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THE JUDICIAL PROCESS IN COMMON LAW CANADA*

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Chief Justice McRuer has recently said that "in Canada we have some reason to be proud of our judicial process but we have no right to be smug".¹ From this statement there can be no valid dissent. In the provinces with which the present article is concerned, those where the law is founded upon that of England, great advantages have been gained by maintaining the judicial traditions of England and adhering to the pattern developed there for the organizational, administrative and procedural components of the judicial process. There is an independent judiciary,² a unified judicial system, and a modernized and simplified procedure.³ Judges have jealously guarded themselves against every external factor which might tend improperly to influence their decisions⁴

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¹ In his scholarly lectures on *The Evolution of the Judicial Process*, p. 73. The W. M. Martin Lectures, delivered at the University of Saskatchewan in 1956. (Published in 1957 by Clarke, Irwin & Co. Ltd.).

² See Lederman, *Independence of the Judiciary* (1956), 34 *Can. Bar Rev.* 769, 1139.

³ In Quebec the judicial system and procedure are more complex than in the other nine provinces.

⁴ For a recent illustration, see Moorhouse J. in *Toronto Transit Commission v. Agca Taxi Ltd.*, [1955] O.W.N. 857.

and have earned the respect of the people for their impartiality, fairness, honesty and courage. Equal benefits, however, have not always been gained from almost complete dependence, especially during the first half of this century, upon the courts of England for development of the substantive law. This dependence has led some Canadian judges to make uncritical and overly mechanical applications of English precedents⁵ and to abnegate an historic function of the judicial process, that of adapting the law to the ever shifting phases which human affairs assume.⁶ The time has now come when such a method of adjudication no longer suffices for the general welfare. Canadian judges, especially those on appellate courts, are now obliged to play an effective part during a period in which the law must be changed and extended in the wake of the accelerated economic and social transformation of mid-twentieth-century Canada. Without weakening the stability of the law they are required to apply and mould it creatively to the full extent permissible within the limits imposed by the nature of the judicial process and by constitutional convention.⁷

Speaking in Washington in 1950, a distinguished Canadian lawyer described with complete accuracy the substantive private law of the provinces of Canada other than Quebec. He said that,

except as modified by statute, [it] is the law developed by the English Courts. . . . Thus the great sections of the law of contract which comprise so much of the law governing commerce, the law of wrongs, of trusts and general equitable principles, much of our company law, and all of our law of admiralty are law developed in England. . . . Pick up any report of cases decided in one of the common law provinces or on appeal to the Supreme Court of Canada, and you will find the basic principles generally supported by the citation of English authorities.⁸

⁵ Roscoe Pound has observed that "the most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules." *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), 29 Rep. Am. Bar Assn. 395.

⁶ See Goodhart, *English Contributions to the Philosophy of Law* (1948), pp. 27-34.

⁷ Dean Erwin Griswold has recently said: "We talk about 'a government of laws and not of men,' and there is great truth in the aphorism. It cannot be wholly true unless we can reduce law to an IBM machine. It is indeed true that the law must be interpreted and applied by men; but this does not mean that we really have a government of men and not of law. For these are trained men, and they are conscientious and restricted men. They are trained in the history and background and growth of the law, and they are confined by the law so that their judgments ordinarily are operative only within narrow limits. As Justice Holmes has said, they can usually act only interstitially . . ." *The Function of the Supreme Court* (1958), 9 Harv. Law School Bulletin 3, at p. 5.

⁸ See Carter, *Some Merits and Defects of the Administration of Justice in Canada* (1950), 33 Proc. Can. Bar Assn. 31, 28 Can. Bar Rev. 941. *Italics mine.*

A decade ago, the most authoritative Canadian writer on the law of torts concluded his portrayal of the growth of that branch of law in Canada by saying that "the past twenty-five years have been fruitful ones in the law of torts. Specific and unrelated instances have yielded to coherent organizing principles, based on social policies which are becoming much easier to discern." But he showed that in almost all of this gradual development up to 1947, the leadership had been provided for the courts of Canada by the more enlightened of the English judges and commentators who realized that development of any part of the law must of necessity come from the impact of ideas or events outside the body of the law itself.⁹ "In the realm of ideas," he said, "American thinking and American development of the law of torts in general and negligence in particular has been . . . of peculiar significance. . . . [But] Canada, with much greater opportunities than England, has largely failed to respond to those ideas, save following England's lead. . . ."¹⁰ The author provides a thoroughly documented demonstration of the generally noncreative role of the Canadian judiciary in an area of law where the results of contemporary living have insistently demanded imaginative reformation.

Recently the present writer prepared a casebook in the law of contracts designed for use by Canadian students. One purpose was to demonstrate for them the development of the law on the subject by the courts of Canada, and the tentative title chosen was "Cases on the Canadian Law of Contracts." There have been decisions in this country on almost every phase of the subject included in the book. Study of most of the reported opinions revealed that while some of them show much skill in the techniques of applying precedents by analogy, almost all are routine deductions from English authorities or their unmodified derivatives. The rare departures from them appear to have been mostly accidental, since seldom did a judge question whether his adherence to them provided the right answer to the particular economic or social problem in the Canadian environment. Consequently, to indicate more accurately the nature of the book, its title finally became *Cases and Other Materials on the Common Law of Contracts in Canada*.

There has undoubtedly been a slow but steady development

⁹ Dean C. A. Wright, *The Law of Torts: 1923-47* (1948), 26 Can. Bar Rev. 46, 94. The other reviews of Canadian private law during the same twenty-five-year period reflect the same condition. See esp. Milner, *The Law of Contract*, *ibid.*, 117; and Falconbridge, *Conflict of Laws*, *ibid.*, 334.

¹⁰ Wright, *ibid.*, at p. 54. Cf. as to development of the private law of England, Goodhart, *Recent Tendencies in English Jurisprudence* (1929), 7 Can. Bar Rev. 275.

of much of the private common law in general in Canada during the past half-century; but, as in the law of torts and contracts, Canadian courts have sought all but a negligible number of their authorities in the English law reports.¹¹ With a few exceptions they have purported to apply them without question and with little modification.¹² Indeed, a perusal of Canadian law reports not only verifies an absence of creative approach, but conveys the impression that most of the opinions reported there are those of English judges applying English law in Canada, rather than those of Canadian judges developing Canadian law to meet Canadian needs with guidance of English precedent.

This attitude toward English authorities is a regression from the approach taken by Canadian judges during the nineteenth century, when the applicability doctrine influenced judicial attitude toward the common law as well as the statutes of England.¹³

¹¹ Including the Supreme Court of Canada: See Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians* (1951), 29 Can. Bar Rev. 1038, at p. 1045. The attitude is reflected in the volumes of cases judicially noted in the Canadian digest systems; e.g., in *The Canadian Abridgement* covering "from the earliest times" to 1953, only eight American cases are included although they were cited several times in Canadian decisions.

¹² See some illustrations in the text *infra*. See also Bowker, *The Honorable Horace Harvey, Chief Justice of Alberta* (1954), 32 Can. Bar Rev. 933 and 1118; MacIntyre, *Last Clear Chance After Thirty Years* (1955), 33 Can. Bar Rev. 257; Wright, *The English Law of Torts; a Criticism*, (1955), 11 U. of Toronto L. J. 84, 108-9.

¹³ It will be recalled that during this period the courts were accustomed to determining the applicability of doctrines of the common law and statutes of England to the circumstances of the colonies. In Nova Scotia, which has always been treated as a colony by settlement, it was held in *Uniacke v. Dickson* (1848), James 287, that the English common law would be recognized as in force unless it was found to be inapplicable, whereas the only statute law received would be that which was found to be obviously applicable. Haliburton C. J. in this case quoted Blackstone's observation concerning the extension of the laws of England to the colonies that "What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial Judicature, subject to the revision and control of the King in Council." In Upper Canada and later Ontario, where the English law "relative to property and civil rights" was introduced by the first Parliament of Upper Canada by the English Law Act of 1792, the courts by construction in a series of cases utilized much the same test of applicability as in *Uniacke v. Dickson* until 1907. (See language of Robinson C.J. in *Doe d. Anderson v. Todd* (1845), 2 U.C.R. 82, at p. 86 and cf. Moss C.J. in *Keewatin Power Co. v. Kenora* (1907), 16 O.L.R. 184, at p. 189). See the long list of nineteenth century cases concerning applicability of English statutes to Canadian colonies in Clement, *The Law of the Canadian Constitution* (3rd ed., 1916), p. 1060 *et seqq.* See generally, Clement, *ibid.*, Ch. XIV, and Lefroy, *A Short Treatise on Canadian Constitutional Law* (1918), Section V.

Roscoe Pound in *The Theory of Judicial Decision* (1923), 36 Harv. L. Rev. 802, at p. 807 includes the doctrine that the common law of England "was received only so far as applicable to the physical, political, social and economic conditions of America" as one of the creative forces

Ontario supplies an illustration. As late as 1887 the Court of Appeal for Ontario after making an independent analysis refused to accept a prior dictum of the English Court of Appeal. In 1882, in *Abouloff v. Oppenheimer*,¹⁴ Lord Justice Brett had said that when fraud in the procurement of an otherwise valid foreign judgment is alleged, an English court can go so far in its search for such fraud as to retry the merits of the original action solely upon the same evidence as was before the foreign court. But five years later, when this question arose in Ontario in *Woodruff v. McLennan*,¹⁵ Mr. Justice Patterson made his own analysis and concluded that the dictum gave undue weight to the policy favouring the vitiating effect of fraud and not enough to that favouring *res judicata*. He established a precedent to which Canadian courts have since adhered for a rule that the conclusiveness of a foreign judgment that has been rendered with jurisdiction cannot be disturbed unless there is proof of fraud collateral or extrinsic to the record.¹⁶ Then, in 1890, came *Vadala v. Lawes*¹⁷ in which the question came up squarely for decision in England and the Court of Appeal gave full effect to Lord Justice Brett's dictum. In 1905, when a case with similar facts reached the Ontario Queen's Bench Division, Chief Justice Armour followed the English precedents.¹⁸ Believing that the facts in the case before him were indistinguishable from those in *Woodruff v. McLennan*, he declared: "It is said . . . that we ought to follow the decision of our own Court of Appeal in *Woodruff v. McLennan* in preference to the decision of the Court of Appeal in England in *Vadala v. Lawes*. I do not, however, see the wisdom or propriety of such a course, although it was adopted in *Macdonald v. Macdonald*¹⁹ and *McDonald v. Elliott*.²⁰ For the Judicial Committee of the Privy Council, our highest appellate tribunal, in *Trimble v. Hill*²¹ expressed the opinion that as to the matter

that influenced the growth of law in the United States during much of the nineteenth century.

¹⁴ (1882), 10 Q.B.D. 295.

¹⁵ (1887), 14 Ont. A.R. 242.

¹⁶ Followed in *McDougall v. Occidental Syndicate, Limited* (1912), 4 D.L.R. 727; *Manolopoulos v. Pnaiffe* (1930), 1 M.P.R. 366 (N.S.).

¹⁷ 25 Q.B.D. 310.

¹⁸ 26 O.R. 61.

¹⁹ (1886), 11 O.R. 187.

²⁰ (1886), 12 O.R. 98.

²¹ (1879), 5 App. Cas. 342. The question in *Trimble v. Hill* depended on interpretation of the New South Wales Gaming Act which was identical with the English Gaming Act. Sir Montague Smith's language was: "Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it." at p. 344.

there in controversy, the Colonial Courts ought to have followed the judgment of the Court of Appeal in England; and if that is so as to the matter in controversy in that case, much more ought they to do so in this, involving as it does, a question of such wide and general interest as the binding effect of a foreign judgment.”²² With this, in *Beaver v. Jacobs*²³ decided by the Ontario Court of Appeal in 1908, Chief Justice Moss disagreed. He said: “If I may venture to say so, *Woodruff v. McLennan* was, in my opinion, well decided, and I see nothing in the subsequent cases that should shake its authority. But even if it were otherwise, I must say, speaking for myself, that I think it should be adhered to until reversed by the decision of a Court of proper appellate jurisdiction. In this province, in all matters of controversy relative to civil rights, resort is to be had to the laws of England as they stood on the 15th of October, 1792, as the rule for the decision of the same, except so far as the said laws have been repealed by Imperial Acts having force in the Province or by Acts of the Provincial Legislature. But it is for the Courts of the Province, subject to appeal to properly constituted appellate tribunals, to declare these laws for the people of the Province. And, still speaking for myself, I think that a decision of the highest Court of the Province, while it remains unreversed by a tribunal having appellate jurisdiction over it, ought not to be set aside or ignored simply for the reason that other Courts, not possessing appellate jurisdiction over it, and themselves subject to reversal by higher Courts, have subsequently expressed views that may appear to be not in harmony with the decision. And I do not think that the suggestion of the Judicial Committee in *Trimble v. Hill*, 5 App. Cas. 342, affords warrant for any such practice.”²⁴ It transpired, however, that the stand taken by the Chief Justice was a rearguard skirmish in a cause that was to be largely lost.

During the first half of the present century a number of in-

²² *Supra*, footnote 18, at p. 66. Followed by the same court as regards a domestic judgment in *Johnston v. Barkeley* (1905), 10 O.L.R. 724.

²³ 17 O.L.R. 496. In *Jacobs v. Beaver*, the decision in *Woodruff v. McLennan* was approved by Moss C.J.O. and Garrow J.A. and its effect explained by the latter.

²⁴ *Ibid.*, at pp. 499-500. In *Robins v. National Trust Company*, [1927] A.C. 515, [1927] 2 D.L.R. 97, in the Privy Council Lord Dunedin said: “When an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board.”

fluences combined to produce the condition of uncritical adherence to English authorities. Among these have been (a) restraint imposed by the Judicial Committee of the Privy Council, (b) rigid adherence to a *stare decisis* doctrine including a belief that the decisions of English courts were binding in Canada, and (c) prevalence of eighteenth- and nineteenth-century English jurisprudential ideas.

The British American colonies inherited the methods as well as the precepts of the common law. The attendant doctrine of *stare decisis* required all courts to be bound by the decisions of courts superior to them in their hierarchy; and for the colonies, including those which in 1867 united to form Canada, the court at the top of the hierarchy was the Judicial Committee of the Privy Council. Consequently, until that tribunal ceased to be the highest court for Canada, Canadian courts correctly regarded themselves as bound by the decisions of the Privy Council. This alone would have strongly fortified the natural tendency, that was observable for many years in the United States, to seek authoritative guidance from the decisions of the judges who were exercising their jurisdiction within the confines of England, the home of the common law. But Canadian courts went even further; they were led by the Privy Council to regard themselves as bound by the decisions of the courts of England as such. Succinctly the chain of reasoning was somewhat as follows:

The Privy Council, although not formally bound by its own decisions—which are in theory advices to the sovereign—and although not technically identical with the House of Lords, has considered itself bound by decisions of the House of Lords. The House of Lords holds itself strictly bound by its own decisions. All lower English courts are bound to follow the decisions of the House of Lords, therefore [it was reasoned by] Canadian courts [they] must follow the decisions of all English courts which they regarded as superior to themselves in the hierarchy.²⁶

Thus did the Lords of the Privy Council impose, and Canadian judges compound for themselves, a condition of juristic dependence, comfortable but relatively uncreative, which lasted at least until attainment of political and constitutional independence severed the hierarchical chain.

Even before the Privy Council announced that it had subordi-

²⁶ Wolfgang Friedmann, *Stare Decisis at Common Law and Under the Civil Code of Quebec* (1953), 31 Can. Bar Rev. 723, at pp. 726-27. Most useful critical discussion of this problem is by Gilbert Kennedy in (1948), 26 Can. Bar Rev. 581 and (1951), 29 Can. Bar Rev. 92.

nated itself to the House of Lords in nonconstitutional cases,²⁶ it impressed upon Canadian judges that in any attempt to shape the private law to a Canadian mould they were not at liberty to disregard English authority, especially decisions of England's highest court. A striking illustration occurred in 1926 after the Court of Appeal of Alberta held that after having been granted a decree of judicial separation the wronged wife could acquire a domicile in Alberta distinct from that of her husband for the purpose of divorce jurisdiction. Here four Canadian judges took the unusual step of departing deliberately from English precedent because they were convinced that a socially sound solution of the legal problem in issue required, in the words of Cardozo, a "conscious departure from a known rule, and the deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel and cut a new one for itself." But the case was taken *per saltum* to London, where the Canadian attempt at originality was restrained.²⁷ The Privy Council, reversing the Alberta Court of Appeal, adhered to what they considered the "true effect" of a prior House of Lords decision²⁸ and held that even after having obtained a decree of judicial separation, a deserted married woman could not acquire a separate domicile from that of her husband while the marriage status continued to exist.

A person who reads the opinion of Lord Merrivale for the Privy Council can find little to criticize from an analytical point of view. It is simply an example of mechanical application of case law and adherence to a precedent in disregard of the fact that its economic and social underpinning had disappeared. Anyone, however, who is convinced that the law is not an end in itself, that logical symmetry or mere certainty should not always prevail against ethical values, social utility, and suitability to the conditions to which the law is designed to apply, is apt to derive more satisfaction from the attempt of the majority of the Court of Appeal of Alberta to make a new rule.²⁹

²⁶ In *Robins v. National Trust Co.*, *supra*, footnote 24.

²⁷ In *Attorney-General v. Cook*, [1926] A.C. 444. See Stuart J.A. in *Cook v. Cook and Attorney-General for Alberta*, [1923] 4 D.L.R. 366, at p. 367. See also the concurring opinion of Beck J.A. at p. 376. See Lippman, *The Breakdown of Consortium* (1930), 30 Col. L. Rev. 651.

²⁸ *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146.

²⁹ See Pollock, *Expansion of the Common Law* (1904), pp. 107-8; Pound, *Law and Morals* (1924), p. 123; Read, *Recognition and Enforcement of Foreign Judgments* (1938), p. 203. The First Report of the Private International Law Committee, made to the Parliament of the United

An example of the extent to which many Canadian judges have deferred to English authority occurred in 1948 when a trial judge of the British Columbia Supreme Court decided the case of *Lim v. Lim*.³⁰ He held that an action for alimony could not be sustained there by a Chinese woman who thirty years earlier had entered a polygamous marriage in China, where both she and her husband were domiciled at the time. The judge pointed out that Lord Penzance, sitting alone in the English Court for Divorce and Matrimonial Causes, had held in 1866 in *Hyde v. Hyde*³¹ that the remedies provided in matrimonial causes in England were not available to a party to a polygamous marriage. He then referred to a decision of the Court of Appeal of British Columbia rendered in 1923 in which that court had exempted two wives of a Chinese polygamous marriage from liability under the Succession Duty Act. In the course of their opinions the judges of the Court of Appeal had distinguished *Hyde v. Hyde* by limiting its application to matrimonial causes, but they had also expressed the view vigorously that the policy underlying that case was both basically unsound and inappropriate for Canadian conditions. Nonetheless, in the face of the criticism of *Hyde v. Hyde* by his own Court of Appeal, the judge believed that he was bound by the English authority. He deplored the result that he believed was forced upon him, saying:

It does not seem to me consistent with common sense that this plaintiff who was admitted into this country under our immigration laws as the wife of the defendant and who, in China prior to her coming to this

Kingdom in 1954 (Cmd. 9068), contained a recommendation that a married woman who has been separated from her husband by the order of a court of competent jurisdiction should be able to acquire a separate domicile. In accord with the Committee's recommendation, when the bill for "An Act to amend the law relating to domicile" was introduced in the House of Lords in 1958, clause 5 read: "The domicile of a married woman is that of her husband unless there is in force an order of a court by which she is not bound to cohabit with him". Discussion dwelt principally on this question in the debates on second reading and on the Committee and Report stages. (See Hansard, vol. 210, No. 84, 30 June 1958.) As a result the bill was amended on third reading by deleting clause 5 altogether and providing in effect that a married woman has the same capacity to acquire an independent domicile as an unmarried one. (See Hansard, vol. 211, No. 99, 24 July 1958.)

³⁰ *Lim v. Lim*, [1948] 2 D.L.R. 353.

³¹ (1866), L.R. 1 P & D 130. The rule as originally stated by Lord Penzance was: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." The Court of Appeal case was *Yew v. Attorney-General*, [1924] 1 D.L.R. 1166. In *Leon v. Casey*, [1932] 2 K.B. 576, at p. 587, Greer L.J. said that: "No more unpleasant duty has to be performed by a judge than giving, in accordance with binding authority, a decision which upon the facts before him he considers both unreasonable and unjust."

country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost thirty years with the defendant as her husband, and after acquiring a domicile in this country, she seeks against her husband the remedy which our law provides to a wife to claim alimony. . . . However, . . . I do not think that I can in the face of the English decisions venture to blaze a new trail. . . . The implications arising from refusal to recognize the plaintiff's status for the purpose in question are so many and so repellent to one's sense of justice that it is with regret that I come to the conclusion to which I am on the authorities as I read them forced to arrive.

While the Privy Council functioned as the ultimate court, the Supreme Court of Canada, as merely an intermediate tribunal, became itself as completely captive to English authority as did the courts inferior to it. An illustrative instance occurred when the Supreme Court quietly accepted as having been established for all Canadian provinces the English conflict of laws rules governing tort liability, despite the fact that writers in legal texts and periodicals had subjected few decisions to more criticism than the one which had established those rules. In 1944 an eminent legal scholar, writing in the *Canadian Bar Review*,³² had set out and augmented the continuous stream of criticism that had been provoked by the English rules during the forty-seven years since they were erroneously enunciated by Lord Justice Lopes in the Court of Appeal.³³ Nonetheless, when, the very next year, the precise point came to be decided by the Supreme Court for the first time, those rules were applied³⁴ without question and with merely casual citation. There was no searching examination of legal principle and social utility.

Deep-rooted notions about the nature of the judicial process have also minimized lawmaking by the courts. Until recently most lawyers of common law Canada have been nurtured with the juristic thought of nineteenth-century England. From Hobbes and Bentham through Austin, they have regarded law as positive commands of the sovereign to be found more and more in the acts promulgated by an omnipotent legislature; less and less, but still chiefly, in the past decisions of the courts.³⁵ At the same time, from Maine, many are professed believers in the declaratory theory of

³² Hancock, *A Problem in Damages for Tort in the Conflict of Laws*, (1944), 22 *Can. Bar Rev.* 843. See also comment by the same author on *McLean v. Pettigrew* in (1945), 23 *Can Bar Rev.* 348.

³³ In *Machado v. Fontes*, [1897] 2 Q.B. 231.

³⁴ In *McLean v. Pettigrew*, [1945] 2 D.L.R. 65, [1945] S.C.R. 62. For a recent critical discussion see J. G. Castel, *Canadian Private International Law Rules in the Field of Civil Responsibility* (1958), 18 *R. du B.* 465.

³⁵ See Jerome Hall, *Living Law of Democratic Society* (1949), pp. 28-29.

law, and in the ancient Blackstonian fiction that the rules applied in those decisions were not made by the judges but were merely derived from custom discovered and declared. These seemingly inconsistent doctrines—which, however, unite in teaching that judges should not be lawmakers, that the proper function of the judge is only to expound the law, not to change it—have been expressed and acted upon again and again during the past fifty years by Canadian judges.

During this period, strict *stare decisis*, with its illusion of certainty and predictability of judicial decision, has consequently held even fuller sway within Canada than in England.³⁶ The doctrine has included not only, as has been seen, the principle that all courts are bound by the decisions of courts superior in the hierarchy; it has also included a rule propounded by the Supreme Court of Canada in 1909, that it is bound by its own previous decisions save in very exceptional circumstances.³⁷ Other Canadian courts have varied according to time and place in their regard for previous decisions of their own and those of Canadian courts with co-ordinate jurisdiction. Inevitably most Canadian judges have at one time or another evaded the crippling effect of a strict *stare decisis* by resort to one or another of the traditionally permissible techniques of evasion, and in this way deviously managed to legislate interstitially³⁸ under the guise of only applying existing law.³⁹ But until now Canadian law reports have revealed little trace of the flexibility in the use of precedent shown by some judges in England and the United States.⁴⁰ A partial explanation may be that the relatively slow development of the Canadian economy prior to the last decade has placed little strain on *stare decisis*.

During the same half-century Canadian courts have also subjected themselves to a constitutional restraint inspired by Austinian

³⁶ Cf. Julius Stone, *The Province and Function of Law* (1950), pp. 406-10. Concerning "certainty" of precedent see C. K. Allen, *Case Law: An Unwarrantable Intervention* (1935), 51 L.Q. Rev. 333.

³⁷ *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516. See discussion of this case in Laskin, *op. cit.*, *supra*, footnote 11, at pp. 1071-74. See also, Joanes, *Stare Decisis in the Supreme Court of Canada* (1958), 36 Can. Bar Rev. 175.

³⁸ Cf. Holmes J. in *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524.

³⁹ See Wolfgang Friedmann, *op. cit.*, *supra*, footnote 25, at pp. 731-40.

⁴⁰ For a short account of the use of precedent in England and the United States see Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied*, (1945), 31 A. B. A. Jour. 501. See also Goodhart, *Case Law in England and America* (1930), 15 Cornell L.Q. 173, and Precedent in English and Continental Law (1934), 50 L.Q. Rev. 40. Cf. Lobingier, *Precedent in Past and Present Legal Systems* (1946), 44 Mich. L. Rev. 955.

thinking. While with one hand maintaining the historic common law position that a legislative command is to be construed literally so as to interfere as little as possible with the status quo,⁴¹ the courts have with the other hand elevated a concept that only the legislature has lawmaking power into a formidable barrier to improvement and adaptation of law through the judicial process. This, it has been contended, is a necessary corollary of the doctrine of supremacy of Parliament. In Canada today, therefore, the orthodox common-law technique leaves mostly to the legislature the task of abrogating the old and formulating and establishing the new precept.⁴²

In theory it is easy to say that the legislature should make law and that judges should decide cases. But just where in practice should the borderline be drawn between the legislative and judicial functions? At least one answer to be found in past decisions is a logical anomaly and inconsistent with an era in which large scale reform of law has been undertaken by legislation expressed in general terms. Lord Haldane stated that "The binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from being unsettled and vague".⁴³ Despite their longstanding assertion of the supremacy of Parliament, however, the traditional hostility of judges toward legislation and their professional "thought-ways"⁴⁴ have led them to adhere to a restrictive and literal interpretation and also to reduce the legislative function to mere rule making.⁴⁵ The orthodox position confines a statutory innovation almost altogether to fact situations which it covers expressly and refuses to extend the principle established by the legislature to essentially similar but not identical situations.

⁴¹ For a recent illustration see *Toronto General Transit Commission v. Aqua Taxi Ltd.*, [1955] O.W.N. 857, at pp. 858-60. See Cardozo, *The Paradoxes of Legal Science* (1928), pp. 9-10; Pound, *Common Law and Legislation* (1908), 21 Harv. L. Rev. 383, at pp. 386-88; Stone, *The Common Law in the United States* (1936), 50 Harv. L. Rev. 4, at pp. 12-16, and in *The Future of the Common Law* (1937), pp. 130-35.

⁴² See *Applebaum v. Gilchrist*, [1946] 4 D.L.R. 383, at pp. 390, 411. Pound, *What of Stare Decisis* (1941), 10 Fordham L. Rev. 1, at pp. 12-13.

⁴³ In *Krelinger v. New Patagonia Meat and Cold Storage Company, Limited*, [1914] A.C. 25, at p. 29.

⁴⁴ See Julius Stone, *op. cit.*, *supra*, footnote 36, p. 198. For citation of illustrative material see especially his footnotes 275-285.

⁴⁵ Seemingly, as in the United States, "attributable to the fact that, long before important legislative expansion (of the common law), the theories of Coke and Blackstone of the self-sufficiency and ideal perfection of the common law, and the notion of separation of powers and of judicial independence had come to dominate our juristic thinking": Harlan F. Stone, *op. cit.*, *supra*, footnote 41.

Treating a principle established by the legislature as an authoritative precedent is condemned as judicial law making.⁴⁶

Nonetheless, a few judges have ventured to adapt the common law to new principles that they have found in statutory enactments. In 1932, *Ebers v. MacEachern*⁴⁷ was decided by the Supreme Court of Prince Edward Island. The defendant had shot and killed a silver black fox when it approached the hen house on his farm. The fox, which was ranch-bred and the progeny of foxes bred in captivity for many years, had escaped from its pen and been at large for several days. The plaintiff, owner of the fox, claimed its value and the defendant argued that the shooting occurred after the plaintiff's ownership had ceased because the fox was an animal *ferae naturae* which had escaped without *animus revertendi*. The court rejected this argument and allowed the action expressly in implementation of a new principle found in a statute. The provincial *Domestic Animals Act* of 1888⁴⁸ had been amended in 1919⁴⁹ so as to include silver black foxes within the definition of "animal". Although the Act is confined to regulating the running at large of tame animals and nowhere grants their owner a personal right of action for their destruction,⁵⁰ Mr. Justice Saunders said: "Certain it is that the legislators intended that foxes should be regarded as tame or domestic animals as they were specifically included in the 1919 amendments. . . . I think it goes without saying that no person would be justified in shooting his neighbor's horse or cow should it stray on his premises and now, since a fox is placed in the same category as a horse or cow and regarded as a tame or domestic animal, the same principle applies."

In 1945, the Honourable J. K. MacKay, then an Ontario trial judge, held a restrictive covenant to be void which read: "Land not to be sold to Jews, or to persons of objectionable nationality."⁵¹

⁴⁶ See Freund, *Interpretation of Statutes* (1916), 65 U. Pa. L. Rev. 207, at p. 226.

⁴⁷ 4 M.P.R. 333.

⁴⁸ Stats. P.E.I., 1888, c.4. As amended the pertinent definition read: "In this Act. . . : (a) the expression 'animal' . . . means and includes horses, meat cattle, sheep, *silver black foxes and cross or patch foxes* . . . turkeys, geese and all other domestic fowl". In the 1951 Revised Statutes of P.E.I. the italicized words were omitted. R.S. P.E.I., 1951, c. 45 s. 1, (a).

⁴⁹ Stats. P.E.I., 1919, c. 6, s. 4.

⁵⁰ S. 72 of the Act of 1888 required the owner of enclosed premises on which a domestic animal had strayed to "use due diligence and reasonable efforts to cause said animal to return to its owner." S. 76 entitled the owner to possession upon tendering to the person having custody of the animal all costs of advertizing and a reasonable amount for its care and sustenance.

⁵¹ *In Re Drummond Wren*, [1945] 4 D.L.R. 674.

He found inspiration from Justices Cardozo⁵² and Holmes⁵³ and then drew for the foundation of his decision upon present day public policy against racial discrimination, discovering that policy primarily in the Ontario Racial Discrimination Act⁵⁴ and other Ontario legislative enactments.⁵⁵ This was a judicial method that seemed to be in accord with legislative supremacy since the judge sought and found the principle in the statutes.⁵⁶ Four years later, however, when the validity of a similar restrictive covenant was in issue, another trial judge and four judges of the Court of Appeal of Ontario agreed with one another that Mr. Justice MacKay had wrongfully trespassed on the exclusive law-making field of the legislature,⁵⁷ saying that "courts should not attempt, by judicial decision, to encroach upon a subject which has already been a matter occupying a field of recent legislation."⁵⁸ When this case reached the Supreme Court of Canada, that court gave a judgment of Solomon.⁵⁹ Without discussing the validity of Mr. Justice MacKay's decision it reversed the Ontario Court of Appeal, not because the covenant involved racial discrimination, but because the particular covenant was not one that would run with the land and was too vague and uncertain to be enforced.⁶⁰

⁵² The Growth of Law (1924): "Existing rules and principles can give us our present location, our bearing, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth." pp. 19-20.

⁵³ The Common Law (1881): "The very considerations which judges most rarely mention and always with apology are the secret root from which the law draws all the juices of life. I mean, of course, what is expedient for the community concerned." p. 35.

⁵⁴ Stats. Ont., 1944, c. 51.

⁵⁵ The Insurance Act, now R.S.O., 1950, c. 183, s. 101; and the Community Centre Act, now 1950, c. 58, (regulations passed under s. 10.). Indirectly also from the terms of the Charter of the United Nations and declarations of leaders of democratic nations. This received much comment from international lawyers. See for example Sayre, *Shelley v. Kraemer* and *U. N. Law* (1948), 34 Ia. L. Rev. 1, at p. 8; Lauchterpacht, *International Law and Human Rights* (1950), pp. 150, 152, 156, 411.

⁵⁶ See Pound, *Common Law and Legislation*, (1908), 21 Harv. L. Rev. 383, at pp. 406-407.

⁵⁷ In *In re Noble & Wolf*, [1948] 4 D.L.R. 123, [1948] O.R. 579, [1949] 4 D.L.R. 375, [1949] O.R. 579. The Chief Justice was able to distinguish and uphold this covenant on the ground that it was limited as to time, but the four other judges agreed with the trial judge in the opinion that *Re Drummond Wren* was wrongly decided. See Bourne, comment in (1951), 29 Can. Bar Rev. 969, at p. 973. See especially the opinion of Hogg J.A. who denied that the policy relied on by MacKay J. existed.

⁵⁸ Hogg J. A. at [1949] 4 D.L.R. 399.

⁵⁹ *Noble et al v. Alley*, [1951] 1 D.L.R. 321, [1951] O.R. 64.

⁶⁰ See Denning, *The Road to Justice* (1955), p. 98, who regards the action of the Supreme Court of Canada in this case as "very wise because it left the conflict of public policy (that favouring sanctity of contract v. that against racial discrimination) to be settled by the Legislature which is surely better fitted to deal with it than the courts of law."

When it is clear that the legislature has elaborated rules on a subject in great detail it might well be improper for a court to fill a gap in the rules, but if an enactment is phrased in general terms embodying a clearly discernible principle, a court can hardly be said to be abiding by the supremacy of Parliament⁶¹ or carrying its share of the burden of shaping the law⁶² if it fails to adapt the common law to that principle.

The conclusion is clear that in the first half of the twentieth century the rigor of *stare decisis* and the doctrine of legislative supremacy as applied in Canada combined to produce a static

In 1954 the Racial Discrimination Act (R.S.O., 1950, c. 328) to which MacKay J. referred in *In re Drummond Wren*, was repealed and replaced by the Fair Accommodation Practices Act, (1954, c. 28) in which by way of preamble the legislature declared that "Whereas it is public policy in Ontario that places to which the public is customarily admitted be open to all without regard to race, colour, nationality, ancestry or place of origin; whereas it is desirable to enact a measure to promote observance of this principle; and whereas to do so is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations."

⁶¹ Mr. Justice Holmes of the Supreme Court of the United States in *Johnson v. United States* (1908), 163 F. 30, said: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change in policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

⁶² In *State v. Herndon* (1946), 27 So. 2d. 833, a Florida case, Ferrell J. in the course of his majority opinion holding that since legislation had established the principle of separateness of husband and wife as to property, contracts and torts, it followed that a man can steal from his wife, although the legislature had not expressly said so, remarked somewhat brashly; "A court can no longer interpret the law from the back of an ass: the process is so slow it overlooks factors that require a different interpretation today from what might have been required yesterday." See *Rees v. Hughes*, [1946] 2 All E.R. 47 and commentary thereon in (1946), 62 L. Q. Rev. 319.

In Judicial Implementation of Legislative Policy (1957), 3. U. of Queensland L. J. 139, at p. 143, J. L. Montrose said: "... There have been many who have contended that where Parliament has failed to deal with some topic within the general purview of the broad object of an Act, and it is clear what Parliament would have provided for the omitted topic, then the courts should legislate as Parliament would have legislated. This would be a legislative implementation by the courts of the policy of the legislature. But Denning L. J. (in *Seaford Estates v. Asher*, [1949] 2 K.B. 481.) was not contending for this. Moreover, a refusal by the courts to legislate in this manner by no means entails a refusal to consider legislative policy for the purpose of interpretation. It is submitted that despite the views of Lord Simonds (*In Magor and St. Mellons R.D.C. v. Newport Corporation*, [1950] 2 All E.R. 1226, at p. 1236A.), it still remains a principle of English law that legislative policy is properly to be considered in the process of interpretation. The principle on which such use of legislative policy may be rejected is not impropriety of judicial legislation but the very different one of a constitutional doctrine of promulgation."

and mechanical operation of law. What is the present need? What is the probable future trend?

In Canada the foundations of economic development have disclosed themselves slowly. Now that they are revealed in their amazing plenitude, it is plain that Canadian institutions, including the courts, are met with a prodigious need for creative statecraft in the years immediately ahead.

When the federal Parliament, functioning as the supreme law-maker for an independent Canada, abolished appeals to the Privy Council, it became henceforth unconstitutional for all Canadian courts to hold themselves bound by any decision of an English court, except possibly decisions of the Judicial Committee made before the abolition.⁶³ Therefore full responsibility now and in the future must be carried solely by the Canadian judges. If many of them fail to overcome past habits and to reduce their obstacles to fuller participation in advancement of policy, "the law will stand still while the rest of the world goes on, and that will be bad for both."⁶⁴ No one would reasonably suggest that the great heritage of English-made law should be jettisoned; but it should be utilized as a fortress from which to advance, not as a place of rest.

All provincial courts and the Exchequer Court are bound to follow the decisions of the Supreme Court of Canada. Obviously, therefore, on the judges of the Supreme Court falls the chief burden of determining whether the courts of the country as a whole are to play an effective part in shaping the substantive law to adjust the fast-changing interests of the Canadian people. There is every reason to believe that the judges are aware of the tremendous responsibility that this entails,⁶⁵ although a decision made in 1954 failed to show that they were. In that year the Supreme Court of Canada⁶⁶ held itself bound by a House of Lords case⁶⁷ to decide

⁶³ See the convincing justification for this statement by W. R. Lederman in (1952), 30 Can. Bar Rev. 1083, at p. 1084.

⁶⁴ Denning, L. J. in *Packer v. Packer*, [1953] 2 All E.R. 127.

⁶⁵ In the course of his report on legal education prepared for the Survey of the Legal Profession in Canada, Mr. Justice Rand said: "Mechanical discoveries and inventions have mastered the matter and forces of land, sea and air, and have produced a material structure for human utilization undreamt of by past generations. At the same time, the growth of population, largely by reason of advances in medical science, has accelerated tremendously. New problems arising out of the changing social conditions, not least in the psychological field, have proliferated. To the smallest detail, this has been recorded in writings which give historical fixity to the new levels attained.

As a corollary, the legal order is now in process of a corresponding adjustment: new aspects, new orientations, and vast expansions of its areas of action, have already appeared or taken place or are about to take place".

Legal Education in Canada (1954), 32 Can. Bar Rev. 387, at pp. 389-90.

⁶⁶ In *Brewer v. McCauley*, [1954] S.C.R. 645, [1955] 1 D.L.R. 415.

⁶⁷ *Chichester Diocesan Fund & Bd. of Finance v. Simpson*, [1944] A.C. 341.

that a residuary bequest "for charitable, religious, educational, or philanthropic purposes" is void for uncertainty. When the House of Lords case was before the Court of Appeal, Lord Justice Goddard, as he then was, while concurring in reaching that result because he was bound by previous decisions, remarked:

I cannot feel any enthusiasm for this rule. Indeed, when I find a rule which says that if property is left to trustees to give to charitable *and* benevolent purposes, that is good, but, if it is for charitable *or* benevolent purposes it is not, I regard it with some distaste. That was described by the Master of the Rolls in the recent case of *In re Horrocks*⁶⁸ as a trap into which the unskilled draughtsman not infrequently falls.⁶⁹

Neither of the judges of the Supreme Court who wrote opinions in this case considered the validity or desirability of the rule applied by him, nor did he refer in any way to argument of counsel for both sides that since the court is now the final court of appeal for Canada it is no longer bound by the House of Lords or other English courts.⁷⁰ There is no indication whether the judges adopted this rule of "idiotic linguistic gymnastics"⁷¹ to govern a matter of great social importance because they believed that (a) the House of Lords decision per se was binding upon them, or (b) the law of England as it exists from time to time is for historical reasons a part of the body of the common law of New Brunswick where the case originated, or (c) there is a general body of common law brooding in the sky, which prevails universally without regard to what the court with jurisdiction in a particular unit of territory holds to be the rule in force there. In any event, the Supreme Court showed no evidence of regarding law as a living thing to be applied and shaped to meet the needs of an evolving society.

A striking contrast however, is found in a case reported in 1955, where Mr. Justice Rand, by way of reasoned dictum, led the way in advancing the common law of contracts beyond previous express English and Canadian formulation by stating that it is "the tendency of Courts to treat offers as calling for bilateral rather than unilateral action when the language can be fairly so construed . . ."⁷² He quoted as authority Williston's statement of the

⁶⁸ [1939] P. 198.

⁶⁹ Sub nom. *Re Diplock, Wintle v. Diplock*, [1941] Ch. 253, at pp. 266-67.

⁷⁰ See critical comments on *Brewer v. McCauley* by Eric C. E. Todd and Gilbert D. Kennedy in (1955), 33 Can. Bar Rev. 334, 340, 630.

⁷¹ Todd, *ibid.*, at p. 338. The Conference of Commissioners on Uniformity of Legislation in Canada has in preparation a draft statutory provision designed to rectify the effect of this rule.

⁷² In *Dawson v. Helicopter Exploration Co.*, [1955] 5 D.L.R. 404, at pp. 410-11. See also attitude of Kerwin J. in *Boucher v. The King* (1950), 96 C. C. 48 and on re-hearing (1951), 99 C. C. 11. See comment by Brewin, (1951), 29 Can. Bar Rev. 193.

effect of American authority,⁷³ and quoted the famous words of Judge Cardozo in the New York Court of Appeals that "the law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman and every slip was fatal."⁷⁴

In 1957 the Supreme Court of Canada again made a significant development of the law. In *Orchard v. Tunney*⁷⁵ the plaintiff was a trade union member who suffered pecuniary loss by losing his job under a closed shop agreement as a consequence of having been wrongfully suspended from the union by the defendants, the members of its executive board. The members of the board were held to be individually and personally liable in tort and damages were awarded accordingly. When the case was before the Court of Appeal of Manitoba, Mr. Justice Tritschler, (*ad hoc*), made a deliberate departure from previous doctrines by treating the act of the defendants as a violation of an incident of a status. He said:

I cannot myself accept the theory that the relationship between a member of a union and his union is purely contractual. It starts in contract but once created the relationship ripens into status. The wrongful destruction of this status is a tort. The categories of tort are not closed. . . . At one time the courts based their jurisdiction to relieve persons improperly expelled from associations upon the narrow ground of protection of the member's right of property, that is, his interest in the assets of the association of which he was deprived by the expulsion. With the growth of associations, particularly labour unions, in which members had no property rights, the law did not hesitate to meet the changing conditions. It found a remedy in the theory of contract. The property theory was too narrow and rigid but the law proved flexible. It has now been demonstrated that the contract theory has become too rigid. . . . If the law is too rigid, who makes it so? Who can keep it flexible? The judges found it possible to move from property to contract to meet the exigencies of the times. The step from contract to status is not more revolutionary. . . . In my opinion the destruction of plaintiff's union status was a tort. What was done was tortious on the further ground that it was done maliciously. . . . Therefore, damages are recoverable.⁷⁶

On the appeal to the Supreme Court the decision of the Court of Appeal was affirmed, but Mr. Justice Rand, with whom Mr.

⁷³ Williston on Contracts, vol. 1 (1938), pp. 76-77.

⁷⁴ In *Wood v. Lady Duff-Gordon* (1917), 222 N.Y. 88, at pp. 90-91; 118 N.E. 214.

⁷⁵ (1957), 8 D.L.R. (2d) 273 on appeal from the Court of Appeal of Manitoba, reported in, [1955] 3 D.L.R. 15, (1955), 15 W.W.R. (N.S.) 49. Mr. Justice Locke also gave reasons for reaching the same result with which Mr. Justice Nolan concurred.

⁷⁶ 15 W.W.R. (N.S.) 49, at pp. 75-76. For a review of various theories see Stone, *Wrongful Expulsion from Trade Unions: Judicial Intervention at Anglo-American Law* (1956), 34 Can. Bar Rev. 1111. See also Dennis Lloyd, *The Right to Work* (1957), 10 Current Legal Problems 36.

Justice Cartwright and Mr. Justice Abbott concurred, was unable to agree that the relations of a member with his immediate union had attained the stage of status, that is "a condition of one or more persons between or toward one another or others distinctive legal relations exist to which by the domestic law special rights, duties, capacities and incapacities are annexed."⁷⁷ Instead, he held, that the rights of a union member are essentially contractual. He said: "What is vital to a member is his right as such to protection in employment; that would be an incident of the status; and the conclusive answer seems to be that on the assumption that the group is bound by an underlying agreement the incidents are already furnished by the parties themselves. To declare a contractual provision to be an incident of a newly recognized status would be an unnecessary act of legislation; to extend it to an element beyond the contract would be to embark upon legislative policy in an unwarranted manner."⁷⁸ The union, not being itself a legal entity, the contractual rights of a member are with all members except himself. "This contractual condition gives rise to a right to engage in all work for which the Union mark is a requisite; and when a Union or a closed shop agreement is entered into with an employer, Union membership secures to each member the right to continue in the employment free from improper interference on the part of the Union or its officers. Membership is the badge of admission and continuance and, vis-à-vis the employer, to remove the badge is directly and immediately to defeat the right."⁷⁹ Mr. Justice Rand then advanced the boundaries of the law by allowing recovery in tort for violation of this right. To accomplish this he made a new application of the principle enunciated long ago by Chief Justice Holt that, "if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."⁸⁰

Although the Supreme Court in this case found itself unable to go to the extent of establishing a new concept upon which to develop this branch of the law, it was because it was not convinced that such a concept is justifiable by the existing facts of trade union membership.⁸¹

⁷⁷ *Supra*, footnote 75, at p. 281 (D.L.R.).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, at p. 282.

⁸⁰ In *Ashby v. White* (1703), 2 Ld. Raym. 938, at p. 953.

⁸¹ See comprehensive and discerning discussions of *Orchard v. Tunney* by Dennis Lloyd in (1958), 36 Can. Bar Rev. 83, and by Crawford and Stone, *ibid.*, p. 97. In the latter commentary the authors make two main

Perhaps the members of the Supreme Court have been wise, for the sake of stability, in refraining from making any bold declarations of policy concerning departure from precedent. So far there have been only two express indications of the direction of their thinking. First, in the context of private substantive law there was the cautionary admonition in which Chief Justice Rinfret expressed the considered attitude of the judges in 1951, when he said:

It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all Courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationship between the Courts.⁸²

Second, in the context of constitutional law, Mr. Justice Rand in 1957, in *Reference re Farm Products Marketing Act* said that: "The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents."⁸³ If this carefully phrased proposition receives acceptance concerning precedent in the entire area of the law the self-disciplined freedom

criticisms of the reasons for judgment, first, that it is a matter of common knowledge that a trade union is in fact a legal entity and that the court should have approached the problem with this fact in mind; and, second, that, "although it is conceded that the concept of status is ill defined, it is . . . for this very reason such a concept may constitute a more adaptable basis, than does contract, upon which to develop this branch of the law."

⁸² In *Woods Manufacturing Co. Ltd. v. The King*, [1951] 2 D.L.R. 465, at p. 475.

⁸³ (1957), 7 D.L.R. (2d) 257, at p. 271.

will be attainable to enable the court to meet the challenge that has been cogently put by Gilbert Kennedy:

Our Supreme Court faces the very great challenge to develop, over the next few years, not merely the law in a few individual cases but the approach to law in this country for years to come. Any attitude which ties us blindly to the House of Lords is, I suggest, merely the green light for a continuance of the stagnation in Canadian legal thought and development of which many of us are all too aware.⁸⁴

Canadian law reports afford ample proof that judges now on the bench possess a high degree of law-making capability. In the rare cases of first impression, Canadian courts have of necessity avowedly made new rules of law. Inability to bring the case in hand under any pre-existing judicial or legislative rule provided no escape from the anguish of decision. In such cases the judges have usually created their new rules in harmony with what they have believed to be "the contemporary common sense and needs of the nation."⁸⁵ In the last decade they have also shown in those cases a quickening tendency to seek illumination in United States decisions and writings, and the *Restatement* has lately begun to be directly quoted and applied.⁸⁶ Hitherto benefit from the *Restatement* had been mainly derived indirectly from the leading English cases in which its principles have been commanding increasing acceptance.⁸⁷

For one example, in 1943 the Supreme Court of Canada was asked to decide a question on which there was then no authority in the law of New Brunswick: is recrimination an absolute bar in a suit for divorce on the ground of adultery?⁸⁸ Mr. Justice Rand⁸⁹ fulfilled the historic judicial role of creative lawmaker by drawing upon sources both from within and without the body of existing law and shaping the new rule to accord with what those sources indicated that it ought to be. "We are then," he said,

to determine from the conventions of the common law of New Brunswick what, in the light of present-day circumstances, a rule of the nature in question should be. . . . A glance over the course of the past century

⁸⁴ (1955), 33 Can. Bar Rev. 630, at p. 632.

⁸⁵ See Sir Frederick Pollock, *Judicial Caution and Valour*, in *Jurisprudence in Action* (1929), pp. 371, 373.

⁸⁶ In 1934 neglect of the *Restatement* and reference instead only to Williston on Contracts influenced rejection of the doctrine of promissory estoppel by the Supreme Court of Canada in *Dalhousie v. Boutilier Estate*, [1934] S.C.R. 642. But in 1944, the Supreme Court resorted to the *Restatement* in *C.P.R. v. Kizlyk*, [1944] 2 D.L.R. 81, where House of Lords authority was doubtful.

⁸⁷ See Denning, *The Restatement of the Law: Its Place in the English Courts* (1951), 37 A.B.A. Jour. 329.

⁸⁸ In *G. v. G.*, [1943] S.C.R. 527.

⁸⁹ Writing on behalf of the Chief Justice and himself.

shows the unmistakable change in attitudes towards the social and individual relationships [of husband and wife]. . . . What is called for is a flexible means through which the relevant legal considerations can be applied; and that, in the circumstances, must be found in a judicial discretion.⁹⁰

Recrimination was therefore a discretionary, not absolute, bar to granting a decree *a vinculo* in New Brunswick.

For a second example, in 1946 the Ontario Court of Appeal allowed a wife to recover in an action against a third person for enticing away her husband.⁹¹ The question of whether a wife had a substantive right to the consortium of her husband was unprecedented in the province. As a reflection of judicial method and attitude, the manner in which the majority of the court, especially the chief justice, reached the answer to the question was noteworthy in several respects. After observing that in England in the opinion of judges and text writers the modern development of the legal rights of a wife arising from her marital status included the right to consortium, the chief justice remarked that "it is of assistance, in the consideration of a question where social relations are of fundamental importance, to see what the law is in the United States." He then quoted the American Law Institute's *Restatement of the Law of Torts* and Prosser's textbook⁹² and asserted that:

Even if there were no [English] judicial opinion supporting such a claim by a wife as is made here, in my opinion we would be warranted by the social changes that have in modern times tended toward equality of the sexes before the Courts in deciding that the statement of claim in this action states a good cause of action.

Another example of independence and originality was provided by the Supreme Court of Canada in 1951 on an appeal from British Columbia. In *Cooke v. Lewis*⁹³ the plaintiff had been struck by birdshot immediately after the two defendants who were hunting in the vicinity had fired their guns at different birds. The plaintiff was unable to prove which of the defendants had injured

⁹⁰ *Supra*, footnote 88, at pp. 535, 536.

⁹¹ *Applebaum v. Gilchrist*, [1946] O.R. 695, [1946] 4 D.L.R. 383. See, however, Wright, *op. cit.*, *supra*, footnote 12, who points out *passim* that in the same year as the same court decided *Applebaum v. Gilchrist* it apparently thought it necessary in *Buckley & T.T.C. v. Smith*, [1946] O.R. 798, to state that its decision was "supported by English decisions and texts" even though there had never been an actual decision on the point.

⁹² *Restatement* s. 690; Prosser, *The Law of Torts* (1941), p. 928. A recent case in which some assistance might have been gained from American authority was *Thompson v. Mechan* (1958), 13 D.L.R. (2d) 103.

⁹³ [1951] S.C.R. 830, [1952] 1 D.L.R. 1. See commentary by Glanville Williams (1953), 31 Can. Bar Rev. 315.

him and they were not joint tortfeasors. Unable to find any case in point in the courts of Canada or England, the Supreme Court held that if both defendants had acted negligently the plaintiff could recover against both unless one could free himself from liability by proving that the other had injured the plaintiff. To this extent the onus of proof had shifted from the plaintiff. This created an exception to the general rule that where a plaintiff is unable to prove which of several defendants caused him injury he can recover from none. Mr. Justice Cartwright, for a majority of the court, derived from an American case the principle that where two persons have committed acts of negligence under circumstances that disable the injured person from proving which one caused the injury, it is unfair to the injured person to require him to sustain the burden of proof. Mr. Justice Rand, concurring made an analysis of the reasons underlying the principle. He said:

What, then, the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof. The legal consequence of that is, I should say, that the onus is then shifted to the wrongdoer to exculpate himself; it becomes in fact a question of proof between him and the other and innocent member of the alternatives, the burden of which he must bear. The onus attaches to culpability, and if both acts bear that taint, the onus or *prima facie* transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them.

Here, apparently for the first time, the infringement of a remedial right of proof was made the basis of liability in negligence.

There was no mechanical operation of the judicial process in these cases where the courts had no precedents to bind them. Little more in the way of mechanical operation is actually required if *stare decisis* is resorted to as a compass instead of as a crutch.

A degree of certainty, so far as it is attainable, facilitates planning of human affairs in reliance on law, and a strict adherence to precedent makes possible approximate predictability of result in the larger number of routine cases. As contrasted with a mechanical application of precedent, with a strictly analytical and logical deduction from existing premises, however, a flexible use of *stare*

decisis provides at one and the same time the tested legal experience of the past as a guide for present adjudication and a wholesome insurance that justice will be done according to law. By this method also, the difficult task of reconciling stability with change, certainty with reform, may be accomplished. Julius Stone has convincingly demonstrated that the method by which the English judges have evolved great bodies of rules reasonably adapted to changing conditions has not been by the kind of logical deduction which the analysts have portrayed. He has shown that the technique has been to exercise the freedom of choice that arises out of the fallacies of the logical form inherent in the judicial method itself. The determinative factors of judgment have thus lain "in experience of the actual world and search for justice or convenience in new situations."⁹⁴ Lord Wright has remarked that "a good judge is one who is the master, not the slave, of the cases."⁹⁵

Writing in the *Canadian Bar Review*,⁹⁶ Clive Schmitthoff of London has argued that readiness to do justice to the social and economic changes of the postwar era has enabled the courts of England "to perform smoothly the normal function of the judicature to assimilate the new social phenomena into the existing fabric of the law and to apply the conventional process of legal reasoning to new sets of fact." He contends that this became possible because of the evolution of a relative and elastic rule of precedent⁹⁷ that resulted from the decision of the Court of Appeal in *Young v. Bristol Aeroplane Company*⁹⁸ in 1944. He believes that the rule "introduces the exact medium of flexibility which is required to make *stare decisis* workable in the postwar era. . . . In short, *stare decisis* is still the king-pin of English law but has ceased to operate in 'a purely mechanical manner.'" This, he says, is the third of three phases of the rule of precedent that can be distinguished in English law in modern times.

The first covers the 18th and the beginning of the 19th century; in that

⁹⁴ Julius Stone, *Fallacies of the Logical Form in English Law—a Study of Stare Decisis in Legal Flux*, in *Interpretations of Modern Legal Philosophies* (1947), p. 696.

⁹⁵ *The Common Law in its Old Home*, in *The Future of the Common Law* (1937), pp. 66, 79. See the able exposition of this thesis in the article by Wolfgang Friedmann, *Judges, Politics and the Law* (1951), 29 *Can. Bar Rev.* 811.

⁹⁶ *The Growing Ambit of the Common Law* (1951), 29 *Can. Bar Rev.* 469, (1952) 30 *Can. Bar Rev.* 48.

⁹⁷ "The modern qualifications of the rule assume two forms: a considerable liberty of the Court of Appeal to disregard its own decisions, and a diminishing strictness of the rule the lower the courts are in the judicial hierarchy." Cf. Dunfield J. in *Power v. Winter* (1952), 30 *M.P.R.* 131, at p. 148.

⁹⁸ [1944] K.B. 718, *affd.* [1946] A.C. 163.

period, the rule was subject to certain qualifications, which allowed the judges considerable freedom. In the second period, which (in England) includes the later 19th century and the beginning of the 20th century, most of those qualifications were no longer admitted and the rule became absolute.

Some of the abler judges in the Canadian provinces have shown a realization of the possibilities of a creative role and a quickening self-reliance in adjudication since appeals to the Privy Council were abolished, and have made deliberate departures from the course previously charted by their own decisions and those made in England.⁹⁹ But the extent to which this tendency to emerge from the period of absolute *stare decisis* will be permitted or encouraged by the Supreme Court of Canada is, as has been shown above, at the present time uncertain.

In 1949 the Manitoba Court of Appeal, when applying a statute governing assessment of damages for loss of expectation of life, deliberately chose to follow a House of Lords decision from which the Lords had departed, partly because, as Mr. Justice Adamson put it, "There is . . . a difference between the value of life in England and Canada."¹⁰⁰ In 1952, in the same court,¹⁰¹ Mr. Justice Coyne, in an action for nullity of marriage, referring to the decisions of the English Court of Appeal and the House of Lords, declared: "We are not, of course, bound by English cases, and with all deference, I am not prepared to follow the observation in these cases referred to. The sound view in my opinion is that of the High Court of Australia. . . ."

Judges in two provinces, Nova Scotia in 1951 and British Columbia in 1954,¹⁰² exorcised the "ghostly influence" of the ancient forms of action by expelling the action of trespass to the person from the immediate context of suits for harm negligently caused in the opera-

⁹⁹ This has been especially marked in criminal cases. See Wolfgang Friedmann, *op. cit.*, *supra*, footnote 25, at pp. 728-29. See references to Jerome Hall, General Principles of Criminal Law, in *R. v. Mathews* (1953), 9 W.W.R. (N.S.) 649; *R. v. Hoodley* (1955), 15 W.W.R. (N.S.) 397. In New Frontiers in Jurisprudence in Canada (1958), 10 Jour. Legal Ed. 331, at p. 332, Edward McWhinney states that "In fact, it can be said without exaggeration that in English Canada [a realist-sociological emphasis] is the dominant approach to law, the old English positivist legal tradition having been put to flight altogether." Anyone who believes that he would be able to demonstrate dominance of such an approach in contemporary law reports is overly sanguine, regardless of where else he may find it.

¹⁰⁰ In *Anderson v. Chasney*, [1949] 4 D.L.R. 71. This decision was affirmed without comment by the Supreme Court of Canada [1950] 4 D.L.R. 223. See remark of Friedmann, *ibid.*, at p. 739.

¹⁰¹ In *Kerr v. Kerr*, [1952] 4 D.L.R. 578, at p. 584.

¹⁰² In *Eisener v. Maxwell* (1951), 28 M.P.R. 213, (N.S.). See especially MacDonald J. at pp. 237-38, and Doull J. at p. 250; [1951] 3 D.L.R. 345; and Clyne J. in *Walmsley v. Humenick*, [1954] 2 D.L.R. 232 (B.C.).

tion of motor vehicles. This was done in the face of support in contemporary English texts for perpetuation of tactical reliance upon the limitations of such medieval terms of pleading.¹⁰³

In any examination of the function of the courts in development of law a definite handicap should not be overlooked. It is one that inheres in the judicial process. The primary task of judges is to decide the issue raised by the controversy between the parties before them. They are to decide according to the law applicable to the issue, law to be determined by a process of discovery and interpretation. Their duty is primarily to make the right decision for the parties to the action, and only secondarily to be concerned with the effect that the decision will have in the future upon the interests of other persons. But the doctrine of *stare decisis* has, paradoxically, led judges inevitably to become makers as well as appliers of law. Jerome Frank remarked that,

if an opinion does, in truth, lay down rules which must thereafter be followed by the courts themselves in later cases, the responsibility in deciding existing controversies is far greater than that of being fair to the parties to those controversies, for then a judge is playing the important role of legislator.¹⁰⁴

Good lawmaking is probable only when the lawmaker knows the facts that have given rise to the question for which a solution is sought and that indicate the likely practicability and effects of different solutions. Judicial procedures have been developed to aid in resolving litigation and hence are not well designed for finding facts other than those that are directly relevant to the issue between the particular litigants. These procedures have become highly efficient both for discovering the true facts of the particular controversy and for excluding the facts that would show what effect one abstract rule of law or another would have on persons other than the litigants. The judges are compelled to have recourse to the device of judicial notice for knowledge and understanding of these social, economic, and political facts. But these facts are scarcely if at all available in usable and reliable form. Indeed, it has been suggested that the handicaps under which the courts operate as finders of facts relevant to policy may be an important reason why many of them are so reluctant to admit that they make law,¹⁰⁵ even to themselves.

¹⁰³ Cf. however the Ontario decision of *Hollebone v. Barnard*, [1954] O.R. 236, [1954] 2 D.L.R. 278, of which see strong criticism in Wright, *op. cit.*, *supra*, footnote 12, at pp. 102-3.

¹⁰⁴ *Aero Spark Plug Co. v. B.G. Corp.* (1942), 130 F. 2d 290, at pp. 294-99.

¹⁰⁵ Johnstone, *An Evaluation of the Rules of Statutory Interpretation*,

Leaders of the bar are now beginning to recognize their obligation to assist the judges to meet the requirements of the times. In 1954 the Editor of the Canadian Bar Review, reporting to the Canadian Bar Association at its annual meeting, conceded that "the contemporary judge in Canada, by a process of drawing on the capital of the past, and borrowing from the contributions of other countries, may be able still, to do a sort of ready justice between the parties immediately before him." "But," he asked, "what proportion of the judgments now being reported, even of our highest court, can honestly be said to clarify the law . . . or to adapt an outmoded rule to meet a new need?"¹⁰⁶ The Bar Association promptly responded by establishing special committees to explore the problems of sponsoring and financing a continuous programme of legal research on a nationwide scale. Steps are being taken to implement the recommendations of the committees.¹⁰⁷

The legislature is of course the supreme lawmaker, and in a democracy it must determine the major questions of policy. Wherever there is freedom under law, the judiciary, is, nonetheless, still under every constitution a branch of government independent of and co-ordinate with the legislature.¹⁰⁸ The courts are really sub-

(1954), 3 U. of Kan. L. Rev. 1, at pp. 18-21. For discussion of the relative merits of legislatures and courts as lawmakers, see Salmond, *Jurisprudence* (8th ed. 1930), p. 176; Lewis, *Adaptation of the Law to Changing Economic Conditions* (1925), 11 A.B.A. Jour. 11. Extension of the use of the so-called "Brandeis Brief" to the presentation of economic and social facts other than those underlying constitutionality of statutes might well be considered.

¹⁰⁶ G. V. V. Nicholls, Report of the Editor of the Canadian Bar Review (1954), 37 Proc. Can. Bar Assn. 57, at p. 59. He added: "My own impression is that the law of Canada (and in other countries too) is on balance becoming each year more confused—less certain—and more out of step with the requirements of the times." See Braden, *Legal Research: A Variation on an Old Lament* (1952), 5 Jour. Legal Ed. 39. In *Towards Realism in Legisprudence* (1950), 59 Yale L.J. 886, at p. 889, Julius Cohen said: "Judicial policy-making is blind unless it is bottomed on reliable estimates of what it will do—in terms of human gains and deprivations. It impliedly admits that this information cannot with complete reliance be obtained from the briefs or arguments of counsel representing the adversary interests involved; that this body of knowledge must come from some reliable independent source. It recognizes the need for accurate measuring rods of human behavior—measuring rods the creation and application of which would tax the ingenuity and skills of our best social scientists."

¹⁰⁷ See Report of the Committee on Legal Research, submitted by the Chairman, Professor F. R. Scott (1956), 34 Can. Bar Rev. 999. At the 1958 Midwinter Meeting of the Council of the Canadian Bar Association a report was presented from a complementary "Special Committee on Educational and Charitable Foundation" which recommended that the Association sponsor such a Foundation in furtherance of the Scott report. At the 1958 Annual Meeting of the Association the Executive Committee recommended immediate implementation of the Committee's report.

¹⁰⁸ See Goodhart, *English Law and the Moral Law* (1953), pp. 54-55, 60-61; O'Halloran J.A. in *Rex v. Hess*, [1949] 4 D.L.R. 199 (B.C.).

ordinate only to the extent that they must apply a statute after it has been validly made, and their historically established function includes, within limits that have been discussed, making law while in the process of applying it.¹⁰⁹ Under Canada's federal constitution a sizable obstacle to legislative reforms of the private law is the necessity of inducing ten disparate and often reluctant provincial legislatures to act.¹¹⁰ Experience proves that legislators usually find little party advantage, little appeal to the popular vote, in so-called "lawyer's law." Furthermore, in contemporary Canada the pressure of time and events entitles the legislators to rely on the judges to revitalize their historic function as makers of the private law as far as the nature of adjudication will allow. The greater the popular satisfaction with their administration of justice, the fewer will be the unsatisfied claims and expectations demanding change of law by enactment. The judges should, therefore, not merely iron out the occasional minor crease in the elastic fabric of the common law; they should be alert to adjust it to fit the new facts and forces of a relationally organized society and an expanding economy.¹¹¹ If they will it so, they are just as able to relax their self-made fetters as they were to forge them.

The approach in keeping with the needs and spirit of the times was taken in 1952 by Mr. Justice Egbert in the Supreme Court of Alberta when discussing a rule supported by English and some Canadian cases that in a divorce action adultery is required to be proved beyond a reasonable doubt. He said:

The fact of the existence of judge-made law is one as to which it would be futile for any court to close its eyes, and such judge-made law can, in many cases, be most salutary. It is, indeed, one of the principal factors in enabling the law to keep abreast of changing times, and in preserving that dynamic character without which it would be a hindrance rather than a help to men in their daily activities. But when one of these judge-made laws proceeds in a retrograde direction and seeks to impose on laws so archaic and inadequate—as our divorce laws are—that they have become the subject of wide public criticism and of bitter parliamentary debate, additional fetters against the exercise of a jurisdiction created, recognized and sanctioned by statutory enactment, then it behooves other judges and other courts to examine such supposed laws carefully, and if they offend their conscience, and are not

¹⁰⁹ This is the essence of the supremacy of Parliament doctrine. The "separation of powers" aspect is not fundamental and, in spite of Montesquieu, has never really functioned in the parliamentary system. The functions of making law, judging, and execution are differentiated only by degrees measured by practicabilities of governmental labor.

¹¹⁰ Under the British North America Act "property and civil rights" are within the exclusive purview of the provincial legislatures.

¹¹¹ See Pound, *The New Feudalism* (1930), 16 A.B.A. Jour. 553; Friedmann, *op. cit.*, *supra*, footnote 95.

imposed upon them by courts of superior jurisdiction, directly binding upon them, to reject them and to adopt in their stead rules which seem to them to be based upon sounder and more equitable grounds.¹¹²

In the words of Lord Denning, "The truth is that [the courts] do every day make law, though it is almost heresy to say so."¹¹³ "If Parliament does nothing," he has asked, "are the courts to do nothing? Are they forever to say 'This is a matter for Parliament and not for us'?" The Canadian judges are now able to answer these questions for themselves. They must use their limited creative and abrogative powers effectively to make of law a living organism that grows and moves in response to the larger and fuller development of the nation.¹¹⁴

¹¹² In *May v. May* (1952), 4 W.W.R. (N.S.) 577, at p. 581 [1952] 3 D.L.R. 725, at p. 731.

¹¹³ Denning, *The Changing Law* (1953), vii (and *The Road to Justice* (1955), p. 98.

¹¹⁴ William O. Douglas in *Stare Decisis* (1949), 49 Colum. L. Rev. 735, at p. 737, said:

"... The law is not properly susceptible to whim or caprice. It must have the sturdy qualities required of every framework that is designed for substantial structures. Moreover, it must have uniformity when applied to the daily affairs of men. ...

It is easy, however, to overemphasize *stare decisis* as a principle in the lives of men. Even for the experts law is only a prediction of what judges will do under a given set of facts—a prediction that makes rules of law and decisions not logical deductions but functions of human behavior. There are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions. The difficulty is to estimate what effect a slightly different shade of facts will have and to predict the speed of the current in a changing stream of the law. The predictions and prophecies that lawyers make are indeed appraisals of a host of imponderables. The decisions of yesterday or of the last century are only the starting points."