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THE PROTECTION OF INTERESTS BY STATUTE AND THE PROBLEM OF "CONTRACTING OUT"

I

"Beyond all the controverted questions of jurisprudence," says one writer,[1] "lies the master-problem whether law exists for the sake of enlarging or for the sake of restricting the liberty of man;" and "akin to this problem is the question whether law is to be regarded primarily as a system of rights or of duties; for legal right, however we define it must mean some enlargement, or at least, some guarantee, of individual freedom of action or of enjoyment; while legal duty denotes some restriction necessitated by the interests of others, upon self-interest." The problem thus raised calls for a solution; the question invites an answer. Law exists for the sake of enlarging the liberty of men, and as a consequence there must be restrictions on the liberty of man; based on this premise, law is to be regarded primarily as a system of duties, involving the proper recognition of the interests of others as a necessary limitation upon self-interest.[2]

Hardly anyone to-day is disposed to challenge the assertion that law cannot fulfil the function assigned to it unless it ceases to accentuate the recognition of rights and devotes itself to the protection of interests.[3] The accepted complexity of our modern world, the myriad contending social forces in a continual state of ferment, the constantly changing conditions of society,[4]

[1] C. K. Allen, *Legal Duties* (1931), 40 Yale L. J. 331.

[2] POLLOCK, FIRST BOOK ON JURISPRUDENCE, (6th ed., 1929) 57. See also, Smith, *Self-Interest in Law* (1926), 4 Can. Bar Rev. 234.

[3] Jenks, *The Function of Law in Society* (1923), 5 Journ. Comp. Law 169 at p. 171: "Law is, historically, and still, in the main, actually, an attempt to prevent the individual encroaching on the interests of his fellows, or, to put it in another way, its object is the regulation of social conduct."

[4] Wright, *An Extra-Legal Approach to Law* (1932), 10 Can. Bar Rev. 1, 17.

impose a heavy task on courts and legislatures to keep the law abreast the current trends. Nor are they in a position to equivocate. The impelling force of economic circumstances has driven them into hurried activity to seek, from their cul-de-sac, to avert the possibility of unexampled disorder through the rapprochement of competing social interests, by throwing the weight of the state behind those interests which the individualistic legal theories of an evanescent period have proved pitifully inadequate to protect.[5]

The crude economy of a few centuries ago made relatively light demands on our legislatures, and the courts concerned themselves with surrounding the law with such a maze of procedural technicality that Maine's famous phrase of the substantive law being secreted in the interstices of procedure,[6] aptly describes the state of affairs of the time. It would be unfair, however, not to mention the rôle that equity played in an era of legislative inaction and common law rigidity. Maitland's memorable lectures on equity, published in 1909, graphically recount how the chancery courts brought the spirit and letter of the law into closer intimacy with reality. One instance might perhaps be given here relating to the question of contracting out. The mortgage at common law was strictly construed, and if payment of the mortgage debt was not made on the due date, the land which was the mortgage security, vested absolutely in the mortgagee without the right or hope of redemption. Under the liberal jurisdiction of equity, a right to redeem the mortgaged land after the due date was permitted, and the equity of redemption became recognized as an estate in the land. "The equity of redemption grew in time to be such a favourite with the courts of equity, and was so highly cherished and protected, that it became a maxim, that 'once a mortgage, always a mortgage'. The object of the rule (was) to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass or restrain the right of redemption (were) regarded with jealousy,

[5] The reference is, of course, to the recognized futility of continuing to apply the philosophy typified by Mill's *Essay on Liberty* (1859) to the regulation of the legal relations of persons with disparate bargaining powers or belonging to different economic classes or with different educational qualifications or with unequal means of protection, in the naive belief that because each person knows best what will serve to secure his own advancement, equality before the law will be achieved. See the whole problem of de facto legal inequality under individualism discussed by Ely, *Control of Contract by Law*, in WIGMORE AND KOCOUREK RATIONAL BASIS OF LEGAL INSTITUTIONS, 152 at pp. 156 *ff.* See also Pound, *A Comparison of Ideals of Law* (1933), 47 Harv. L. Rev. 1.

[6] MAINE, EARLY LAW AND CUSTOM, 389.

and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor."[7]

By the nineteenth century however, equity lost its elasticity; it became, like the common law, burdened with precedents, and its categories became stereotyped. The Judicature Acts merely certified to what had been recognized for some time; that while within its own framework equity might perhaps develop new remedies, the responsibility for the protection of new interests and the legal recognition of new social forces must hereafter be primarily the concern of the legislature and not of the courts.[8] No suggestion is intended hereby that the courts no longer do creative work; the very fact that statutes must go through the "judicial process" is refutation enough of any such notion. What is meant to be conveyed is, that where social advance has outstripped legal theory and the gap between the two must be closed, the legislature is better fitted than are the courts to accomplish the result. "The legislative discretion exercised by the judges necessarily operates for the most part within much narrower limits than that of a legislative body. The courts seldom feel free to effect an important and direct change in an established legal rule in a way that a legislature would have no hesitation in doing. They usually confine themselves therefore to nibbling at the rule by creating distinctions and exceptions and thus diminishing or deflecting the scope of its direction and operation. As Mr. Justice Holmes has put it, "they limit their activities to molecular as contrasted with molar motions".[9] Again, observers of the social scene need not be told that "from time to time abuses arise that must be remedied, and these abuses can often be remedied by legislative action only",[10] because legislatures "can frame their rule to meet a new situation without the need for bringing it into any formal logical alignment with already existing rules".[11] This ability of the legislature to depart at its will from a course of development into new fields, is inherent in its barometrical sensitivity to the needs of the community; within narrower limits, the same is true of the courts.[12]

[7] KENT, COMMENTARIES, IV, 158; *Salt* v. *Northampton*, [1892] A. C. 18, 19. See Ontario Consolidated Rules of Practice (1928), rule 489.

[8] HANBURY, MODERN EQUITY, 1st ed., 23, 27.

[9] Dickinson, *The Law Behind Law* (1929), 29 Col. L. R. 113, 285, 314.

[10] *Legislative Interference with Contract* (1927), 71 Sol. J. 323.

[11] Dickinson, *supra*, note 9 at p. 315.

[12] HOLMES, THE COMMON LAW, 35: "In substance, the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its

The difficult problem is, however, how quickly do legislatures and courts respond to communal needs? How ready are they to shed old convictions, as they inevitably must, and adopt new ideas more in conformity with the prevalent social desire than outworn theories that no longer serve? "We have a tendency," it has been said, "to lose sight of actual living conditions in the logical pursuit of abstract legal doctrines."[13] The reproach must be directed against the legal profession, against which it has been charged that any serious impetus to law reform has come from outside and not inside the profession.[14] How quickly law reform follows social change can only depend, therefore, on how acutely conscious our law-makers are of their changing social environment and what their training has been in the social sciences.[15]

It would serve no good purpose to discuss at too great length that principle of social and political thought which exalted the individual will, and which found its niche in legal theory and practice in the freedom permitted to each to serve his own interests in unrestrained competition,[16] to the exclusion of consideration for the possible effects of such an anarchic ideal on the general social welfare. It was argued with that deadly logic which, taken alone, more often than not misleads, that because the individual knew better than the state what would best secure his own advancement, the state ought not to be concerned with defining or delimiting the nature or extent of a person's lawful pursuits. As arbiter merely, the task of the state was to see that all contestants observed the formal rules : that contracts were made for some consideration, no matter how

grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."

[13] COHEN, LAW AND THE SOCIAL ORDER, preface, vi.

[14] LASKI, LAW AND JUSTICE IN SOVIET RUSSIA, II. See also D. Hughes Parry, *Economic Theories in English Case Law* (1931), 47 L. Q. R. 183, 186: "We have entered upon a period of profound social and legal readjustments — particularly in the department of social legislation. Yet the general body of lawyers is wholly untrained in legal science. This fact is ominous, particularly when we are reminded that legal progress, like trade depressions, appears in cycles and that these cycles have more frequently than not been heralded and guided by legal philosophies."

[15] Wright, *supra*, note 4, at p. 2. Note the innovation in New York State of the creation of a permanent advisory body, known as the New York Law Revision Commission, charged with reporting to the legislature on desirable changes in the law. For a discussion of this body, see W. P. M. Kennedy's short note in (1936), 1 University of Toronto L. J. 353.

[16] See for example, *Printing Co.* v. *Sampson* (1875), L.R. 19 Eq. 462; *Mogul Steamship Co.* v. *McGregor, Gow and Co.*, [1892] A.C. 25; *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587.

inadequate;[17] that the Statute of Frauds was observed, though equity might give a remedy in some cases where it was not; that wills were properly drawn and attested, though it mattered not if the testator, through some idiosyncrasy or eccentricity, deprived his family of a proper share of his bounty.[18] This philosophy reached its apotheosis in the declaration that liberty of testation and freedom of contract were the "two great institutions without which modern society can scarcely be supposed capable of holding together".[19] The fact that despite a theory which gave practically undisputed sway to the individual will, many lost the power to will, was quite disregarded. Queer indeed was this in view of the fact that some measure of protection existed for infants and lunatics, who were considered not to have the necessary will to enable them freely to enter into transactions. Apparently it would have shocked the exponents of individualism to have suggested that it was quite possible for a person over twenty-one years of age and who was not a psychiatric case, to be rendered so helpless through economic privation as to be incapable of having a free will.

"The life of the law," wrote the late Mr. Justice Holmes,[20] "has not been logic; it has been experience." And the experience of recent years has proved the absolute necessity of the law reorientating itself to meet the demand of an evolutionary society for more positive protection of the status and capacity of its constituent members than the haphazard and meagre shelter afforded by reliance on the individual will. The trend of juristic thought has been, for some time, in that direction;[21] and a more immediate matter for satisfaction is the increasing number of cases in which such thought is being translated and utilized for practical purposes by legislative action.[22]

[17] For examples of healthier tendencies in this connection, see *Inequality of Bargaining Power as an Occasion for the Non-Enforcement of Bargains in which the Consideration is Inadequate* (1927), 27 Col. L.R. 430. Also the English Landlord and Tenant Act (1927), 17 & 18 Geo. V, c. 36, sec. 9, under which the courts are charged with the duty of looking into the adequacy of consideration in contracts made under the act.

[18] McMurray, *Modern Limitations on Liberty of Testation*, in WIGMORE AND KOCOUREK, RATIONAL BASIS OF LEGAL INSTITUTIONS, 452.

[19] MAINE, ANCIENT LAW (Pollock ed.), 214, 215.

[20] HOLMES, THE COMMON LAW, 1.

[21] Jones, *The Aims and Methods of Legal Science* (1931), 47 L.Q.R. 62; Goodhart, *Law and the State* (1931), 47 L.Q.R. 118; Cohen, *Philosophy and Legal Science* (1932), 32 Col. L.R. 1103; Pound, *Law and the Science of Law in Recent Theories* (1934), 43 Yale L.J. 525.

[22] Mackintosh, *Limitations on Free Testamentary Disposition in the British Empire* (1930), 12 Journ. Comp. Law 13; Collective Labour Agreements Extension Act (1934) 24 Geo. V, c. 56, Statutes of Quebec; Industrial Standards Act (1935) 25 Geo. V, c. 28, Statutes of Ontario.

The tendency exhibited in modern legislative enactments to safeguard and restrict invasions on certain interests as a matter of public necessity is in furtherance of the primary function of law to enlarge the liberty of men. There is nothing paradoxical in the claim that restrictions are the *causa sine qua non* of freedom in a civilized community. It is, or should be, manifest to all, that the idea of freedom or liberty can never result in practical realization unless the conditions of men who claim to assert similar rights are as far as possible equalized. The legislature, therefore, in coming to the aid of the workman, widow, infant or lunatic, is lending its support to those, who, in the opinion of the community as a whole, are incapable of self-care because of their greater susceptibility to exploitation, sharp practices, fraud or economic pressure, or because such near-helpless classes represent interests which the public policy of the state deems essential to preserve. And in so conserving such interests, the legislature equalizes the conditions under which both the protected classes and those who are competent to protect themselves, enjoy the liberty which it is the functionof law to secure.

One of the liberties venerated in the nineteenth century, and which still commands a considerable following, is freedom of contract.[23] From what has been said before, it seems unnecessary to assert that unlimited freedom of contract, like unlimited freedom in other directions, does not of necessity lead to public or individual welfare. The extreme of the doctrine is seen in countries like United States where attempts have been made to canonize liberties by writing them into constitutions.[24] The ultimate futility of such a practice, which pays homage to rigidity and makes change difficult in a society in which conditions are constantly changing, needs no comment. Here in Canada, and in England too, where the law is largely pragmatic, and liberties are not confined within the four corners of a document, restrictions on unlimited freedom of contract in the interests of public policy, have nevertheless been not too easily won. An infinitely harder battle is being fought in United States for reasonable limitations on the freedom of contract.[25]

[23] See Pound, *Liberty of Contract* (1909), 18 Yale L.J. 454, for a discussion of the whole doctrine.

[24] See, for example, *Lochner* v. *United States* (1905), 198 U.S. 45, 53: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the federal constitution. Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."

[25] Williston, *Freedom of Contract*, in SELECTED READINGS ON THE LAW OF CONTRACTS, published by the Association of American Law Schools, 100.

The limitations which have been imposed on freedom of contract have assumed various forms; for example, inquiry by the courts as to the adequacy of the consideration,[26] standardization of the forms of contract by statutes, which fix the terms to be included in contracts of the kind which the statute purports to affect,[27] statutory prohibitions against entering into contracts of certain kinds.[28] All limitations bear witness to the fact that there resides in the community a power to restrict the freedom of individuals to contract, when such freedom in fact destroys the interests of the individual.[29] The matter is very succinctly stated by the late Mr. Justice Cardozo as follows :[30]

> Restrictions, viewed narrowly, may seem to foster inequality. The same restrictions, when viewed broadly, may be seen to be necessary in the long run in order to establish the equality of position between the parties in which liberty of contract begins. Charmont, in 'La Renaissance du droit naturel', gives neat expression to the same thought: "On tend a considerer qu'il n'y a pas de contrat respectable si les parties n'ont pas été placées dans les conditions non seulement de liberté, mais d'égalité. Si l'un des contractants est sans abri, sans ressources, condamné a subir les exigences de l'autre, la liberté de fait est supprimée".

To the same effect is the statement of Professor Cohen; he says:[31]

> To put no restrictions on the freedom to contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will 'voluntarily' enter under economic pressure — a pressure that is largely conditioned by the laws of property. Regulations, therefore, involving some restrictions on the freedom to contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways. From this point of view, the movement to standardize the forms of contract — even to the extent of prohibiting variations or the right to "contract out" — is not to be viewed as a reaction to, but rather as a logical outcome of, a regime of real liberty of contract. It is a utilization of the lessons of experience to strengthen those forms which best serve as channels through which the life of the community can flow most freely.

The right to "contract out" which Professor Cohen mentions is a phase of freedom of contract, operating somewhat in the nature of a release. In the ordinary contract, the parties bargain

[26] Landlord and Tenant Act (1927) 17 and 18 Geo. V (Eng.) c. 36, sec. 9, mentioned *supra*, note 17.

[27] For example, The Insurance Act R.S.O. 1937, c. 256.

[28] See WILLISTON, CONTRACTS, secs. 3069 - 3089. Also RESTATEMENT OF THE LAW OF CONTRACTS (AMERICAN LAW INSTITUTE) Vol. 2, 1087 *ff.*

[29] Ely, *Control of Contract by Law*, in WIGMORE AND KOCOUREK RATIONAL BASIS OF LEGAL INSTITUTIONS, 152, 163: "Public necessity, public welfare and public policy are above private contract."

[30] THE NATURE OF THE JUDICIAL PROCESS, 81.

[31] THE BASIS OF CONTRACT, IN LAW AND THE SOCIAL ORDER, 69, 105.

for rights or advantages against each other; the situation in "contracting out" differs slightly in that it presupposes that one of the parties already has some right, claim or advantage against the other, which he bargains not to assert. The question of "contracting out" assumes particular importance in relation to those statutes which purport to protect certain interests by conferring rights and privileges incidental to such protection. The problem here presented is how far can rights and privileges secured by legislation of this kind be renounced by individuals who are within the statutory ambit of protection. The problem involves to some extent the reconciliation of two opposing principles. On the one hand, the legislature has seen fit to assert, let us say, that a workman shall be entitled to have one afternoon during the week free. On the other hand, the principle of freedom of contract would seem to permit the labourer to contract with his employer not to take advantage of this statutory privilege. Thus the question arises whether this is a case where freedom of contract ought to be restricted, or whether it should be given full scope for operation.

It is, of course, quite conceivable that the statute itself may expressly prohibit anyone from contracting out of its provisions, in which case there is no difficulty.[32] Where the statute is silent on the question of "contracting out", there arises the need to consider whether it is consistent with the policy of the statute to permit contracts to be made to avoid its effect.[33] In this connection the maxim *quilibet potest renunciare juri pro se introducto* should be noted. "I beg attention to the words *pro se*" said Lord Westbury in *Hunt* v. *Hunt*,[34] "because they have been introduced into the maxim to show that no man can renounce a right of which his duty to the public and the claims of society forbid renunciation." Referring to the same maxim, *Maxwell* on *The Interpretation of Statutes* remarks that "everyone has a right to waive and to agree to waive the

[32] See for example, The Workmen's Compensation Act R.S.O. 1937, c. 204, sec. 15: "It shall not be competent for a workman to agree with his employer to waive or to forego any of the benefits to which he or his dependants are or may become entitled under this Part and every agreement to that end shall be void." Most Workmen's Compensation Acts are to the same effect. See the Manitoba act, C.A.M. 1924, c. 209, sec. 10; the Saskatchewan act, R.S.S. 1930, c. 253, sec. 18; the Alberta act, R.S.A. 1922, c. 177, sec. 40; the British Columbia act, R.S.B.C. 1924, c. 278, sec. 13; the Quebec act, Statutes of Quebec, (1931) 21 Geo. V, c. 100, sec. 16; the Nova Scotia act, R.S.N.S. 1923, c. 129, sec. 14; the New Brunswick act, Statutes of New Brunswick, (1932) 22 Geo. V, c. 36, sec. 13. For further examples, see HALSBURY (2nd ed.) Vol. 7, 168.

[33] Vinogradoff, *Rights of Status in Modern Law* (1923), 1 Can. Bar Rev. 460, 462, 469.

[34] (1862), 4 D.F. & J. 221, 223.

advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which may be dispensed with without infringing any public right or public policy."[35] "But if public policy requires the observance of the provision, it cannot be waived by an individual. *Privatorum conventio juri publico non derogat.* Private compacts are not permitted either to render that sufficient between themselves which the law declares essentially insufficient, or to impair the integrity of a rule necessary for the common welfare."[36]

There can be no doubt that it is often a delicate task to determine when the claims of society forbid renunciation of rights conferred by statute. "The essential fact is always that current *mores,* factors of social convenience and the like, are things about which there is room for a considerable scope of difference of opinion, and that when it is a question of their writing themselves into the law the opinion which prevails is the judge's opinion."[37] An appreciation of how judges have handled the task of deciding when the claims of society, as voiced by legislation, take precedence over freedom of contract, can be gleaned only from the decided cases. And before turning to them, it may perhaps not be superfluous to heed here the warning given by Sir Frederick Pollock, that, "confusion and trouble must arise when private rights arising out of legal or administrative rules established with a primary view to the public weal are treated as if they were matters of merely private interest".[38]

II

"As a general rule," one reads in Halsbury's Laws of England,[1] "any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy." Illustrative of this general rule and typical of the nineteenth century philosophy already mentioned is the case of *Griffiths* v. *Dudley.*[2]

[35] 7th ed. 329.
[36] *Ibid.*, 331.
[37] Dickinson, *supra,* note 9, 307; CARDOZO, PARADOXES OF LEGAL SCIENCE, 104 *ff.*
[38] *The Contact of Public and Private Law* (1923), 1 Camb. L.J. 255.
[1] 2nd ed. Vol. 7, 168.
[2] (1882), 9 Q.B.D. 357. See also CORPUS JURIS, Vol. 13, 423: "A person may lawfully waive by agreement the benefit of a statutory provision, but there is an exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed

Shortly stated, the facts were that G, a workman in the employ of the defendant, was killed owing to the negligence of other workmen of the defendant in their inspection of certain works on which the deceased had been employed. His widow sued under the Employers' Liability Act.[3] She was met by the successful defence that the deceased had, in his lifetime, contracted himself out of the benefits of the Act. "The main question," said Cave J.,[4] "is whether or not a workman can contract himself or his representatives out of the benefits of the Employers' Liability Act. The plaintiff's husband did so contract himself; it is said that the contract was against public policy. . . . . I should not hold it to be so, and thus interfere with freedom of contract, unless the case were clearly brought within the principle of the decisions as to the contracts which are against public policy." The vagueness of Cave J. on what the principle of public policy stood for at the time, necessitates our turning to the judgment of Field J.[5] who is more specific, for he says that

> It is at least doubtful whether, where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy.[6]

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therein." See *Rumsey* v. *North Eastern Railway Co.* (1863), 14 C.B.N.S. 641, where the point involved was whether the railway company could by contracts with passengers exclude the statutory privilege given to passengers to carry with them a certain amount of luggage. Of this, Willes J. said at p. 653, that, "as that is a right which is conferred upon the passenger for his benefit exclusively, he may agree to sell that right to the company."

[3] (1880), 43 and 44 Vict., c. 42. It seemed to be the consensus of opinion that this act was designed to overcome the difficulty created by the decision in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, which prevented a workman, injured through the negligence of a superior person in the employment, from recovering any damages from the common employer. To establish a cause of action under this act, the plaintiff had to prove (1) the relationship of employer and employee between the defendant and himself, (2) the suffering of personal injuries by reason of a defect in the condition of the plant connected with the defendant's business and (3) that the defect had not been discovered or remedied owing to the defendant employer's negligence or that of his servants. If this were proved, the act said that "the workman, or in case the injury results in death, the legal personal representatives of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the empoyer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

[4] *Supra*, note 2, p. 364.

[5] *Ibid.*, p. 363.

[6] See *Clements* v. *London and North Western Railway Co.*, [1894] 2 Q.B. 482, which involved the same statute and a similar matter of

A case five years later,[7] dealing with a different matter, namely, the breach of a statutory duty,[8] and argued on the basis of the maxim *volenti non fit injuria* appeared to indicate the willingness of the courts to water down the generality of the right of contracting out. The court in this case took occasion to say that

> there ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement ought to be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement between the deceased and the defendant in consequence of which the principle of volenti non fit injuria is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by the statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to.[9]

It seems patent from the foregoing, that where a court finds that the provisions of a statute are intended for the

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contracting out by an infant. No mention of *Griffiths* v. *Dudley* was made in the judgments. The court concerned itself with dealing with the binding effect of the contract on the infant, the right to contract out of the act being apparently conceded.

[7] *Baddeley* v. *Granville* (1887), 19 Q.B.D. 423. The plaintiff's husband, employed by the defendant, was killed by reason of the breach of the statutory duty of the defendant to keep a banksman at his mine during the night as provided by the Coal Mines Regulation Act (1872) 35 and 36 Vict., c. 76.

[8] Ely, *Control of Contract by Law, supra,* Part I, note 5, p. 162, says that "if a statute imposes a duty to provide safety appliances and makes the employer who fails to do so liable, he cannot contract out of this liability."

[9] *Supra,* note 7, per Willis J., p. 426. See also *Equitable Life Assurance Society of the United States* v. *Reed,* [1914] A.C. 587, a decision of the Privy Council on appeal from the Court of Appeal of New Zealand. The case involved a contract of insurance wherein the insured agreed to waive certain benefits conferred on her by the Life Insurance Act (1908) of New Zealand. Section 64 was the key section. It was finally held that as the insured's case did not come within section 64, she could validly waive the benefits of the act, but regarding an insured who came within that section, Lord Dunedin said at p. 595, that "section 64 is the first of a fasciculus of sections headed 'Protection of Policies'. . . . . Their Lordships have no doubt that this is a section intended to lay down a rule of public policy, and that it is impossible for either an assured or an assurer to contract himself out of it or to wiave its effect."

See too, *Wheeler* v. *New Merton Board Mills Ltd.,* [1933] 2 K.B. 669, 690, where Scrutton L.J., referring to *Baddeley's Case,* said: "I cannot make out from Will J.'s judgment whether he was deciding the case on the ground that is contrary to public policy that where there is a statutory obligation on the employer the workman should contract out of it, or whether he was deciding the case on some ground which I do not understand. He does not hold as a matter of law that the agreement would be illegal as being against public policy."

general benefit, it will deny the right to contract out. This general benefit was missing in the case of *Great Eastern Railway Co.* v. *Goldsmid*,[10] which concerned a royal grant, confirmed by statute, to the city of London to the effect that no market "within seven miles round about the aforesaid city shall be granted by us or our heirs to anyone". "It is a jus introductum for the particular benefit of the city of London," said the Court,[11] "and it falls within the general principle of law, 'unusquisque potest renunciare juri pro se introducto', ... In such cases, when the rights given have been only private rights, unless there has been also in the Act of Parliament a clause excluding a power of contract, it has been held that by contract or by voluntary renunciation such rights, as far as they are personal rights, may be parted with and renounced." It was clear enough here that the benefit of the Act was particular; the task of the court was not therefore difficult. Where the court itself must decide whether the general or particular benefit is aimed at by a statute the problem is infinitely harder.

Such a problem arose in the leading case of *Guardians of the Poor of Salford Union* v. *Dewhurst*.[12] The plaintiff here had retired from the defendant Guardians' employ after some fourteen years' service. Under the Poor Law Officers' Superannuation Act,[13] superannuation was based on salary and emoluments during the five years preceding retirement. The plaintiff had, in these five years, been paid war bonuses besides his salary, and it was admitted that these came within the term 'emoluments' under the statute. The defendants did not include the bonuses in computing the plaintiff's superannuation, claiming that the plaintiff had, in effect, agreed to accept the bonuses on the understanding that the Superannuation Act was to have no relation to them. The plaintiff's answer to this was that a contract to this effect, even if proved, was ultra vires. The trial judge, Astbury J.,[14] drew attention to the fact that the statute said that persons eligible "shall be entitled"[15] to the superannuation allowance. And recognizing the novelty of the point raised in the case, he went on to remark that "neither side has been able to discover any

[10] (1884), 9 App. Cas. 927.
[11] *Ibid.*, p. 936.
[12] [1926] A.C. 619, and *sub. nom. Dewhurst* v. *Salford Guardians* [1925] Ch. 139, 655.
[13] (1896) 59 and 60 Vict., c. 50.
[14] [1925] Ch. 139, 144.
[15] *Supra*, note 13, secs. 2, 3.

decision in which, where benefits have been compulsorily given by a statute to individuals or limited classes without any prohibition against contracting out, contracting out has been held to be impliedly prohibited".[16] He agreed that a court ought to take a wide view of the construction of the Act having regard to the intention of the legislature, but, he continued :

> I do not think the words of the act go far enough to compel the construction that the express contract by the workman against the operation of the act should not take effect. In all the cases referred to in argument, in which the legislature has intended to enact that a person shall not be allowed to contract himself out of an Act of Parliament, very express words have been used. As a general rule, entire freedom of contract has been preserved; it has only been interfered with to obviate great public injustice. . . . . The strongest argument suggested in favour of the contention for the plaintiff is the desire of the legislature to protect workmen. Protection has been afforded them against late hours, unfenced machinery, the employment of children in manufactories, and in other instances. If it could be shown in the present case that large classes of workmen would be deprived of the protection which the legislature intended to give them by a decision that they could contract themselves out of the provisions of the . . . . . act, a strong argument against that construction would be afforded. But that cannot be shown. . . . . I am unable to come to the conclusion that if officers and servants of these Guardians were allowed to contract themselves out for considerations appealing to them, large classes of workmen would be deprived of the protection which the legislature intended them to have.[17]

The Court of Appeal reversed the trial court's decision. The difference in the decisions is not based on any difference of interpretation of a rule of law; it is markedly indicative of a difference in social attitude. "It is said," remarks Pollock M. R.,

> there are . . . . . cases in which you can find that where an Act provides a particular privilege to a private person, it is at the will and discretion of that private person to renounce the privilege which has been given to him, and the maxim is quoted — 'Unusquisque potest renunciare juri pro se introducto'. . . . . It is to be observed that the maxim speaks of 'pro se introducto'. You have to find something which is inserted in the Act for his advantage. I do not think it is possible to read the Act of 1896 as being intended to confer what might be called a private and personal benefit upon

[16] *Supra*, note 14, p. 145.

[17] *Ibid.*, p. 146. Owing to the novelty of the point raised, it was considered desirable to report the judgment of Astbury J. and in fact, all the judgments in this case, rather fully, because of the social philosophy typified by the various judgments.

> individual officers which they can at their will and pleasure renounce. It seems to me that the intention was to put the poor law officers in the same position in which public officers, asylums officers and many other persons have been placed in the interests of the community at large, and that the public should be safeguarded from the melancholy spectacle of seeing a man who had done work and been in a responsible position during years of his life, suffering from poverty and distress by reason of the fact that no adequate provision has been made to enable him to spend his latter years in reasonable comfort.[18]

Turning to the act itself, Warrington L. J. says :

> It is unnecessary to go through the actual words of the Act, it is quite enough to say that both with regard to the (superannuation) allowance itself and with regard to the contribution of a certain proportion of wages, salary and emoluments which is to be made by the officers or servants, the Act is, in its terms, imperative. No choice is left either to the Guardians on the one hand or to the officers and servants on the other.[19]

From this it follows that

> on the construction of this Act, whatever may be the proper construction of other Acts of Parliament, Parliament did intend that this allowance should be paid on the statutory scale, and did not leave it open to the Guardians and the particular servant to contract either that there should be no allowance, or, as in the present case, that the allowance should not be calculated upon the scale laid down by the Act of Parliament, but upon some other scale.[20]

A realistic appreciation of the modern social outlook is seen in the judgment of Sargant L. J. He points out that the judgment in *Griffiths* v. *Dudley* does not cast doubt on the principle that there may be indications or implications in a statute which prohibit contracting out. As to whether there were any such implications in the statute under consideration, he said :

> I think that there are, and I think that indications or implications of that kind, which might not have been sufficient fifty years ago, may be much more readily considered sufficient at the present day, in acts passed within the last thirty years, having regard to the general tendency of legislation to ignore the extraordinary sanctity of freedom of contract.[21]

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[18] [1925] Ch. 655, 664. At p. 666, referring to *Griffiths* v. *Dudley*, Pollock M. R. says : "Field J. held that all that the (Employers' Liability) Act did was to get rid of a particular defence, (supra note 3) and that as a general rule you might take it that entire freedom of contract had been reserved. Whether that principle is quite as plain to-day as it was when it was laid down may be open to question, but I am of opinion that *Griffiths* v. *Dudley* does not really apply to this case. We have to consider this statute as it stands, and having regard to its terms I think it is plain that it is to be interpreted as a compulsory act."

[19] *Ibid.*, p. 668.

[20] *Ibid.*, pp. 670, 671.

[21] *Ibid.*, p. 674. See Warrington L.J. at p. 669: ". . . . . it is impossible, to my mind, to read the provisions of the act as merely

The House of Lords affirmed the Court of Appeal's decision but not without strong opposition on the part of Lord Sumner. It was argued before the House of Lords, in effect, that in order to interfere with freedom of contract, the statute must use express words declaratory of that intention; in short, that the words of a statute could never imply a prohibition against contracting out. To this contention Lord Sumner lent support by remarking that

> I think it is not an unwholesome rule of construction (and construction is the whole of our task) to say that, just as we are bound absolutely by the language of the legislature, so we must abstain from putting upon the legislature anything that is not clearly what it has said, and for this very good reason, that it is so extremely apt to make judicial ideas, as to what is good for the public or within the vague confines of public policy, do duty instead of a literal and unimaginative interpretation of the legislature's own words.[22]

Whether or not Lord Sumner was correct in his remarks on the judicial construction of a statute will be discussed later. It will suffice to say here that the other four members of the House of Lords in this instance clearly recognized that a statute might be so obligatory that special provisions against contracting out would be mere surplusage.[23]

Statutes creating exemptions[24] are usually of the kind above mentioned. "It is a rule nearly universally based on public policy that a debtor's waiver of his exemption right, by stipulation of an executory contract, is absolutely void."[25] This statement is however too general. The terms of the specific exempting statute must be looked at.[26] This was

conferring a particular benefit upon the individual servant by himself. It is intended to be a benefit conferred upon a certain class of public servants as a whole; that it is not such a benefit that one public servant of that class could renounce by means of arrangement between himself and the Guardians; for if that were once admitted, it might result in a practical repeal of the act altogether with reference to a particular body of Guardians and their employees or servants."

[22] *Supra*, note 12, p. 633.

[23] See the recent case of *Powell* v. *Sheffield Corporation* (1936), 52 T.L.R. 248, which approved *Guardians of the Poor of Salford Union* v. *Dewhurst*. Here too, it was held that the terms of the Local Government and Other Officers' Superannuation Act (1922) 12 and 13 Geo. V, c. 59, prevented contracting out by an officer eligible for superannuation under the act.

[24] CORPUS JURIS, Vol. 25, 8: "The term 'exemption' . . . . . may be defined as a statutory freedom of the . . . . . property of debtors from liability to seizure and sale under legal process for the payment of their debts."

[25] CORPUS JURIS, Vol. 25, 111.

[26] *Yorskhire Guarantee and Securities Corporation* v. *Cooper* (1903), 10 B.C.R. 65. Also *Roy* v. *Fortin* (1915), 25 D.L.R. 18. This case dealt with exemptions under the British Columbia Homestead Act, R.S.B.C. 1911,

forcibly brought out in an American case which involved a Pennsylvania exemption statute.[27] The court inquired: "Is this exemption allowed for the benefit of the bankrupt, or is the exemption law in the nature of a police regulation, and primarily for the benefit of the community, to prevent insolvents from becoming public charges? In the State of Pennsylvania the exemption is viewed as the personal privilege of the debtor, which he may waive and which he may lose".[28] It can be said nevertheless that most exemption statutes are designed "not only to protect every debtor from total destitution, but also to protect the public from the resultant necessity of providing for him as a public charge".[29] Another consideration which weighs heavily with the courts in denying to a debtor the right to contract out of exemptions is the protection of the family, which is also a matter of public concern. In *Recht* v. *Kelly*,[30] R. gave a promissory note containing a clause waiving "the benefits of all laws exempting real or personal property from levy and sale". The Illinois court, in holding this to be ineffectual, went on to say that

> the exemption created by the statute is as much for the benefit of the family of the debtor as for himself, and for that reason, he cannot by an executory contract waive the provisions made by law for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void. Laws enacted from considerations of public concern, and to subserve the general welfare, can not be abrogated by mere private agreement.[31]

Two Quebec cases[32] are of considerable interest in the matter of contracting out of exemptions. Article 598 of the Quebec Code of Civil Procedure, as it stood at the time these cases were decided, read as follows: "The debtor may select and withdraw from seizure", followed by an enumeration of

c. 100, sec. 17. Exemptions hereunder were a matter of option to be exercised within two days after seizure or notice thereof and hence were considered as merely a personal privilege which could be lost, which was the situation here.

[27] *In re Liby* (1915), 218 Fed. 90.

[28] Regarding the American position on exemptions, see CORPUS JURIS, Vol. 12, 1075: "No small confusion has prevailed among the decisions as to the power of a state to create or increase exemptions of property from execution or attachment for previously contracted debts." In the United States the problem is a constitutional one, involving the question whether a state can materially impair the obligations of contracts. The authorities are collected in CORPUS JURIS, Vol. 12, 1076, notes 83, 84.

[29] *In re Solomon* (1919), 254 Fed. 503, 505.

[30] (1878), 82 Ill. 147.

[31] *Ibid.*, p. 148. See also *Curtiss* v. *O'Brien* (1866), 20 Iowa 376; *Maxwell* v. *Reed* (1859), 7 Wis. 583.

[32] *Meese* v. *Wright* (1924), Q.R. 62 S.C. 233; *Falardeau* v. *Trepanier* (1925), Q.R. 63 S.C. 349.

certain goods and articles. In both cases there had been renunciation by the debtor of the exemption rights given by Article 598. In the first case, *Meese* v. *Wright*, the single judge who decided the case held that Article 598 was in the public interest and that its benefits could not be renounced by any individual who came within its protection. *Meese* v. *Wright* was brought to the attention of the single judge who sat in the second case of *Falardeau* v. *Trepanier*. He however refused to follow it, and held that, since Article 598 said the debtor 'may select', this point to the exemption being a matter of purely private concern and, therefore, the exemption could be renounced. Having regard only to the words of the Article, the decision in *Falardeau* v. *Trepanier* has much to commend it, but looking at the purposes of exemption statutes generally, it is submitted that the decision in *Meese* v. *Wright* is more socially desirable. That this latter decision was in accord with the intention of the Quebec Legislature became apparent when an amendment was made to Article 598 of the Quebec Code of Civil Procedure,[33] the following paragraph being added: "Any renunciation whatsoever to the exemptions from seizure resulting from the above provisions is null and void, whatever may be the terms of the renunciation." The conflict between the above two cases has thus been unequivocally resolved in favour of that decision which considered the exemption law as subserving a recognized public interest.

The exemption statutes of the other provinces of Canada resemble each other to such a degree that, practically speaking, there is uniformity in exemption laws. The use of the phrases "shall be exempt"[34] and "is hereby declared free",[35] they being the alternative forms of expression, conveys the mandatory sense of the various laws, lending support to the fact that contracting out is not permitted in view of the declared policy of the legislation. It should not be forgotten, however, that

[33] (1928) 18 Geo. V, c. 91, sec. 1, Statutes of Quebec. See GRIGG, CODE OF CIVIL PROCEDURE OF QUEBEC (1930), Articles 598, 599.

[34] The Execution Act, R.S.O. 1937, c. 125, sec. 2. See also sec. 5, which preserves the exemption after the death of the debtor for the benefit of his widow and family; The Public Lands Act, R.S.O. 1937, c. 33, sec. 46; The Execution Act, R.S.B.C. 1924, c. 83, sec. 25; The Homestead Act, R.S.B.C. 1924, c. 104, secs. 4, 5; The Memorials and Executions Act, 1903, C.S.N.B., c. 128, sec. 34; Rules of the Supreme Court of Nova Scotia, Order 40, rule 40; Rules of Court of Prince Edward Island, Order 41, rule 23. See *'May or Shall'* (1928), 72 So. J. 391.

[35] The Exemptions Act, R.S.A. 1922, c. 95, sec. 2. See also sec. 5, which is like the similar Ontario section, *supra* note 34. See (1935) Statutes of Alberta, c. 24, sec. 3, which gives exemption rights to a chattel mortgagee who is in default. The Exemptions Act, R.S.S. 1930, c. 64, sec. 2; The Executions Act, R.S.M. 1913, c. 66, sec. 29.

other provisions in a statute may modify what appears at first blush to be an absolute prohibition against contracting out implied from, or expressed in, the terms of the statute.[36] Statutes, dependent as they always are on legislative vagaries, are not uniformly susceptible to general rules.[37] The exemptive tendency in statutes, typified by provisions regarding exemptions from seizure under execution and from distress, in order to prevent destitution as a matter of public interest, has long been recognized as a necessary aid in the ordering of social relations. Similarly, other types of restrictions, akin to exemptions, are coming into vogue because the state is being forced, under the impetus of communal pressure, to intervene whereever freedom of contract leads to anti-social results.[38]

A line of departure from strict contract theory that is likely to be followed and extended is seen in the English Landlord and Tenant Act of 1927.[39] The Act deals with the payment of compensation for improvements and goodwill to tenants of premises used for business purposes or the grant of a new lease in lieu thereof. Section 9 of the act says that

> this act shall apply notwithstanding any contract to the contrary . . . . . provided that if on the hearing of a claim or application under this part of this act it appears to the tribunal that a contract . . . . . so far as it deprives any person of any right under this part of this act, was made for adequate consideration, the tribunal shall in determining the matter give effect thereto.

In short, not only must there be some consideration for the tenant's signing away his rights under the Act, but the consideration must be adequate in the opinion of the court. The old notion that it is not for the court to make a bargain for the parties, whatever its validity, is here destroyed by a statute which, in effect, places the onus of safeguarding the

[36] *Re McCuaig*, [1924] 3 D.L.R. 44.

[37] *Guardians of the Poor of Salford Union* v. *Dewhurst*, [1926] A.C. 619, per Lord Parmoor at p. 634.

[38] The Landlord and Tenant Act, R.S.O. 1937, c. 219, sec. 29; The Insurance Act, R.S.O. 1937, c. 256, sec. 87 (6); also sec. 89, sec. 106, The Bankruptcy Act R.S.C. 1927, c. II, sec. 23 (ii), sec. 40 (2). See *Re Thoun* (1925), 7 C.B.R. 251, in connection with sec. 51 (4) of the Bankruptcy Act, which points out that the terms of the section which confers a right on creditors to be paid *pari passu* give only a personal privilege to the creditors out of which they may contract. The Railway Act R.S.C. 1927, c. 170, sec. 348 (1), (2), prevents common carriers from contracting out of their common law liability unless their contracts are authorized or approved by the Board of Railway Commissioners. See *Bayne* v. *C.N.R.* (1933), 42 C.R.C. 340. Also annotation by A. G. Blair in 42 C.R.C. 1, on *Restricting Liability of Common Carriers*. For other provisions in the Railway Act relating to contracting out, see sec. 312 (7), sec. 365.

[39] 17 Geo. V, c. 36.

interests of the tenant under the Act on the courts.[40] The provisions of this act came under discussion in *Holt* v. *Cadogan*,[41] where the court pointed out that, for a contract depriving the tenant of statutory benefits to be valid within the meaning of the Act, the benefits obtained by the tenant under the contract must approximate in value the loss of rights under the Act sustained by him.

The English Workmen's Compensation Act of 1906[42] provides a clear example of how reticent the courts were to impinge on the province of free contract in spite of words in a statute which were plainly intended to have that effect. The scheme of the Act was that injured workmen were absolutely entitled to weekly payments, but that these weekly payments could be redeemed by an agreement to pay a lump sum, subject to the approval of the court as to the amount, which scheme of redemption had to be registered. Section 3 (1) of the Act was definite that "save as aforesaid, this act shall apply notwithstanding any contract to the contrary". Unless, therefore, a proper scheme of redemption were registered, no contract could be made to deprive an injured workman of his absolute right to weekly payments. However clear this appears to be, a long line of cases,[43] none of which went to the House of Lords, ruled that an injured workman could nevertheless compromise his claim to compensation for a lump sum, before the amount of the weekly payments he would be entitled to was ascertained. "My view," said a member of the Court of Appeal in one of these cases,[44] "is that the power to compromise their disputes being inherent in all persons of full contractual capacity, that power is not in any particular case to be regarded as taken away by any other than very plain statutory words." That there could be an implied power to this effect was not established till some years later,[45] but certainly it seemed that the words of the statute were here precise enough to show

[40] *Contracting Out of the Landlord and Tenant Act* (1928), 72 So. J. 655.
[41] (1930), 169 L.T. 234.
[42] (1906) 6 Ed. VII, c. 58. See now, Workmen's Compensation Act (1925) 15 and 16 Geo. V, c. 84. Note that in Canada the provincial compensation acts strictly prohibit contracting out and no problem has arisen with regard to them as arose in connection with the 1906 English act. See *supra* Part I, note 32.
[43] *Ryan* v. *Hattley*; [1912] 2 K.B. 150; *Hudson* v. *Camberwell* (1917), 86 L.J.K.B. 558; *Rawlings* v. *Hodgson* (1918), 11 B.W.C.C. 73; *Williams* v. *Minister of Munitions* (1919), 88 L.J.K.B. 1105; *Haydock* v. *Goodier*, [1921] 2 K.B. 384. The dissenting judgment of Scrutton L.J. at p. 399 was accepted by the House of Lords in *Russell* v. *Rudd* two years later as the proper interpretation of the act.
[44] Younger L.J. in *Haydock* v. *Goodier*, [1921] 2 K.B. 384, 402.
[45] *Guardians of the Poor of Salford Union* v. *Dewhurst*, [1926] A.C. 619.

that the legislature intended to prohibit all contracts regarding compensation, except insofar as they came within the exact permission of the statute. The House of Lords arrived at this conclusion in *Russell* v. *Rudd*.[46] Cave L. C. said quite plainly that "to substitute for compensation . . . . . the payment of a lump sum, fixed only by agreement between employer and workman and free from any examination by the court, is to contract out of the act, and accordingly is a contravention of section 3 (1) of the act and void".[47] "The effect of this section," remarked Lord Dunedin,[48] "seems to me plain. The right of an injured workman to a weekly payment is absolute and cannot be got rid of except insofar as the act allows. It follows therefore that a contract which purports to take away that weekly payment is bad so that . . . . . the workman could go on to claim the weekly payment by arbitration and could not be stopped by virtue of the contract alleged."

Fatal accident statutes provide a point of interest in connection with the subject of contracting out in the question how far the deceased can deprive his dependants of their right of action by contracting to exclude himself from any right to claim damages for injuries. The scheme of such acts is familiar. The dependants of a deceased are given a cause of action, "new in its species, new in its quality, new in its principle, in every way new",[49] but they cannot sue on such cause of action unless the deceased, had he lived, would have had a right to maintain an action for damages. Scrutton L. J. put the matter succinctly by saying:[50]

> The Fatal Accidents Act has, I think, been interpreted by authorities which are binding on us, to mean that the dependents have a new cause of action, yet cannot recover on that cause of action unless the deceased had at the time of his death a right to maintain an action and recover damages for the act, neglect or default of which they complain. He may have lost such a right in a number of ways; he may have been guilty of contributory negligence; he may have made a contract by which he excluded himself from the right to claim damages[51] . . . . . and in such a case as that the right of his dependants would be also barred.

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[46] [1923] A.C. 309.

[47] *Ibid.*, p. 317.

[48] *Ibid.*, p. 323. See *Clawley* v. *Carlton Main Colliery Co.*, [1918] A.C. 744, 758, per Lord Wrenbury.

[49] *The Vera Cruz* (1884), 10 App. Cas. 59, at p. 70, per Lord Blackburn.

[50] *Nunan* v. *Southern Railway Co.*, [1924], 1 K.B. 223, 227. See *British Electric Railway Co.* v. *Gentile*, [1914] A.C. 1034.

[51] *Haigh* v. *Royal Mail Steam Packet Co.* (1883), 49 L.T. 802; *The Stella*, [1900] p. 161.

It is clear then that the deceased could by antecedent contract defeat the claim of his dependants to damages resulting from his death. A novel point came up in *Nunan* v. *Southern Railway Co.*[52] A passenger travelling on the defendant's railway was killed by reason of the negligence of the servants of the railway company. The contract of carriage stated that the liability of the company for damages to any passenger was limited to £100. The widow of the deceased sued under the Fatal Accidents Act.[53] Sir John Simon, for the railway company, argued that if the deceased had contracted with the company that it be wholly exempt from liability the deceased's representatives would be bound, and since he had contracted to limit the company's liability, his dependants should likewise be bound. The Court of Appeal did not accede to this. They admitted this anomalous situation, that the deceased could totally exempt the company from liability and so deprive his dependants of any right of action, but if he contracted to limit the company's liability, he still had some right to sue, and this satisfied the condition precedent to the widow suing under her new cause of action given by the Fatal Accidents Act. Since hers was a new cause of action, the deceased could not limit her, by any contract he made, in the amount of damages she might recover, though he might deprive her of any right of action at all.[54]

Statutes limiting freedom of testation have become quite popular since the beginning of the twentieth century.[55] Their effect must be considered in relation to the problem of contracting out. Such statutes, most of which are patterned along similar lines, aim at the protection of the widow and dependent children of a testator who has failed to make adequate provision for them in his will. Power is generally given to the courts to order proper provision to be made for the family of the testator out of his estate, after taking into consideration the testator's circumstances, the circumstances of his dependants, the claims of other persons, and generally anything else likely

[52] [1923] 2 K.B. 703; [1924] 1 K.B. 223.

[53] (1846) 9 and 10 Vict., c. 93.

[54] *Miller* v. *Grand Trunk Railway Co.*, [1906] A.C. 187; *Robinson* v. *C.P.R.*, [1892] A.C. 481.

[55] The New Zealand Family Protection Act of 1908 was a pioneer in this field. See *Allardice* v. *Allardice*, [1911] A.C. 730, and *Allen* v. *Manchester*, [1922] N.Z.L.R. 218.

On the question of the power of testation generally, see the excellent material collected in POWELL, CASES AND MATERIALS ON TRUSTS AND ESTATES, Vol. I, 234 *ff.* Also McMurray, *Modern Limitations on Liberty of Testation*, 14 Modern Legal Philosophy Series, 452.

to be material, such as services rendered to the testator by any dependant who is applying to the court for relief, or money or property provided by a dependant for the testator, or any inter vivos gifts made by the testator to his dependants.[56] If an allowance is made by the court, the tendency is to keep it within the limit of the shares that the dependants would have been entitled to had the testator died intestate; some statutes have provided for this specifically.[57]

There seems little doubt that statutes of this nature were framed in the public interest, so that on the principles hereinbefore enunciated, a dependant could not validly contract with a testator in his lifetime to forego any rights such dependant may have under dependant relief acts, if the testator failed to make adequate provision for such dependant in his will. This would be so, unless in the 'contracting out' agreement the testator had made sufficient provision for the dependant, so that the court could find no reason for disturbing the testator's testamentary dispositions. A problem of this kind arose in an Alberta case, *In re Anderson Estate*.[58] A separation agreement had been entered into between a husband and wife, wherein the wife, in consideration of a certain settlement, agreed to relinquish her rights to all her husband's property. The husband died leaving a will which made no provision for his wife. She made an application under the Alberta Widows Relief Act.[59] The court dismissed her application on the ground that she had not satisfied the onus upon her of proving that in the circumstances it was just and equitable that an allowance be made to her out of the estate of her late husband contrary to his will.[60] The remarks of McGillivray J. A. are particularly interesting.[61] He says:

> I am . . . . of the opinion that the widow . . . . has not so contrated in the separation agreement as to deprive herself of the benefit of the Widows Relief Act, if indeed she could so contract, having regard to the fact that the exercise of this statutory authority by the court is a matter of public as well as private concern.

[56] Dependants' Relief Act, R.S.O. 1937, c. 214; Testator's Family Maintenance Act R.S.B.C. 1924, c. 256; *In re McAdam*, [1925] 2 W.W.R. 593; *Walker* v. *McDermott*, [1931] S.C.R. 94; The Widows Relief Act R.S.A. 1922, c. 145.

[57] Dependants' Relief Act of Ontario, sec. 11, *supra* note 56; *Re Jones* (1930), 38 O.W.N. 466; *Re Hannah* (1931), 39 O.W.N. 499; *Re McCaffery*, [1931] O.R. 512; Widows' Relief Act R.S.S. 1930, c. 91, sec. 8.

[58] 1934] 1 W.W.R. 430.

[59] R.S.A. 1922, c. 145. Under sec. 2, a widow can apply to the Supreme Court for relief if her husband leaves her, by his will, less than she would have obtained had he died intestate.

[60] *Ibid.*, sec. 8. The words 'just and equitable' are used in this section.

[61] [1934] 1 W.W.R. 430, 437.

There is some implication in McGillivray J. A.'s remarks that even had the separation agreement provided adequately for the widow, she could still disregard the provisions of such an agreement in seeking the aid of the court in obtaining a just share of the testator's estate. It is extremely doubtful whether the dependant relief acts now in vogue go so far. It seems that the furthest that one can go is to say that the policy of dependant relief acts prevents contracting out of their provisions where such contract, in the opinion of the court, does not adequately substitute for the claims which such acts give to unprovided for or inadequately provided for dependants against the estate of a testator.[62] The probability is, however, that what McGillivray J. A. really meant was that the statutory power of the court to hear an application by a dependant could not be ousted by a contract previously made, but the court might dismiss the application if the contract had adequately provided for the dependant. This is implicit in the remarks of Clarke J. A. in the same case when he says: "I think the separation agreements do not affect the widow's rights after the husband's death other than as affecting the amount to be awarded to her."[62A]

The problem of attempting by contract to oust statutory powers given to the court to be exercised in favour of one of the contracting parties was fully considered by the House of Lords in *Hyman* v. *Hyman*.[63] The English Supreme Court of Judicature (Consolidation) Act,[64] section 190 (1), provided that "the court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum, for any term not exceeding her life, as

[62] See Mackintosh, *Limitations on Free Testamentary Disposition in the British Empire* (1930), 12 Journ. Comp. Legis. 13. Admitting, that in a state where there is a dependant relief act, you can contract out of such act only when the contract provides adequate substitution for any claims that dependants may have under the act, it seems that aside from this, a testator can still defeat the moral claims of his dependants against his estate, which dependant relief acts make legally enforceable, by conveying away all his property in his lifetime so that he leaves nothing by his will. *Quaere*, however, whether this might not be considered, in view of the statute, a tainted transaction defeating recognized claims of his dependants to a share of his bounty and which the courts might be moved to set aside on equitable grounds.

[62A] [1934] 1 W.W.R. 430, 432. See also McGillivray J.A. at p. 437: "Notwithstanding that the separation agreements are not a bar in law to the widow's success, I am of the opinion that they may be and should be examined in considering whether it is just and equitable that an allowance should be made."

[63] [1929] A.C. 601.

[64] (1925) 15 and 16 Geo. V, c. 49.

having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable. . . . ." Section 190 (2) went on to say that "in any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (i) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife, such monthly or weekly sum for her maintenance and support as the court may think reasonable". In the case under consideration, the husband and wife had entered into a separation agreement in which the husband agreed to make certain lump payments and also to pay a weekly sum for maintenance to his wife during her life. The wife in return agreed that she would not in any way seek further maintenance or alimony other than the sums agreed upon. Some years later the wife obtained a decree nisi of divorce and also filed a petition for permanent maintenance under the Act above referred to. The husband, who had been abiding by the terms of the separation agreement, offered the agreement as a defence. His argument was that there were no express words in the statute against contracting out and, that being so, a person was at liberty to barter away his rights unless prevented on some ground of public policy. The wife, he contended, had contracted not to resort to the privileges given by the provisions of the statute in question, and that no public policy was involved, argued the husband, was shown by the case of *Gandy* v. *Gandy*.[65]

This case concerned a separation agreement in the same terms as the one in the *Hyman Case*. Upon obtaining a decree of judicial separation the wife applied for alimony under the then statute, the Matrimonial Causes Act.[66] The Court of Appeal, speaking through Jessel M. R., held that the separation agreement prevented the court from interfering, for "public policy requires that contracts should be kept and covenants fulfilled". The fallacy of this judgment was that it failed to recognize that there might be a paramount public policy to the effect, not that contracts should be kept, but, that contracts directed at overcoming statutory privileges could not be entered into. This was implicit in the remarks of Lord Shaw[67] in *Hyman* v. *Hyman*, where he said: "I do not conceal from your Lordships that I think the judgment of the Court of Appeal

[65] (1882), 7 P.D. 168.
[66] (1857) 20 and 21 Vict., c. 85, sec. 32.
[67] [1929] A.C. 601, 617.

in the case of *Gandy* v. *Gandy* was — I say so quite boldly — an erroneous judgment".[68] This had been the opinion of a majority of the Court of Appeal in *Hyman* v. *Hyman*, in deciding that the separation agreement in question could not prevent the court from exercising its statutory duty to consider the question of maintenance upon the application of the wife.[69] The matter was one concerning the public weal. In the words of Sankey L. J.,[70] as he then was,

> the jurisdiction of the divorce court refers to delicate matters which cannot be treated as you would treat a contract for the sale of goods, or a suit for specific performance. As above pointed out, the parties to a marriage contract are not at liberty to do as they like with regard to the contract. There are public and national interests to be considered.

And further,

> in my view a consideration of the statutes clearly point(s) to a covenant of this character being invalid, and it is impossible for parties so to contract out of this Act of Parliament.

This decision the House of Lords affirmed. Lord Atkin struck at the heart of the whole matter when he said:[71]

> When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse of the poor law authorities. In my opinion the statutory powers of the court were granted partly in the

[68] *Ibid.*, 618, per Lord Shaw: "*Gandy* v. *Gandy* is assumed to be sound by Lawrence L. J. dissenting in *Hyman's Case*, [1929] p. 55, and not only sound, but to have such soundness and fundamental principle as to enable it to be quoted effectively not in a separation case but in a divorce case, and with the result that it contracts parties to a divorce case out of the provisions of an Act of Parliament, and impedes and cripples the power of courts of law in settling alimony in such cases upon the grounds comprehensively and definitely set forth by statute. In my opinion the whole of this reasoning is a mistake."

[69] [1929] P. 1. See *Hughes* v. *Hughes*, [1929] P. 1, which was tried with the *Hyman Case*. Also *Morall* v. *Morrall* (1881), 6 P.D. 98. *Bishop* v. *Bishop*, [1897] P. 138, involved the same question but it is of weaker authority since there was no express covenant by the wife in the separation agreement to abstain from seeking a maintenance award from the court. The case is of interest because Lindley L.J. who agreed with Jessel M.R. in the *Gandy Case* says here, of that case, at p. 162: "Nothing was decided respecting any of the statutory powers of the divorce court in suits for dissolution of marriage". In other words, a distinction was made between cases of divorce and cases of judicial separation like *Gandy* v. *Gandy*. The House of Lords in the *Hyman Case* recognized the difference (*supra*, note 68) but held that as a matter of principle, the power of the court, given by statute, to award maintenance, was the same in either case.

[70] [1929] P. I, at pp. 78 - 79.

[71] [1929] A. C. 601, 628.

> public interest[72] to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true, the powers of the court in this respect cannot be restricted by the private agreement of the parties . . . . In my view no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, 'having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties'.[73] The wife's right to future maintenance is a matter of public concern, which she cannot barter away.[74]

It is interesting to compare *Hyman* v. *Hyman* with *Guardians of the Poor of Salford Union* v. *Dewhurst*,[75] in the light of the statutory provisions involved in each of these cases. In both cases, the House of Lords came to the conclusion that the policy of the statutes in question prevented any contracting out of their provisions, because the public had a vital interest in seeing that the privileges which the statutes conferred should be maintained for the benefit of those within the ambit of the statutory protection. The prohibitions against contracting out were thus implied by the court from the statutes themselves. It is true that the decision in the *Dewhurst Case* was fortified by a reference to the words of the statute there under consideration, "shall be entitled", which are plainly mandatory, but there is nothing in the case that suggests that this was conclusive, or that it was in fact anything more than one factor which, together with others, led the court to the conclusion to which it arrived. In the *Hyman Case*, on the other hand, the statute in question read that the court "may" order that the husband secure to the wife a sum of money for her maintenance. Yet the permissive "may" was not deemed by the court to have the effect of permitting a contract to be made to oust the court from its duty, in the public interest, to consider the question of main-

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[72] *Ibid.*, p. 614, per Hailsham L.C.: "The power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such dissolution, conferred not merely in the interests of the wife, but of the public, and . . . . . the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction."

[73] A separation agreement between the parties would come within the meaning of the words of the statute "the conduct of the parties".

[74] See The Matrimonial Causes Act R.S.O. 1937, p. 208. Sections 1, 2, follow in substance the provisions of the English act considered in the *Hyman Case*. The result of the *Hyman Case* would thus seem to be binding in Ontario since the Ontario act too reflects a public policy which prevents parties from contracting out of the act so as to defeat the statutory duty of the court to inquire into the question of proper maintenance for the wife.

[75] *Supra* note 12.

tenance regardless of any contract to the contrary. This duty the court gathered from the general tendency of the statute, even in the absence of mandatory words. The policy of a statute depends therefore on more than a literal interpretation of the words used in it, whether they be mandatory or permissive, though this is not without significance. Some consideration must hence be given to the question of how the sense of a statute is arrived at.

III

The methods of judicial ascertainment of the policy of a statute still followed by the courts have given many writers just cause for concern.[1] It will not be gainsaid that the only justification of a statute lies "in some help which the law brings towards reaching a social end which the governing power of the community has made up its mind that it wants".[2] The creation and interpretation of a statute are therefore complementary parts of one process whose success depends on the closest co-operation between the courts and the legislature, and since the legislative act precedes the judicial appraisement of it, it is on the courts that the brunt of the burden appears to fall.

Towards the close of the sixteenth century, the court in *Heydon's Case*[3] laid down four guides to the interpretation of a statute. Briefly, a court must inquire into what the common law was before the passing of the act; what was the mischief and defect for which the common law failed to provide; what remedy had Parliament appointed to cure the defect; and what was the true reason of the remedy. Two factors militated against the full application of these rules. One was the growing notion of the supremacy of Parliament, a notion which the end of the seventeenth century saw indelibly stamped in the minds of all Englishmen. The other was the belief in the totalitarian virtue of the common law, a belief which caused the courts to look askance at statutes and to treat them, as Sir Frederick Pollock has said,[4] "on the theory that Parliament changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds."

[1] Radin, *Statutory Interpretation* (1930), 43 Harv. L. Rev. 863; Amos, *The Interpretation of Statutes* (1934), 5 Camb. L.J. 163; Davies, *The Interpretation of Statutes in the Light of their Policy by the English Courts* (1935), 35 Col. L.R. 519; *Corry, Administrative Law and the Interpretation of Statutes* (1936), 1 University of Toronto L.J. 286.

[2] HOLMES, COLLECTED LEGAL PAPERS, (1921) 225.

[3] (1584), 3 Co. Rep. 7b.

[4] ESSAYS IN JURISPRUDENCE AND ETHICS 85.

One result was that the courts felt it their duty, in respecting the supremacy of Parliament, not to go beyond the words of a statute and to seek the aim and object of a statute in the statute itself, which expressed the will of the legislature.[5] That the legislature possessed a will was a notion as curious and mythical as the later conception of a corporate will.[6] The fundamental rule of interpretation became, therefore, to find the intention of the legislature. In actual practice this meant the literal interpretation of statutes, the strict adherence to the plain meaning of the words used. Words at their best are awkward modes of expressing purposes; they have no definite content nor any mathematical exactitude, and, being capable of nuances in meaning, are ill suited to be the effective indicators of a legislative purpose. The literal interpretation of statutes imposes a heavy task on the draftsman but, even if he achieves the highest degree of perfection, there is no literal meaning which automatically resolves every case. A second result was the application to a statute of the same rules of construction as were applied to other written instruments, the most unfortunate of which was the rule excluding extrinsic evidence.

Under such a state of affairs we get statements to the effect that "in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense is to be adhered to unless it would lead to some absurdity in which case the grammatical sense is to be modified but only to overcome the absurdity and no further".[7] "The statute must be taken to mean what it says," remarked Lord Shaw in *Hyman* v. *Hyman*,[8] "and . . . . . there is much danger in allowing invasion of its terms followed by subsequent invasions succeeding the first until the virtue of the statute is emasculated." Queer indeed, this ascribing of virtue to the written word behind which one could not go without being accused of seducing the statute. The outburst of Lord Sumner in *Guardians of the Poor of Salford Union* v. *Dewhurst* has been previously referred to.[9] He expressed the fear that, unless the meaning of the written word was adhered to, there would be a tendency for judges to substitute their private opinion for that of the legislature. Yet it is precisely in the strict adherence to the doctrine of literalness that

[5] This idea persists in the text-books. See MAXWELL, INTERPRETATION OF STATUTES (7th ed.) 1: "A statute is the will of the legislature."

[6] Corry, *op. cit.*, *supra* note 1, at p. 299.

[7] *Grey* v. *Pearson* (1857), 6 H.L. Cas. 106. Also *Gundy* v. *Penniger* (1852), 1 DeG. M. & G. 502, 505.

[8] [1929] A. C. 601, 616.

[9] *Supra*, Part II, note 22.

the danger lies of judges substituting their private convictions of policy for the real aim and object of the statute. If judges cannot go outside the words of an act, and words being what they are, within the wide limits set by their meaning, the judge can become a real legislator, free to substitute his own ideas of reason and justice for those of the men and women whom he serves.[10]

A minor modification was urged and accepted finally in regard to the literal doctrine. The modified rule became known as the golden rule of construction.[11] "It conceded full effect to the literal meaning of the words except where that meaning led to an absurdity or manifest injustice. In such cases, the words might be modified to avoid a result which the legislature could never have intended."[12] The rule seems however to have been repudiated, and for this reason, that the prolixity of statutes suggested to the courts that Parliament meant to leave nothing to implication, not even to avoid an absurdity; and should the courts attempt to apply the golden rule, they would be guilty of usurping the legislative functions of Parliament.[13] The literal rule of interpretation, in all its stricture, regained its supremacy.

The courts departed from the rules in *Heydon's Case* because they were based on a theory and practice of government that, even at the time they were laid down, was on its way out. This was the fact that both Parliament and the judiciary were subordinated under the Crown in a real sense. Statutes represented the whims of the King and his Council of which the judges were members. Here no theory of interpretation was really needed. Even after the judges ceased to be members of the King's Council and so long as the King could dispense with Parliament and govern alone, the judges could only seek in their interpretation of the statutes to ascertain the royal conception of their aim and purpose. The supremacy of Parliament after 1688 gradually brought in the literal doctrine of interpretation and the rules in *Heydon's Case* went by the boards. The revolution of 1688 also brought in the conception of individual rights to liberty and property. The strict interpretation of statutes made it easier to detect any

[10] Corry, *op. cit., supra* note 1, at p. 291.
[11] *Mattinson* v. *Hart* (1854), 14 C. B. 385, per Jervis C.J.
[12] Corry, *op. cit., supra* note 1, at p. 299: "The rule was designed to avoid the harshness of literal interpretation and at the same time to prevent the courts from legislating."
[13] *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354; *Hilder* v. *Dexter*, [1902] A.C. 474.

interference with private rights. The persistence of this method of interpretation makes it more difficult to find in a statute a general public benefit.

To-day the theory and practice of government is again undergoing vital change. Illustrations have been given as evidence of the fact that it can no longer be said that Parliament does not intend to interfere with private rights unless it clearly says so.[14] The simple society in which the literal doctrine was developed is no longer with us. Parliament has been forced to legislate more and more in general words. To such legislation the literal doctrine cannot be successfully applied at all. Judges have been forced, in many instances, to abandon it in favour of looking at the scope and object of the act. Yet even here sometimes, judges, in their implicit faith in literal interpretation, have limited general expressions in accordance with their own views of policy.[15] It is also true that much of our social legislation of to-day deals with matters with which judges have had no direct acquaintance.[16] How can they possibly, therefore, approach such a statute literally and without the aid of extrinsic evidence, and still expect to interpret it to the community? It is small wonder that there is a tendency to remove the administration of certain social legislation from the courts and entrust it to administrative tribunals who might better deal with it for the achievement of its purposes.[17]

It is clear that there must be a new technique of interpretation.[18] There can be no greater absurdity than the belief that the words of a statute alone are indicative of its policy. "The supremacy of Parliament would not be shaken in any way if the courts should throw off the spell of literalness and . . . . . proceed . . . . . to examine the objective data which will reveal the aim and object of the legislation".[19] There is no harm in the courts continuing to look for the 'intention of the legislature' provided they have a precise and

[14] *Guardians of the Poor of Salford Union* v. *Dewhurst* (1926) A.C. 619; *Hyman* v. *Hyman*, [1929] A.C. 601; *Powell* v. *Sheffield Corporation* (1936), 52 T.L.R. 248.

[15] Corry, *op. cit.*, *supra* note I, 311; Davies, *op. cit.*, *supra* note I, 526 *ff.*

[16] Jennings, *Local Government Law* (1935), 51 L.Q.R. 180, 192.

[17] Davies, *op. cit.*, *supra* note I, 519.

[18] See *Report on Ministerial Powers* (1932) Cmd. 4060, and the appended note by Professor Laski on the 'Judicial interpretation of Statutes', wherein he suggests that statutes should be accompanied by explanatory memoranda setting forth the purposes they are intended to serve.

[19] Corry, *op. cit.*, *supra* note I, 312.

practical notion of what that means. Their actions to date would seem to suggest they have not. Yet cause there must be for some hope and optimism in the words of Mr. Justice Cardozo that "courts know to-day that statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the frame-work of present day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad".[20] And if the courts know this, they should not delay in applying this knowledge practically.

If the doctrine of literalness is abandoned, what then? Where will the courts find the policy of a statute? The object and purpose of the statute can still be the guide, but in more than a formal sense. "The policy of legislation is largely determined by public pressure upon the legislature by means of public opinion and periodic elections. Though the intention of the legislature is a fiction, the purpose or object of the legislation is very real. No enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose".[21] This is the fundamental truth, stripped of all the theory and niceties of constitutional dogmas — a statute is the result of social pressure on the government of the day. That social pressure must be taken into account in interpretation. "The meaning of a statute consists in the system of social consequences to which it leads or of the solutions to all the possible social questions that can arise under it. The solutions or systems of consequences cannot be determined solely from the words used, but require a knowledge of the social conditions to which the law is to be applied as well as of the circumstances which led to its enactment. . . . . The meaning of a statute, then, is a judicial creation in the light of social demands".[22] The courts then must go behind the statute to realize its policy. They should be able to refer to Parliamentary discussion of the bill, both in committee and in the house, and to its legislative history; they should take cognizance of the trend of social forces and treat the statute as a means to the realization of a social end. It would thus be possible to discover the aim and policy of most legislation and there would be less danger of the judge substituting his own views

[20] THE NATURE OF THE JUDICIAL PROCESS, 81.
[21] Corry, *op. cit., supra* note I, 292.
[22] COHEN, LAW AND THE SOCIAL ORDER, 131.

of policy[23] than under an adherence to the literal doctrine of interpretation. Under the literal doctrine, a judge is practically forced to read into a statute his own ideas of policy when he is confronted by nothing but a mass of words. With objective data before him, the thing that counts with the judge is not what he believes to be right. It is what he may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.[24] It is only by this method of interpretation that the courts can offer the co-operation with the legislature that is so necessary in order to keep the law moving with the currents of social change.

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[23] CARDOZO, *supra* note 20, 83 *ff.*; Davies, *op. cit.*, *supra* note I, 533 *ff.*
[24] Cardozo, *supra* note 20, 88. Kohler, Interpretation of Law, 9 Modern Legal Philosophy Series 192.