

Articles

LAW AND JUSTICE —

TWO CONCEPTS OR ONE?†

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My theme this evening centres upon the concepts of law and justice and poses the question whether these concepts are two in number or one. In approaching my task I must first lay down one or two ground rules. And the first of them is this: we must not be chained down to a strict and literal interpretation of the term justice. For we are dealing with a system that is admittedly fallible and imperfect and it is being administered by fallible and imperfect men. Sometimes the system may falter or fail, and the result will be something less than justice. Does such an occurrence then brand the legal system as unjust? If so, I should stop here and now; for I cannot advance or support a thesis that the law will invariably produce a just result. Its failure to do so may spring from a defect in the legal system itself. More commonly it will proceed from an imperfection in those who administer the system — perhaps a negligent or inadequate lawyer, or even a negligent or inadequate judge. And these failures tend to attract public notice and attention, indeed much more so than do the routine operations of the law. So my first ground rule is this — do not ask for perfection in the law, for perfection can only be an objective and not an attainment; look at the law in its entirety and judge it by its substantial performance; and so judging, ask whether it qualifies as truly an instrument for justice.

My second ground rule, growing out of the first, relates to the law's stance or attitude towards the imperfections that lie within it. If the law's attitude is one of unconcern or indifference, if it reveals itself as content with the status quo and willing to perpetuate it into the long future, the law can properly be condemned as unworthy and unjust. But if, on the other hand, those who form part of the legal system recognize its imperfections and actively seek to make the law a better thing in the world of tomorrow, then condemnation of the law as something other than justice becomes unwarranted and unfair. So I ask that here too we look not only at the law's blemishes but also at the

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remedial efforts that are steadily being made (and, I may add, on a vast and increasing scale) towards the objective of the law's reform. So our second ground rule is concerned with direction: Is the law looking backward to the past or forward to the future?

My method of approach will be to select certain areas of the law and in them to examine and assess the law's performance, to see how far in some cases the law has been from justice, and how close it has been in others. The available field of inquiry is a vast one, indeed limitless. So it is necessary to select and to omit. The areas of the law chosen for examination tonight do not even begin to exhaust the theme. I recognize that other areas, no less valid and no less relevant, could be suggested by most of you. But I offer those which I have selected, three in number, in the belief that they are pertinent and illustrative, and in the hope that you will agree that they are worthy of inclusion in an analysis of the concepts of law and justice.

May I add that my concern will be less with the law in theory than with the law in action. The law must be measured by its performance, that is to say, by the quality of the cases and decisions to which it gives rise. Preferring the concrete to the abstract, I will this evening examine some actual cases, most of them well known, some perhaps not so well known — but always with the object of determining whether in them we have taken the right road to justice, or whether instead we found ourselves on an unhappy detour.

The three areas with which I will be concerned are these:

- (1) Human rights and the law.
- (2) Technicalities and the law.
- (3) Women and the law.

I begin then with the first of these, namely,

Human rights and the law

To put the subject in a setting which will indicate how far the law has moved from earlier days, I turn to an American case. The year is 1856, the locale where the events arose is the State of Missouri, and the decision is that of the Supreme Court of the United States. The plaintiff claimed that the defendant had assaulted him, his wife, and his two young daughters. The defendant admitted that he had laid his hands upon the plaintiff and the others, but claimed that they were his slaves and that he therefore had the right to do what he had done. The defendant further contended that the plaintiff, as a Negro slave, had no

right to sue in any of the courts of the United States, and that therefore the court lacked jurisdiction to try the case. We are dealing of course with the celebrated Dred Scott case — *Dred Scott v. Sanford* (1856) 60 U.S.R. 393; 19 Howard 393.

Hear now what Chief Justice Taney had to say in giving the majority judgment of the Court:

P. 404 "The question before us is, whether the class of persons described . . . (i.e. Negro slaves) compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."

Later Chief Justice Taney quotes parts of the Declaration of Independence, including the stirring lines: "We hold these truths to be self-evident: that all men are created equal." Well and good. But unfortunately he goes on to add that these words would not embrace the Negro race who "were never thought of or spoken of except as property." And property the black slave was, said Chief Justice Taney, adding — and these are his words — "like an ordinary article of merchandise."

In the result Dred Scott was held to be a person without a right to sue in court, and his case was dismissed for want of jurisdiction.

What can one say about a case like that? Here is a decision rooted in bigotry, deriving from prejudice, and flowing from narrow-minded intolerance. It pays no respect whatever to the dignity of human personality. Nor is there anything to indicate that the court arrived at its decision with reluctance, that the result was forced on the Court by the compulsion of statutory language. Rather the result is asserted by Chief Justice Taney with conviction and, seemingly, with indifference as to whether it was just or unjust.

I do not single out the Dred Scott case in a spirit of chauvinism, because it was American rather than Canadian. We have had our unhappy moments too, as we shall see. And in fairness to our good neighbours I should add that in 1954, about a century after the Dred Scott case, came the decision of the Warren Court in *Brown v. Board of Education* (1954) 74 Supreme Court Reporter 686, holding that segregation in education of blacks and whites, by depriving members of the black race of the equal protection of the laws, did violence to the American constitution. A far cry indeed from the unfortunate case of Dred Scott.

I turn to Canada now and to the Canadian treatment of this subject. Let us look at the decision of the Supreme Court of Canada in the case of *Christie v. The York Corporation* (1940) S.C.R. 139. Christie was a black; he was a British subject; and he was a season subscriber to hockey games held in the Forum in Montreal. In the Forum the defendant operated a beer tavern, selling beer by the glass. One evening Mr. Christie, accompanied by two friends, entered this tavern, put down 50 cents on the table and asked the waiter for three steins of light beer. (Presumably beer was then 15 cents a glass). The waiter refused to fill the order, stating that he was instructed not to serve coloured people. Because of this humiliating experience the plaintiff sued for damages for breach of contract and damages in tort. The case ultimately came to the Supreme Court of Canada. Here is the way Rinfret, J., speaking for the majority, dealt with the matter:

P. 142 "In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order."

This could hardly be clearer. A merchant is free to deal or not to deal, unless there is a specific law decreeing otherwise, and at that time there was none; or unless he adopts a rule that is contrary to good morals, and at that time discrimination against a coloured person was not regarded as violating good morals.

Lest we think that *Christie v. York* stands alone, I must tell you that there are other such misguided decisions, some earlier and some later. Thus in *Loew's Montreal Theatres v. Reynolds* (1919) Q.R. 30 K.B. 459, the theatre owner was held entitled to deny the plaintiff, a coloured man, a seat in the orchestra section since only whites were permitted to sit there. And in *Rogers v. Clarence Hotel* (1940) 2 W.W.R. 545 the hotel owner refused to serve the plaintiff, a black man, with a glass of beer on account of his race and colour. The majority of the Court of Appeal of British Columbia (there was a strong dissent by O'Halloran, J.A.) held that *Christie v. York*, with its emphasis on freedom to deal or not to deal, enunciated the relevant principle and that it should be followed and applied. Again, in *King v. Barclay's Motel* (1960) 24 D.L.R. (2d) 418, a black man had been refused accommodation in the defendant's motel in Calgary. The Court followed the *Christie v. York* decision and dismissed the plain-

tiff's claim. It noted that in Alberta there was no statute comparable to the *Fair Accommodation Practices Act*, 1954, Cap. 28, of the Province of Ontario. That statute prohibited discrimination in the field of public accommodation on account of race, creed, colour or nationality.

So there we have a number of decisions, all reflecting the spirit of *Christie v. York*, decisions which can hardly be said to represent Canada's finest hour. If the law were arrested at that hour, if it still expressed the mood and the policy of today, then assuredly it would not personify justice, and the terms law and justice would have to be described as distinctly two concepts and not one. But fortunately the law has moved forward, and in my view *Christie v. York* would never be followed today. What then brought about this change? Many answers might be given to this question. I offer two such — one, a series of very progressive decisions delivered by the Supreme Court of Canada during the 1950's, the other, the enactment by parliament and legislatures of statutes in support of civil liberties and human rights, of which the most significant is the Canadian Bill of Rights passed in 1960 (S.C. 8-9 Elizabeth II, Cap. 44).

In the field of human rights the decade of the 1950's was a golden age for the Supreme Court of Canada. It produced a number of significant decisions concerning various aspects of individual freedom. The essence of democracy is the free communication of ideas. Free speech includes the right to advocate the peaceful adoption of policies with which others may disagree. In other words, it includes freedom of speech for the dissenter. Over the years the case for permitting such freedom of speech has been articulated in impressive and convincing terms by many distinguished persons. Voltaire is surely of that company, as is John Stuart Mill, and, of course, Mr. Justice Holmes who admonished us to remember that time has upset many fighting faiths, and that the best test of truth is its ability to get itself accepted in the competition of the market. In that spirit our Supreme Court dealt with several cases concerning human rights.

One of these related to what was known as the Quebec Padlock Law: This was a Quebec statute of 1937 aimed at communist activity. ("An Act to Protect the Province against Communistic Propaganda", 1 Geo. VI, Cap. 11). It empowered the Attorney-General of that province to make a closing order in respect of any building that had been used to propagate communism, that term however being nowhere defined. The amazing thing is that the statute went unchallenged for twenty

years. Finally, in 1957, the Supreme Court of Canada dealt with that statute in the case of *Switzman v. Elbling*, 1957 S.C.R. 285 and declared it beyond the powers of Quebec to enact, and hence unconstitutional. The judgment of Mr. Justice Rand is particularly noteworthy. He said that liberty of thought and the right to communicate it by language are no less vital to man's mind and spirit than breathing is to his physical existence. These rights are embodied in his status as a Canadian citizen and are beyond nullification by a province. The termination of the Padlock Law by judicial action was, I suggest, a great moment in Canada's onward quest for freedom.

Some of the cases before the Court arose from the activities of the sect known as Jehovah's Witnesses. As you know, they distribute literature, usually in the form of pamphlets or leaflets. Some of the literature distributed in Quebec was strongly anti-Catholic in tone. To prevent this distribution municipal by-laws were passed requiring a prior licence or permit from the Chief of Police. The validity of such a by-law was tested in the case of *Saumur v. City of Quebec* (1953) 2 S.C.R. 299. Again the judgment of Rand, J. is especially significant. The language of the by-law, in his view, comprehended the power of censorship. In despotisms the uncensored printed word was viewed with fear and wrath. But Canada was not a despotism. Rather it was endowed with a constitution "similar in principle to that of the United Kingdom." As such it embodied the concept of government resting ultimately on public opinion reached by discussion and the interplay of ideas. "If that discussion is placed under license, its basic condition is destroyed: the government, as licensor becomes disjoined from the citizenry." The by-law was legislation in relation to religion and free speech and not in relation to the administration of the streets. It accordingly had to be declared invalid.

The running battle between the Provincial Government of Quebec and the Jehovah's Witnesses gave rise to the celebrated case of *Roncarelli v. Duplessis* (1959) S.C.R. 121. Roncarelli was the proprietor of a restaurant and a holder of a liquor license. He was a member of the Jehovah's Witnesses. As members of that sect were arrested Roncarelli would promptly go bail for them. In this role he incurred the wrath of the Provincial authorities. Premier Duplessis, undoubtedly to punish Roncarelli, gave orders that his liquor license be cancelled, and it was indeed cancelled by the Quebec Liquor Commission. Roncarelli sued, and the Supreme Court of Canada said that the Premier must be held accountable for this arbitrary abuse of power.

Long years ago, in 1612, to King James I, who was asserting the divine right of kings, Chief Justice Coke said that "The King ought not to be under any man, but the King was under God and the law." Kings and Premiers and all who sit in the seats of the mighty are indeed under the law. Whenever the despot, be he king claiming divine right or state asserting arbitrary powers, makes an attack on liberty, it is the judicial process which stands forth as the shield and the safeguard of the freedom of the individual.

Keeping pace with the progressive stand of the Supreme Court of Canada in the 1950's, and perhaps to some degree being influenced by it, our legislatures and parliament have erected statutory safeguards for the protection of human rights. These have taken a variety of forms. Some of them were concerned with the field of public accommodation. Typically they provided that "everyone had the right to obtain accommodation or facilities of any hotel, victualling house, theatre or other place to which the public is customarily admitted, regardless of such person's race, creed, religion, colour or ethnic or national origin." (*Vide*, Tarnopolsky, "The Canadian Bill of Rights", Carswell, 1966, P. 53). Some statutes were aimed at unfair discrimination in employment. Seeking the goal of fair employment practices they too prohibited discrimination on grounds of race, creed, colour, religion, or national origin. Our own Province had enactments of these types, now combined into a single statute called "*The Human Rights Act*", S.M. 1974, Cap. H175. Subject to certain declared exceptions, it prohibits discriminatory practices based on race, nationality, religion, colour, sex, age, marital status, or ethnic or national origin. A *Christie v. York* incident would find itself in direct conflict with the express provision of Sec. 3 of *The Human Rights Act*.

Let me say a word about the Canadian Bill of Rights. Enacted in 1960 it took some years for it to make a significant impact upon the Canadian legal scene. At first it was regarded with a measure of skepticism. Even in the courts it failed, with occasional exceptions, to receive broad and sympathetic judicial treatment. What was needed was a pronouncement by the Supreme Court of Canada, in bold and unequivocal terms, that the Canadian Bill of Rights meant exactly what it said; that it enshrined a recognition by parliament of certain human rights and fundamental freedoms, to be enjoyed by all Canadians without discrimination by reason of race, national origin, colour, religion or sex. That pronouncement came in 1970 in the *Drybones* case. (*R. v. Drybones*, (1970) S.C.R. 282).

On the evening of April 8, 1967 in the Old Stope Hotel at Yellowknife in the Northwest Territories, Joseph Drybones, an Indian, was seen in the lobby, manifestly and unmistakably drunk. He was charged under a section of the *Indian Act* (R.S.C. 1952, Cap. 149, Sec. 94 (b); now R.S.C. 1970, Cap. I 6, Sec. 95 (b)) that made it an offence for an Indian to be drunk off a reserve. There are no reserves in the Northwest Territories. The effect of the section therefore was that an Indian who was intoxicated even in his own home — “off a reserve” — would be guilty of an offence. But a white man who was drunk elsewhere than in a public place would not be guilty of anything. Moreover even if drunk in a public place he would be subject under the Liquor Ordinance of the Northwest Territories (R.O.N.W.T. 1957, Cap. 60, S. 19(1)) to less severe penalties than an Indian would be under the *Indian Act*. Did this constitute discrimination by reason of race?

The answer of the Supreme Court of Canada was a ringing affirmation of the Bill of Rights. Rejecting the argument that Drybones suffered no discrimination because he had the same rights as all other Indians, the majority of the Court declared that the section of the *Indian Act* denied to Indians “equality before the law” with their fellow Canadians. It was legislation that infringed one of the rights in the Bill of Rights; and it was accordingly declared inoperative.

In the development of law in Canada *Drybones* is a landmark decision. I am not unaware that in the later case of *Lavell* (*Attorney General of Canada v. Lavell and Bedard* (1974) S.C.R. 1349) the Supreme Court of Canada, in a 5 to 4 judgment, rejected the claim of an Indian woman that, under a section of the *Indian Act* (12(1)(b)), she had been denied “equality before the law . . . by reason of sex.” You will recall that under that section an Indian woman who married a non-Indian man lost her status in the Indian band. But an Indian man who married a non-Indian woman did not lose his status. Was this wrongful discrimination on the basis of sex, and therefore a violation of the Bill of Rights? Our Supreme Court said no. The majority said that this case was not like *Drybones*. It was concerned only with the “internal regulation of the lives of Indians on Reserves.” Personally I preferred the judgment of the minority. But in the present context the point of significance is that even the majority reaffirmed the decision in *Drybones* and then sought to distinguish it. So *Drybones* still stands, pointing the way, we may hope, to the future.

Technicalities and the Law

I move now into another area, one in which critics of the law claim to perceive a sharp divergence between law and justice. It is the area of technicalities; and I am bound to acknowledge that the record of the law is rather spotty here. But I am heartened by a clearly perceptible trend, in current times, away from technicalities and in the direction of substantial justice.

What is a technicality? It is not easy to define with precision, for it may take many forms. But if hard to define, it is at least easy to recognize when encountered. We know how it arises and how it lives. Its dominant characteristic is an exaltation of form over substance. It puts procedural rules ahead of the purpose or object which those rules are designed to attain. It emphasizes formal legalism even at the expense of the right and justice of the case.

When a case is decided on the basis of a technicality rather than on merit, the law itself suffers and is placed in disrepute. So, for example, if a claim is dismissed because counsel inadvertently forgot to establish that the intersection of Portage Avenue and Kennedy Street (where the automobile accident occurred) was in the City of Winnipeg, the defeated plaintiff will not be alone in regarding the law as a frail and inadequate instrument for the securing of justice. So too if a man accused of rape escapes conviction only because Crown counsel had omitted to prove that the victim was not the wife of the accused. Or too if a case is lost because counsel for the plaintiff forgot to establish that the adult defendant was the owner of the automobile involved in the accident.

In all these cases the Court has an essential role to fill. It is to plug the gap left by counsel's inadvertence. Does that mean that the judge is taking sides and ceasing to be impartial? By no means. The judge is not presiding over a debating contest. His task is not to decide which counsel did the better job. Rather it is to do justice in the case before him. So if the judge sees that Crown counsel in the rape case is about to complete his examination of the female involved, without having asked her if she was the wife of the accused, the judge in my view is fully justified in reminding counsel of this point. Similarly if counsel for the plaintiff in a civil action has forgotten to establish that the intersection of Portage Avenue and Kennedy Street is in the City of Winnipeg the trial judge in my opinion is again justified in intervening to draw the point to his attention. In that way justice will be done. In any other way justice will be

defeated.

My colleague Mr. Justice Guy has told me of a case in his office many years ago. It involved a claim against their client, The St. Boniface General Hospital. The plaintiff's lawyer launched an action in the County Court. He named as defendant "The St. Boniface General Hospital." Now, in the popular sense he was right, because that's just how the hospital was generally known. But in the legal sense he was wrong, or at least inexact, because the true name of the institution was "Les Soeurs de la Charite de l'Hopital Generale de St. Boniface." The lawyer in the Guy office who was handling the matter was Rex McCrea, whom many here will remember. In a pixie-like fashion he filed a statement of defence reading thus:

"In answer to the statement of claim a plea is entered of *nul tiel* defendant."

In other words, there is "no such defendant." That was 35 or 40 years ago, and nothing has been heard of the action since. Mr. Justice Guy paints an imaginary picture of counsel for the plaintiff telling his client, "It's too bad but we're stuck. They've filed one of these *nul tiel* pleas, so it's all over for us." Alas, that's how the matter ended.

I venture to suggest that the present-day approach to the treatment of technicalities is more sensible and more realistic. A very good illustration of how such matters will be handled is found in a Manitoba case, *The Queen v. Little and Wolski*, (1973) 23 C.R.N.S. 352 which went all the way to the Supreme Court of Canada. (*Little and Wolski v. The Queen*, (1975) 30 C.R.N.S. 90; (1976) S.C.R. 20). Two men were charged with theft of two diamond rings, "the property of Westwood Jewellers Limited, situate at 3298 Portage Avenue in the City of Winnipeg." The trial judge had no trouble in concluding that the two accused had indeed stolen the diamond rings. He said, "I am satisfied that the accused Little acted as a decoy while Wolski made his way to the jewel case and removed the rings from the case, after which time both accused fled the scene." But the trial Judge felt compelled to acquit the accused on the ground that, while the charge described the owner of the rings as Westwood Jewellers Limited, the evidence showed that the owner was Westwood Jewellers (without the "Limited"), or was a Mr. Nuytten carrying on business as Westwood Jewellers.

In fairness to the trial Judge I must indicate that in theft cases ownership as alleged in the charge is one of the ingredients to be proved at the trial. The point in question has a long history. If A is charged with stealing Brown's cow, and the

evidence indicates that it was Robinson's cow that he stole, can A still be convicted of having stolen Brown's cow? Put that way, and assuming that there are no other circumstances to indicate to the accused the true nature of the charge, the case for acquittal, albeit on a technicality, becomes at least understandable. But suppose that A is charged with stealing Brown's cow, and the evidence shows that it was Browne's cow (Brown with an "e" at the end), surely we then have a mere misdescription of the owner, and an acquittal in such a case would be hard to justify. When the case reached our court, my brother Matas, J.A. pointed out ((1974) 24 C.R.N.S. 326) that under Sec. 512(g) of the Criminal Code no charge is insufficient by reason only that it does not name or describe with precision any person, place or thing. The two accused had in no way been misled or prejudiced by the use of the term "Limited" in the charge. They had reasonable information to identify the transaction and to know the offence with which they were charged. In these circumstances an acquittal would be in direct contravention of Sec. 512(g) of the Criminal Code and would negate the clear intention of Parliament.

Our court accordingly allowed the Crown's appeal and convicted both accused. And that decision was later affirmed by the Supreme Court of Canada.

Less than a year ago Dickson, J., delivering the unanimous judgment of the Supreme Court of Canada in the British Columbia case of *R. v. Harrison* (1976) 66 D.L.R. (3rd) 660, expressed the contemporary reaction of the judges of that Court — and I would like to think of the overwhelming majority of all Canadian judges — to purely technical pleas. The point there in issue was whether a notice of appeal by the Crown was sufficient in form having regard to the person who signed it. Under Sec. 605 (1) of the Criminal Code a Crown appeal may be brought by "The Attorney General or counsel instructed by him for the purpose . . ." In the *Harrison* case the notice of appeal had been signed "J.E. Spencer, Counsel for the Attorney General." Mr. Spencer's authority was derived from a letter bearing the letterhead "Attorney General, Province of British Columbia," signed by an official of that Department, Mr. N.A. McDiarmid, "Director, Criminal Law." It was argued that Mr. Spencer's instructions had to come directly from the Attorney General or the Deputy Attorney General; otherwise there was no valid appeal.

In rejecting this submission Dickson, J. said:

"The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed

personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees . . . will act on behalf of the Minister . . . Any other approach would but lead to administrative chaos and inefficiency."

And he added:

"Technical challenges to jurisdiction based upon alleged insufficiency of signature to notices of appeal can be wasteful of time and money."

And the Court held that the Crown's appeal was in valid form and should be proceeded with.

I suggest that technicalities are finding more and more difficulty in winning judicial approval. Form is very properly being subordinated to substance. In civil cases the rule for judges is that a proceeding should not be defeated by any formal objection and that all necessary amendments may be made so that judgment be given according to the very right and justice of the case. (Q.B. Rule 156). And in criminal cases the powers of the court with regard to amendments can only be exercised after considering whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done. (Criminal Code, Sec. 529(4)(e)). In increasing measure the dictum that "procedure with its rules is the handmaid and not the mistress of justice" is receiving judicial recognition, approval and application.

Women and the Law

I turn now to the third and last of the sub-topics I propose to discuss. It is women and the law. Here is an area in which much change has already occurred and in which there is intense activity directed toward further change.

It may be well to remind ourselves of just how far we have come. For under a common law principle historically recognized in England husband and wife were in law one person rather than two. Under the fictional notion of the unity of the spouses the wife's legal status was not one of independence; rather she spoke, acted and functioned through her husband. That was the common law position, though in equity the wife's separate existence in respect of her separate estate was recognized. The Married Women's Property Act, 1882, effectively put an end to the doctrine of the unity of the spouses. But disabilities of various kinds still continued for women, both married and unmarried.

Near the turn of the century there was much agitation on behalf of women in the political sphere. We recall in that

connection the suffragette movement. The suffragettes, it has been said, knew that they were yearning for something and thought it was the vote. The denial to women of the right to vote was an injustice that clamoured for rectification. But rectification came all too slowly. Manitoba was the first Canadian Province to provide for votes to women, and that did not come till 1916, just over 60 years ago. Getting the vote was one thing, but entitlement to hold public office was quite another. Some of us will remember the contest that took place in the late 1920's concerning the right of women to be appointed to the Senate of Canada. Was a woman a "person" within the meaning of Section 24 of the B.N.A. Act, the governing section on that matter? No, said the Supreme Court of Canada. Yes, said the Privy Council, which at that time was still the ultimate court for Canada. (*Edwards et al v. The Attorney General for Canada, et al* (1930) A.C. 124, reversing (1928) S.C.R. 276). There were restrictions operating in other fields as well. Was a woman, for example, entitled to hold judicial office? There are a few instances in the England of the 1700's of women having held such office, but these have been described as "exceptional" — which may mean unusual rather than illegal. In 1917 in Alberta a judgment of a woman who had recently been appointed a police magistrate for Calgary was challenged on the ground that, being a woman, she lacked the legal capacity to hold judicial office. I am glad to say that the Court of Appeal of that Province, in a carefully reasoned judgment (*R. v. Cyr* (1917) 3 W.W.R. 849), rejected that contention. In considering the common law position Stuart, J. said that the court could take cognizance of the current public attitude in regard to the status of women. He concluded thus:

"I therefore think that applying the general principle upon which the common law rests, namely that of reason and good sense as applied to new conditions, this Court ought to declare that in this province and at this time . . . there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex."

That is a pronouncement deserving of high marks, especially when made as long ago as 1917.

I remind you too that until fairly recently women were excluded from serving on juries. In Ontario this disability was removed in 1951 and in Manitoba a short time later. (Gail Brent: "The Development of the Law Relating to the Participation of Canadian Women in Public Life," (1975) U. of T.L.J. 358).

I cannot deal with the theme of women and the law without a few words on the case of *Murdoch v. Murdoch* (1975) 1 S.C.R. 423 and its aftermath. And first we should be clear on what was in

issue in that case and what the Supreme Court of Canada decided. That Court was not asked to decide that Mrs. Murdoch was entitled to a half interest in her husband's ranch on the simple ground that she was his wife. Nor did the dissenting judgment of Laskin, J. (now C.J.C.) rest upon any view that marriage alone would confer such entitlement. Some of the discussion among laymen (or should I say laypersons) suggests a degree of misconception on this point.

It is not the law — certainly not yet the law — that one spouse is entitled to a half interest in all the assets of the other spouse acquired during the marriage. Nor did Mrs. Murdoch assert such a claim. Rather her claim rested on the nature and extent of her contribution over many years to the acquisition of those assets. A wife's contribution can take more than one form. It can be financial, by direct money payments. The majority of the Supreme Court of Canada upheld the finding of the trial judge that such a financial contribution had not been established on the facts of that case. Laskin, J. felt that Mrs. Murdoch did make a financial contribution "that was more than nominal," but that was not the main ground on which he based his decision. For a wife's contribution can take the form of work and services. It was in that area that the battle was really waged. The majority of the Supreme Court affirmed the trial judge's conclusion that Mrs. Murdoch's work and services amounted to nothing more than an ordinary rancher's wife would do. Laskin, J. disagreed, describing her labours as extraordinary. Mrs. Murdoch herself had testified at the trial on what she had done — namely, "haying, raking, swathng, mowing, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done." More than that. For five months in every year the husband was away, working for the Stock Association in the Forestry Service. In those periods Mrs. Murdoch continued to work on the ranch, but without her husband at her side. It is not difficult to see why Laskin, J. characterized Mrs. Murdoch's labours as extraordinary.

A further point of controversy arose in the *Murdoch* case. Was there a common intention between husband and wife that their labours would be carried on in partnership for their joint benefit? The trial judge was unable to infer such an intention from the facts before him, and the majority of the Supreme Court agreed with him. Laskin, J. did not expressly declare that there was such a common intention but he did say that the evidence

was “consistent with a pooling of effort by the spouses to establish themselves in a ranch operation.”

The *Murdoch* case had to be considered by our court in the case of *Kowalchuk v. Kowalchuk* (1975) 2 W.W.R. 735 on appeal from a judgment of Chief Justice Dewar in the Queen’s Bench. ((1974) 4 W.W.R. 287). In *Kowalchuk* the trial Judge found that the wife had made a significant contribution to the acquisition and growth of the farm assets. That contribution resulted both from her provision of animals (starting with four cows) to the farm operation and from her personal labours on the farm, which amounted to “more than the housekeeping chores.” The total farm income was regarded by both parties “as a single fund,” going into “a common purse.” Moreover until the parties separated, their understanding and intention expressed by their conduct were in terms of working together for the benefit of both. Clearly the *Kowalchuk* case was different on its facts from *Murdoch*. The trial Judge so found, and, in a judgment written by my brother Hall, J.A., we agreed.

I need hardly remind you that the *Murdoch* case has brought in its wake a demand for legislative action to protect a spouse in similar situations. Some people said: “If it’s the law that marriage itself does not give a right to equality in the assets, then the law should be changed.” The matter has received the attention of various Law Reform Commissions, including that of Canada and of our own province. I think it safe to predict that we are standing on the threshold of new legislation in this field. What its exact nature will be is something we do not yet know and concerning which a member of the judiciary should perhaps not publicly speculate.

There is an interesting and important footnote to the *Murdoch* litigation. The first proceedings had arisen on the separation of the parties. They resulted in a decision that the husband alone owned the entire ranch. More recently divorce proceedings between them took place. The court is entitled on such proceedings to make an order for maintenance in favour of the wife, and the order can be in the form of a lump sum award. The judge on the divorce proceedings made an award of \$65,000.00 in favour of Mrs. Murdoch. ((1977) 1 W.W.R. 16). So that litigation, assuming there is no further appeal, has had a happier ending than at first appeared to be the case.

There is just one more matter to which I wish to refer in connection with the theme of women and the law. It concerns a woman’s right to an abortion and the conditions or limits

pertaining to the exercise of that right. Inevitably we confront the *Morgentaler* case (*Morgentaler v. The Queen* (1975) 30 C.R.N.S. 209; 20 C.C.C. (2d) 449; 53 D.L.R. (3d) 161) concerning which some degree of misunderstanding still exists.

Dr. Morgentaler had been charged with performing an illegal abortion. Under Sec. 251 of the Criminal Code abortion is illegal unless done by a qualified medical practitioner in an accredited or approved hospital after obtaining an authorizing certificate from the hospital's therapeutic abortion committee stating its opinion that continuation of the pregnancy would be likely to endanger the woman's life or health. It was admitted that Dr. Morgentaler had not followed the procedure of seeking authority from any hospital committee. At his trial he relied on two defences. One was based on Sec. 45 of the Criminal Code which protects a person who performs a surgical operation with reasonable care and skill, the operation itself being reasonable having regard to the state of health of the patient. The other was based on the common law defence of necessity. You will recall that the jury acquitted Dr. Morgentaler. The Crown then appealed. The Court of Appeal of Quebec reached the conclusion that neither of the two defences relied on was available — the one, because Sec. 45, a general section, could not displace the requirements of Sec. 251, a specific section dealing with abortion; the other, because the defence of necessity, if there be one, was not supported by any evidence in this case. The court allowed the appeal and, exercising a power given by Sec. 613(4)(b)(1) of the Criminal Code, substituted a verdict of guilty for the jury's verdict of not guilty. And that quickly evoked a public outcry. The power was there but no recorded case of its exercise could be found. This was a first. It also became a last, because in response to the tremendous public agitation against a court convicting a person of a charge on which a jury had already acquitted him, parliament amended the law by removing that power.

As you know, Morgentaler launched an appeal to the Supreme Court of Canada against the decision of the Quebec Court of Appeal. In due course that appeal was dismissed on a 6 to 3 division. The opening lines of the judgment of my former colleague Dickson, J., one of the majority judges, are worth quoting. He said:

"It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country between, at the two

extremes: (i) those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere; and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of a human life and tantamount to murder."

That was what the Court was not called upon to decide. What it did have to decide was the availability of the two defences on which Dr. Morgentaler relied. The majority concluded that these defences were not available, Sec. 45 not having any application to abortion, a subject specifically and fully covered in Sec. 251, and the defence of necessity not having any support in the evidence. The minority of three judges, whose views were expressed in the judgment of Chief Justice Laskin, took the opposite view. They declared that both defences were available to Dr. Morgentaler and had in fact been established, that his appeal should therefore be allowed and the jury's verdict of acquittal restored. But in law it is the majority judgment which counts.

In law perhaps, but not necessarily in the court of public opinion. The aftermath of the decision of the Supreme Court of Canada revealed a deep sense of disquiet among the public, accompanied in many cases by outright expressions of dissatisfaction with the majority judgment. Dr. Morgentaler, in jail as a result of the decision, was regarded by many sections of the public as a kind of folk hero and certainly not as a criminal. The jury's acquittal of him was probably at the base of this attitude. But further prosecutions for illegal abortions were launched against him. His defence now was necessity, a defence that had not been legally foreclosed against him by the earlier decisions. Twice more he was acquitted by a jury. These acquittals may indicate one of three things. First, that the jury believed that Dr. Morgentaler could not comply with the abortion law on account of necessity. Secondly, they may indicate public dissatisfaction with the abortion law. Or thirdly, they may simply reflect the jury's refusal to brand Dr. Morgentaler's conduct as criminal. Last month the Attorney-General of Quebec announced that there would be no more prosecutions of Dr. Morgentaler. At the same time he called upon the Minister of Justice, The Hon. Ron Basford, (who as you know had released Dr. Morgentaler from prison) to amend the provisions of the Criminal Code relating to abortion. Dr. Morgentaler applauded that request, saying that he too had for a long time been urging that these provisions be amended. But one may question whether the Attorney General's desired amendment and that of Dr. Morgentaler would be

heading in the same direction. In the meantime the law remains as it was.

Here then are three aspects of the theme, "Law and Justice — Two Concepts or One?" In my treatment of the theme I have not hesitated to portray the errors and the limitations of the legal system and the judicial process. But I have done so in the spirit of Mr. Justice Holmes who said that one may criticize even what one reveres. To express dissatisfaction with what exists need not connote either cynicism or despondency. Rather it may be the dissatisfaction which is purposeful and continuous because the goal is high. In quests of this kind man's portion is the road and not the goal. Performance will often lag behind aspiration.

But the aspiration is there and it should not be forgotten or thrust aside. In the spirit of that aspiration I would give to the question posed in my theme a cautious and qualified answer — that law and justice are not two concepts but in the main are one. To make them truly one is a task for many people — not least of all, for judges who look to the spirit and not the letter of the law, for lawyers who take pride in their profession as an instrument for civilized and orderly living, for law teachers speaking and writing objectively on the law without fear except of error, and for law students who will have the wisdom to see the profession as something more than a vehicle for attaining material wealth but as a medium for the realization of the ideal of the free man in a free society. All these have an honourable role to play; and perhaps the future belongs to them.