.R. (2d) 1. There seems, however, to be a plausible argument that the rule in *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516, has been changed by the abolition in 1949 of appeals to the Privy Council: see *Reg. v. George* (1966), 55 D.L.R. (2d) 386, at p. 395, per Cartwright, J., and there are already signs that in criminal cases the Supreme Court may be willing to depart from its own previous decision: see *Binus v. Reg.*, [1968] 1 C.C.C. 227; *Peda v. Reg.*, [1969] 4 C.C.C. 245. For a now slightly out of date, but still valuable, treatment, see MacGuigan (1967), 25 Can. Bar Rev. at pp. 638-647, 657-659.

The Canadian courts have also freed themselves from the shackles of being rigidly bound by House of Lords' decisions: see the rejection of *Rookes v. Barnard*, [1964] A.C. 870, in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425, 62 D.L.R. (2d) 65, per Spence J. *Bahner v. Marvest Hotel Co. Ltd.*, (1969), 6 D.L.R. (3d) 322, affd. (1970), 12 D.L.R. (3d) 322. *Eagle Motors (1958) Ltd. v. Makaoff* (1970), 17 D.L.R. (3d) 223. Similarly, the rejection of *B.T.C. v. Gourley*, [1956] A.C. 185, in *Reg. v. Jennings* (1966), 57 D.L.R. (2d) 644, and of *Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.*, [1974] A.C. 235, in *Manitoba Development Corporation v. Columbia Forest Products Ltd.*, [1974] 2 W.W.R. 237.

77. In *The Need for a New Equity*, [1952] 5 C.L.P. 1, at p. 10.

78. [1972] A.C. 944.

79. *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union, Re Dowling*, [1967] 1 A.C. 725.

80. Lords Dilhorne, Diplock, Simon of Glaisdale and Wilberforce.

81. Lords Dilhorne, Diplock and Wilberforce.

82. See particularly Lord Simon of Glaisdale, [1972] A.C. at pp. 1024-1025.

construction of statutes or other documents be reconsidered.<sup>83</sup> It would be a great set-back if that view were to be generally applied, for while questions of construction of statutes or other documents may not ordinarily raise fundamental or broad questions of principle, it may be just as important to correct a demonstrable error in the former as in the latter.<sup>84</sup>

The second disturbing sign of excessive conservatism is the decision in *Kneller (Publishing, Printing and Promotions) Ltd. v. D.P.P.*,<sup>85</sup> where the House of Lords was invited to overrule its own previous decision in *Shaw v. D.P.P.*<sup>86</sup>. Of the five Law Lords, only two<sup>87</sup> considered that *Shaw* was rightly decided, yet only one<sup>88</sup> was prepared to overrule it. The reasons given for upholding the previous decision are deeply depressing. Lord Simon of Glaisdale, for example, argued that certainty in the law was established by the decision in *Shaw* that the offence of conspiracy to corrupt public morals was part of the criminal law; a number of persons had been prosecuted and convicted on that basis; the type of "uncertainty" invoked by the appellants was not that envisaged in the House of Lords' practice statement, which was "concerned with that certainty which comes from following rules of law already judicially determined, not with any such certainty as may come from the abrogation of those judicially determined rules of law which involve fact and degree."<sup>89</sup> The short answer to the last point is given by Lord Diplock:<sup>90</sup> "*Shaw's* case . . . did make it certain that to publish advertisements offering the services of prostitutes was a crime irrespective of whether the advertisements themselves were "obscene" within the meaning of the Obscene Publications Act 1959. To overrule-*Shaw's* case will make it equally certain that it is not. The vice of *Shaw's* case was that it opened a wide field of uncertainty as to what other conduct was criminal." Perhaps even more disturbing, and certainly puzzling, is that Lord Reid, who vigorously and splendidly dissented in *Shaw* and who re-affirmed his views in *Kneller*, yet refused to support overruling. He gave three reasons:<sup>91</sup> (i) there had been at least 30 and probably many more convictions of the new crime in the 10 years since *Shaw*; (ii) there had been no manifest injustice or any attempt to widen the scope of the new crime; (iii) Parliament is the proper authority to change the law as determined by the decision in *Shaw*. Any alteration of the law as so determined must in my view be left to Parliament." With all respect to the memory of a pre-eminent judge, that reasoning is unacceptable. If *Shaw* is wrong in principle, the fact that 30 or more persons have been convicted and punished in reliance on it makes it all the more urgent that it should be overruled, lest more be unjustly convicted and punished; and there is no need to wait for any overworked Parliament to perform the task, since judicial overruling would merely put the law back to where most commentators believe it should always have been, and no-one would be unfairly prejudiced by the change.

83. See per Lord Reid, *ibid.*, at p. 966; per Lord Morris of Borth-y-Gest at p. 973; per Lord Pearson at p. 996; per Lord Simon of Glaisdale at p. 1024.

84. See per Lord Dilhorne at p. 993.

85. [1973] A.C. 435.

86. [1962] A.C. 220 See also p. 18. *ante*.

87. Lords Morris of Borth-y-Gest and Kilbrandon.

88. Lord Diplock, whose speech magnificently demonstrates the weakness of the reasoning in *Shaw* and that of his brethren in *Kneller*.

89. [1973] A.C. at pp. 488-489. See also per Lord Morris of Borth-y-Gest, *ibid.*, at pp. 463-464, and see especially his comment on the uncertainty argument: "Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in."

90. [1973] A.C. at p. 480.

91. *ibid.*, at p. 455.

Moreover, as Lord Diplock again demonstrates,<sup>92</sup> the overruling of *Shaw* would not leave any alarming gap in the criminal law to be exploited by the unscrupulous.

One factor which will obviously, and rightly, weigh heavily with the House in reconsidering a previous decision, is the extent to which that decision has been relied on by interested persons in framing their conduct. For example, it would not have been right, in my view, if the opportunity had presented itself, for the House of Lords to have overruled its own previous decision in 1873<sup>93</sup> that *prima facie* a reference in a will or other document to a class of relatives, e.g. children or grandchildren, means legitimate relatives and excludes illegitimates. Innumerable wills must have been drafted and countless estates distributed on the basis of that decision<sup>94</sup> Similarly, the House of Lords was surely right in *Morgans v. Launchbury*<sup>95</sup> to refuse to enunciate any new basis of vicarious liability for accidents caused by a car owned by one member of a household, who permits another member of the household to drive it for his own purposes. The majority of the Court of Appeal held<sup>96</sup> the car-owner vicariously liable for an accident which occurred during a pub-crawl, and Lord Denning, M.R., boldly formulated a new doctrine of the "matrimonial" car. That decision was unanimously reversed by the House of Lords, where the speech of Lord Wilberforce is extremely interesting. He showed<sup>97</sup> that there are at least four systems which could be introduced to fix liability on the owner of the car, assuming that to be the *desideratum*: (i) the "matrimonial" car; (ii) the "family" car; (iii) a rule that any owner who permits another to use his car should be liable; (iv) a system of strict liability. His Lordship could see no basis on which the court "acting judicially can prefer one of these systems to the others or on what basis any one can be formulated with sufficient precision or its exceptions defined. The choice is one of social policy; there are arguments for and against each of them."<sup>98</sup> A change in the law, adopting any of these systems, would have very wide effects on insurance companies, on motorist's (and perhaps, indirectly, others') premiums, on the Motor Insurers' Bureau, and so on; and, moreover, the change would operate retrospectively. Judicial legislation could not, therefore, be justified.

One extremely interesting question is whether the problem of retroactivity could be cured by adopting the technique of prospective overruling, as has been done by courts in some states of the U.S.A. and in the federal jurisdiction, including the Supreme Court.<sup>99</sup> Lord Simon of

92. [1973] A.C. at p. 481.

93. *Hill v. Crook* (1873) L.R. 6 H.L. 265. The position has been changed in England, for post-1969 transactions, by Family Law Reform Act 1969, s. 15. In Canada, the authorities are conflicting: see, for example, *Re Dunsmuir* (1968), 67 D.L.R. (2d) 227; *Re Simpson* (1969), 70 W.W.R. 626; *Re Nicholls*, [1973] 2 O.R. 33; and cf. *Re Herlichka* (1969) 3 D.L.R. (3d) 700. See also the rather curious provision of the Manitoba Wills Act, R.S.M. 1970, c. W150, s. 33, that in the construction of a will *prima facie* "an illegitimate child shall be treated as if he were the legitimate child of his mother." It is well established that next of kin within The Devolution of Estates Act, R.S.M. 1970, c. D70, and "dependants" within The Testator's Family Maintenance Act, R.S.M. 1970, c. T50, are restricted to persons who are legitimate and who trace their relationship through a legitimate link: see *Re Miller* (1957), 22 W.W.R. 571 (Man. Q.B.); *Re Carlson* (1957), 11 D.L.R. (2d) 485 (Sask. C.A.); *Re Kelbu Estate* (1950), 1 W.W.R. (N.S.) 20 (Sask. C.A.).

94. See also the qualification relating to "contracts, settlements of property and fiscal arrangements" in the House of Lords' *Practice Statement*, [1966] 1 W.W.R. 1234.

95. [1973] A.C. 127. Similarly, *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175.

96. [1971] 2 Q.B. 245.

97. [1973] A.C. at p. 136.

98. [1973] A.C. at p. 136-137.

99. For academic discussions, see, for example, Friedmann, *Limits of Judicial Lawmaking and prospective Overruling* (1966), 29 M.L.R. 593; Currier, *Time and Change in Judge-Made Law: Prospective Overruling* (1965), 5 Va. L. Rev. 201. For two recent and very interesting discussions, see Freeman, *Standards of Adjudication, Judicial Law-Making and Prospective Overruling* (1973), 26 C.L.P. 166; Friedland, *Prospective and Retrospective Judicial Lawmaking* (1974), 24 Toronto L. J. 170.

Glaidsdale has begun to think aloud about the merits of such a technique, and there are signs that other members of the House of Lords will follow his lead;<sup>1</sup> at present, however, Lord Simon considers that it would be preferable for Parliament to authorise prospective overruling and to define its scope.<sup>2</sup> This device also has its problems, however. If the overruling is purely prospective, it seems hardly fair to the present litigant whose argument has brought about the change: therefore, in some instances, the present litigant is given the benefit of the change in the law, but as to all others the change will be prospective only. But this latter technique also produces arbitrary distinctions: firstly, the unsuccessful present litigant bears the loss, while everyone else similarly placed has an opportunity to re-frame his conduct, and, secondly, the technique places a premium on being first in time in the appellate court.<sup>3</sup> No Canadian or English court has yet adopted the idea of prospective overruling, and I very much doubt whether any will (except perhaps, in Canada, in the fundamental constitutional areas of the Bill of Rights and the division of legislative powers<sup>4</sup>), partly because of the consequential problems, and partly because, to a judge of the Anglo-Canadian common law tradition, trained to decide as impartially as possible the particular issue before him, this technique will seem too much like pure legislation and therefore as usurping the function of Parliament.<sup>5</sup>

What is needed now, I suggest, is a clear statement from the Court of Appeal in England that they intend to follow the example of the House of Lords and no longer regard themselves, subject only to the limited exceptions stated in *Young v. Bristol Aeroplane Co. Ltd.*,<sup>6</sup> as bound by their own previous decisions. That has for some years clearly been the situation in criminal cases,<sup>7</sup> and there can be no good reason for treating civil cases differently. If, as is now generally accepted, it is right for the House of Lords to have the power to reconsider its own previous decisions, *a fortiori* the Court of Appeal should have the same power, since in all but the most exceptional cases the Court of Appeal is the court of last resort; only in tax cases is there any certainty of an appeal to the House of Lords. I therefore regard as fallacious, and disappointing, recent statements by members of the Court of Appeal supporting the non-review doctrine.<sup>8</sup> There had earlier, in the 1960's, been welcome indications that some influential members of

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1. See the "Afterthoughts" to Lord Simon's speech in *Jones v. Secretary of State for Social Services*, [1972] A.C. 944, at p. 1062; also his extra-judicial view expressed in his Bramley Memorial Lecture, *Judicial Processes in England* (1973), 70 Law Society's Gazette, at p. 2149; per Lord Diplock in *Jones*, [1972] A.C. at p. 1015, and extra-judicially in *The Courts as Legislators* (Holdsworth Club, 1965), pp. 17-18; per Lord Wilberforce in *Morgans v. Launchbury*, [1973] A.C. 127, at p. 137.
  2. [1972] A.C. at pp. 1026-1027. Extra-judicially, he has stated that this would require legislation: see his Bramley Memorial Lecture, cited *supra*.
  3. For other problems raised by the time-factor, see Freeman, *op. cit. supra*, at pp. 205-206.
  4. See Friedland, *op. cit. supra*, at p. 171.
  5. See, for example, the comment of an English judge, Sir Leslie Scarman, then Chairman of the Law Commission and now a Lord Justice of Appeal, in *Law Reform by Legislative Techniques*, (1967), 32 Sask. L. Rev. 217, at pp. 219-220: "I have difficulty in understanding the bifurcation of the judicial process . . . which all of us know has been achieving a measure of employment in various states of the United States of America. I find it difficult to understand how a judge can say a case will be decided in this way for the parties in front of him but to give notice that in future it will be decided in a different way for different parties who come later. This seems, to my mind, a straining or distortion of the judicial process . . ." For subtler, but persuasive arguments against prospective overruling, based on the public's perception of the judicial function, see Freeman, *op. cit. supra*, at pp. 204-207.
  6. [1944] K.B. 718.
  7. *R. v. Taylor*, [1950] 2 K.B. 267; *Reg. v. Gould*, [1968] 2 Q.B. 65; *Reg. v. Gosney*, [1971] 2 Q.B. 674.
  8. See *Tiverton Estates Ltd. v. Wearwell Ltd.*, [1974] 2 W.L.R. 176, at p. 196, per Scarman, L. J., *ibid.*, at p. 194, per Stamp, L. J.; *Barrington v. Lee*, [1972] 1 Q.B. 326; *Millangos v. George Frank (Textiles) Ltd.* (1975), *The Times*, 10 February.

the court would favour a more flexible policy,<sup>9</sup> and in 1969 Salmon, L.J., in effect called for a pronouncement by the whole Court of Appeal on the same lines as that by the House of Lords in 1966.<sup>10</sup> Agreement in making such a statement seems impossible as yet,<sup>11</sup> which leaves the court with the well-tried technique of distinguishing the indistinguishable, as happened in *Lewis v. Averay*.<sup>12</sup>

I turn finally to the third element in the title to this lecture, Equity, by which I mean, of course, that body of rules and principles developed in the Court of Chancery as a gloss on and modification of the common law. Undoubtedly, Equity started out as a means of keeping the law flexible and of adapting it to the requirements of justice, as the name indicates. But equally, I do not think it can be doubted that Equity is now no more flexible than the common law, since both are bound by the same rules of precedent. That need not be considered a matter for regret: if it is true, as I believe, that Equity is not past the age of child-bearing, neither is the common law.<sup>13</sup> In this sense, I do not think that there is now any unique role for Equity to play in law reform, though it must be admitted that certain judges, especially the present Master of Rolls, have not been content to accept that view.<sup>14</sup> There would, however, be substantial, though certainly not unanimous agreement that some recent equitable interventions have proved unsatisfactory. I refer briefly to three. The first was the "equity" of the deserted wife to stay in the matrimonial home. The Court of Appeal gave birth to this weakling in 1952.<sup>15</sup> It was never really viable, if only because proprietary rights cannot depend upon something so variable and transitory as the state of matrimonial relations between husband and wife. Nevertheless, it struggled for life until euthanasia and burial were finally administered by the House of Lords in *National Provincial Bank Ltd. v. Ainsworth*<sup>16</sup> in 1965. Thirteen years of vacillation, the only achievement being a great deal of uncertainty and difficulty. It was clear from the outset that the only satisfactory solution was by legislation, and this came, as mentioned earlier,<sup>17</sup> in the Matrimonial Homes Act 1967, conferring a proprietary right of occupation on either spouse, but also with a whole

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9. See, for example, the line of Crown privilege cases. The high-water mark of Court of Appeal "rebellion" is probably *Broome v. Cassel & Co. Ltd.*, [1971] 2 Q.B. 354, refusing to follow *Rookes v. Barnard*, [1964] A.C. 870, on exemplary damages (incidentally, it is a nice irony to find Lord Denning, that arch-opponent of *stare decisis* self-styled iconoclast (see *The Way of an Iconoclast* (1959), 5 Jo. S.P.T.L. (N.S.) 77), saying "The common law of England on this subject was so well settled before 1964 — and on such sound and secure foundations — that it was not open to the House of Lords to overthrow it. It could only be done by the legislature": [1971] 2 Q.B. at pp. 380-381. But see the rebuke subsequently administered by the House of Lords: [1972] A.C. 1027.) For another indication of the trend, consider the willingness of the English courts to treat a Court of Appeal decision as overruled by a Privy Council decision: for example, *Smith v. Leech Brain & Co. Ltd.*, [1962] 2 Q.B. 405; *Worcester Works Finance Ltd. v. Cooden Engineering Co. Ltd.*, [1972] 1 Q.B. 210.
10. *Gallie v. Lee*, [1969] 2 Ch. 17, at p. 49; but cf. Russell, L.J., at p. 41.
11. See especially the *Milangos* case, *supra*, where even Lord Denning accepts the non-review doctrine.
12. [1972] 1 Q.B. 198, purporting to distinguish *Ingram v. Little*, [1961] 1 Q.B. 31; and see *Barrington v. Lee*, [1972] 1 Q.B. 326, purporting to distinguish *Burt v. Claude Cousins & Co. Ltd.*, [1971] 2 Q.B. 426. Appellate courts in the Canadian provinces appear to regard themselves as free to depart from their own previous decisions, except perhaps the Ontario Court of Appeal: see the survey by MacGuigan (1967), 25 Can. Bar Rev. at pp. 652-657.
13. The decisions in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, and *Herrington v. British Railways Board*, [1972] A.C. 877, have produced two lusty common law offspring. Cf. the ultra-cautious approach of the majority of the House of Lords in *Myers v. D.P.P.*, [1965] A.C. 1001.
14. See his recent dictum in *Re Vandervell's Trusts (no. 2)*, [1974] Ch. 269, at p. 322: "If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law." At the very least, that must be qualified by restricting its scope to cases with an "equity flavour", i.e., where equity may influence the common law result by granting or withholding its special remedies or by employing its own special concepts of, e.g., fraud or trust. Equity could not, for example, mitigate the rigour of the pre-1964 rule of no liability in tort for a negligent misrepresentation.
15. *Bendall v. McWhirter*, [1952] 2 Q.B. 466.
16. [1965] A.C. 1175
17. P. 1. ante.

panoply of ancillary but necessary rules which would have been far beyond the competence of the courts to create.<sup>18</sup> The second development is the decision of the Court of Appeal in *Solle v. Butcher*,<sup>19</sup> that where a contract is induced by a serious mistake common to both parties, the court can, by manipulating equitable remedies, in effect rewrite the contract so as to accord with the parties' presumed intention if they had known the true facts. That decision, made in 1950, has always been anathema to commercial lawyers,<sup>20</sup> who take the traditional, but surely still valid view (at any rate in a commercial context), that the function of the law of contract is to allow the parties to allocate the risks beforehand as between themselves, and that it is not for the law to exercise this kind of vague and unpredictable jurisdiction to impose a new contract.<sup>21</sup> Thirdly, I wish to mention the decision in *Ives Investment Ltd. v. High*,<sup>22</sup> where A trespassed on the land of his neighbour, B, by placing foundations on B's side of the boundary, and B condoned the trespass in return for the right of way over A's land. Under the English Land Charges Act 1972<sup>23</sup> an informal grant of a right of way must be registered as an equitable easement in order to bind a subsequent purchaser of the servient land; in the present case, the right was not registered, although the purchaser knew of it. The Court of Appeal held that the present right arose by acquiescence or estoppel, and that there was nothing in the Land Charges Act to make such a right registrable; it therefore bound the purchaser. I suggest that this decision drives a coach and four through the Act; the fact is that however the right arose, its nature was an equitable easement. I think in truth the Court was anxious to avoid the harsh rule contained in the Act that failure to register a registrable interest makes the interest void even against a purchaser with knowledge.<sup>24</sup> I applaud the sentiments of the Court, but not their methods. In reality, this point raised a very difficult policy question, on which lawyers are divided; the Law Commission, for example, has come down in favour of "the simple, certain rule" that only registration will suffice to protect.<sup>25</sup> For my own part, I take the opposite view; but whatever may be the better view, it cannot be right for the Court of Appeal, having reached its own view, to refuse to apply the contrary provisions of the statute.<sup>26</sup>

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18. It is now clear that the legislation has created numerous problems, and was not properly thought out: see *Wroth v. Tyler*, [1974] Ch. 30.
  19. [1950] 1 K.B. 671; followed in *Grist v. Bailey*, [1967] Ch. 532, and a number of Canadian decisions, e.g., *Ivanochko v. Sych* (1967), 60 D.L.R. (2d) 474, and *Marwood v. Charter Credit Corporation* (1971), 20 D.L.R. (3d) 563; cf. the Australian case of *Svanosio v. McNamara* (1956), 96 C.L.R. 186.
  20. See, for example, Atiyah, *The Sale of Goods*, 4th edn., p. 106. For a similar suggestion, based on the provisions of the Sale of Goods Act 1893, see Benjamin's *Sale of Goods*, para 226.
  21. The English Court of Appeal has firmly refused to extend this jurisdiction to unilateral mistake: *Riverlate Properties Ltd. v. Paul*, [1974] 2 All E.R. 656.
  22. [1967] 2 Q.B. 379.
  23. S. 2 (5), Class D (iii), replacing Land Charges Act 1925, s. 10(1), Class D (iii).
  24. Land Charges Act 1972, s. 4 (6); Law of Property Act 1925, s. 199; *Hollington Bros. Ltd. v. Rhodes*, [1951] 2 T.L.R. 691; cf. "overriding interests" in the English land registration system: Land Registration Act 1925, s. 70, and see also the Manitoba Real Property Act, R.S.M. 1970, c. R30, ss. 57, 58.
  25. Law Commission, Published Working Paper No. 37, para. 20; cf. Megarry and Wade, *The Law of Real Property*, 3rd edn., p. 1040.
  26. As a postscript to this chapter of accidents, it is worth mentioning also *Hussey v. Palmer*, [1972] 1 W.L.R. 1286, where a majority of the Court of Appeal, in defiance of the plaintiff's own uncontradicted evidence, held, because "equity" required it, that an advance of money to build an extension to a house was not a loan, but created in the lender, by way of constructive trust, some form of proprietary interest. The court did not even take the trouble to define the nature of the interest, stating at one point that it was an "interest in the property proportionate to the £607 which (the plaintiff) put into it," arising by way of a resulting or constructive trust: see per Lord Denning, M. R., and Phillimore, L. J., [1972] 1 W.L.R. at p. 1291, yet at the same time declaring that "the plaintiff was entitled to a beneficial interest in the property of the value of £607"; *ibid.*, at p. 1293. Since the former result arises by way of trust, the latter by way of equitable charge or lien, and since the practical and conveyancing consequences of the two concepts differ greatly, the lack of precision is inexcusable. Nor is it in any way obvious why the plaintiff should have priority over the defendant's other creditors.



There are, I believe, some real and legitimate opportunities for the courts of Equity to extend their influence, in particular by generalising some of their existing categories of relief. From the 17th century, Equity has granted to mortgagors relief from objectionable terms in their mortgage agreements. For example, an option granted to the mortgagee to purchase the mortgaged property is void as repugnant to the mortgagor's equity of redemption.<sup>27</sup> But Equity has, in my submission, gone wrong, on the one hand, by applying this benevolent principle remorselessly without regard to the question whether the particular agreement overall is fair and reasonable, or whether the particular mortgagor needs this special protection;<sup>28</sup> on the other hand, these principles have been artificially confined to the category of mortgages. In our day, the equivalent of the oppressive mortgages of the past is seen in one-sided hire, hire-purchase conditional sale agreements, where the courts have been unwilling to intervene in even quite extreme cases. In *Galbraith v. Mitchenall Estates*,<sup>29</sup> for instance, the plaintiff hired from the defendant for five years a trailer valued at L1,050. He made an initial payment, expressed in the agreement to be non-returnable, of L550, and agreed to pay a rental of L12.10s. per month for five years, *i.e.* L750. He failed to pay the rent for four months, and the defendant terminated the agreement, recovering the trailer then worth L800. It was held that the defendant was entitled to retain the initial payment of L550, and he thus made a windfall profit of nearly L300, while the plaintiff paid L550 for four months' use of the trailer.

Another example of Equity's allowing its intervention to become rigidly and narrowly categorised is in the field of relief from forfeiture of leases. Equity can clearly refuse to allow the landlord to forfeit the lease for non-payment of rent if the tenant now pays all the rent due and compensates the landlord for any additional loss caused by the breach.<sup>30</sup> But it required a statute<sup>31</sup> to extend this relief to breaches of other types of leasehold covenants, such as covenants to repair, because of the unnecessarily restrictive decision of Lord Eldon, L.C., in *Hill v. Barclay*.<sup>32</sup> This decision ran Equity into a cul-de-sac, one consequence of which was that, again in the field of oppressive hire-purchase transactions, no relief was available to a hire-purchaser who had fallen, however slightly, into arrears with his instalment payments, and windfalls profits could be made by the repossessing owner.<sup>33</sup> It needed legislative intervention, once again, to restore a fair balance to the law.<sup>34</sup> Recently, however in *Shiloh Spinners Ltd. v. Harding*<sup>35</sup> the Court of Appeal and the House of Lords have shown a welcome, it overdue, willingness to escape from the *Hill v. Barclay* cul-de-sac.

An interesting example of the generalisation, and thus extension, of existing categories of relief, is the jurisdiction propounded by Canadian courts to set aside unconscionable and improvident bargains. In England,

27. *Samuel v. Jarrah Timber and Wood Paving Corporation Ltd.*, [1904] A.C. 323.

28. See *Lewis v. Frank Love Ltd.*, [1961] 1 W.L.R. 261, at p. 270, per Plowman, J.

29. [1965] 2 Q.B. 473; see also *Bridge v. Campbell Discount Co. Ltd.*, [1961] 1 Q.B. 445 (C.A.); [1962] A.C. 600 (H.L.). The *Galbraith* case might well not be decided the same way in Canada: see, for example, *Hughes v. Lukuvka* (1970), 75 W.W.R. 464.

30. Regulated in England by the Common Law Procedure Act 1852, ss. 210-212, in Manitoba by the Landlord and Tenant Act, R.S.M. 1970, c.L70, s. 19.

31. Now (English) Law of Property Act 1925, s. 146; (Manitoba) Landlord and Tenant Act, *supra*, s. 19.

32. (1811), 18 Ves. 56.

33. *Brooks v. Beirstein*, [1919] 1 K.B. 95; *South Bedfordshire Electrical & Finance Ltd. v. Bryant*, [1938] 1 All E.R. 580.

34. See (English) Hire-Purchase Act 1965 (shortly to be subsumed under the more comprehensive provisions of the Consumer Credit Act 1974); (Manitoba) Consumer Protection Act, R.S.M. 1970, c. C200, especially Parts III and IV.

35. [1972] Ch. 326 (C.A.); [1973] A.C. 691.

these categories have tended to become distinct and fragmented: misrepresentation, mistake, undue influence, catching bargains with expectant heirs, and so on.<sup>36</sup> In Canada, however, some of these threads have been pulled together to found the new jurisdiction, which has been judicially stated as follows:<sup>37</sup> "A plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger; and proof of substantial unfairness of the bargain by the stronger. On proof of the circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable . . . or perhaps by showing that no advantage was taken." There are dangers in this, of course: the assessment and balancing of factors such as inequality between the parties, fair price and onerous terms, might render the result of a case difficult to predict,<sup>38</sup> and there is a narrow line to be drawn between relieving those who have been unconscionably treated and the court's "taking on the role of a fussing judicial nanny seeking to protect the improvident from their folly in entering into disadvantageous contracts."<sup>39</sup> I agree, however, with a learned commentator<sup>40</sup> that "on balance, although such jurisprudence is necessarily of uncertain application, it is probably better that the court have a power to nullify these unconscionable bargains than not."

In the end, however, I conclude that the main instrumentality for effectuating the necessary, continuous, systematic and radical law reform, both of common law and Equity, is legislation:<sup>41</sup> and that, I believe, is how it should be in a parliamentary democracy.<sup>42</sup> The creation of the English and Scottish Law Commissions in 1965<sup>43</sup> gave a tremendous boost to careful but thorough-going reform, and that model has been extensively copied, with local variations, in Canada. The work of all the Commissions with which

36. But see *Lloyds Bank Ltd. v. Bundy* [1974] 3 W.L.R. 501, especially the judgment of Lord Denning, M.R. Consider also English courts' use of the concept of unequal bargaining power in restraint of trade cases: *Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 3 All E.R. 616 (H.L.); *Clifford Davis Management Ltd. v. W. E. A. Records Ltd.*, [1975] 1 All E.R. 237 (C.A.), and also in judging the effect of an exemption clause: *British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.*, [1974] 2 W.L.R. 856 (C.A.).

37. *Morrison v. Coast Finance Ltd.* (1966), 54 W.W.R. 257, at p. 259, per Davey, J. A. Other leading cases are *W. W. Distributors & Co. Ltd. v. Thorsteinsson and Stieler* (1960), 33 W.W.R. 669; *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419; *Peter Kiewit Sons Co. v. Eakelns Construction Ltd.*, [1960] S.C.R. 361; *Knupp v. Bell* (1968), 67 D.L.R. (2d) 256; *Grieshammer v. Ungerer and Miami Studios of Dancing* (1958), 14 D.L.R. (2d) 599; *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260. In *Paris v. Machnick* (1972), 32 D.L.R. (3d) 723, the court took a further step, almost, it seems from the report, as an afterthought, by increasing the price to be paid, without even an option for the oppressing party to rescind; this seems very questionable, since, on the technical level, it is impossible to hang the judgment on any equitable remedy, and, on a common-sense level, it gives to the oppressed party more than she had ever desired or conceived of, so that not even an expectation interest is fulfilled. This part of the judgment, however, seems to have been reached by the consent of both parties, and might not, therefore, be generally applicable.

38. See, for example, the contrast between the *Thorsteinsson* case, *supra* (sale to young woman of china and kitchen utensils at inflated price, induced by high-pressure salesmanship with whiff of misrepresentation, set aside) and the *Grieshammer* case, *supra* (contract with young woman of German origin recently arrived in Canada to pay one-half of her year's salary for dancing lessons, upheld). *Quære* also the *Marshall* case, where the fact of the vendor's senility was unknown to the purchaser; the court seems to treat unconscionable dealing by the one party and improvidence by the other party as two independent, rather than inter-related issues.

39. Per Lawton, L. J. in *Starside Properties Ltd. v. Mustapha*, [1974] 1 W.L.R. 816, at p. 826.

40. Bradley E. Crawford at (1966), 44 Can. Bar Rev. 142, at p. 152.

41. The same conclusion is reached by Sir Leslie Scarman in *Law Reform by Legislative Techniques* (1967), 32 Sask L. Rev. 217. See also Gower, *Reflections on Law Reform* (1973), 23 Univ. of Toronto L. J. 257.

42. At any rate, where the legislature is active and effective, as I take to be the case both in Canada (despite, or perhaps because of, federalism) and in England. See the contrast drawn between the United States and England by Jaffe in *English and American Judges as Lawmakers*, pp. 69 *et seq.* I would not differ significantly from any of Jaffe's views, and in particular I accept his central thesis that "The organs of government are partners in the enterprise of lawmaking"; *ibid.*, at p. 20.

43. Law Commissions Act 1965.

I am familiar has been of very high quality, and they have had, in general, remarkable success in having their proposals implemented by legislation.<sup>44</sup> In this work, faculties of law are playing a leading part, probably even more so in Canada than in England, directly by engaging in research and by commenting on the Commissions' ideas in their formative stages, and indirectly, but not less importantly, in their teaching by adopting a critical approach to the existing law, thus encouraging future legal practitioners to be much more than mere legal technicians. There must, therefore, be a co-operative enterprise in the great work of law reform, of ensuring that the gap between law and justice is as small as human ingenuity can possibly make it, so as to "keep law itself pointed always towards the shifting pole of justice."<sup>45</sup>

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44 The Manitoba Law Reform Commission claims to have the best "batting average" of any such body in the Commonwealth in having its recommendations implemented by legislation: report of a speech by the Chairman of the Commission, Mr. Frank Muldoon, Q.C. **Winnipeg Free Press**, October 31, 1974.

45 W. L. Morton at (1972), 5 Man. L.J. 251.

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