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THE COURTS AS LEGISLATORS

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It is, I think, one of the weaknesses of the law in England that here, more than in any other country, there seems to be a gulf between those who teach and study it in the Universities and those who practise and administer it in the Courts. That those who teach and those who administer the law should look at it from different angles is inevitable and healthy—but not that they should do so from different sides of a gulf. This annual Holdsworth lecture constitutes one of the rare bridges across that gulf. That is why I particularly welcome the honour you have done me in inviting me to deliver it this year. I want to seize the opportunity it affords of trying to cross that bridge and to explain to you who teach and study the law what I am trying to do when I am preparing one of those judgments in the Court of Appeal which you will subsequently be criticising in the lecture room and in the Law Reviews.

This is a personal talk about what I find most exciting, most worth while, in the somewhat humdrum work of a Lord Justice of Appeal. I do not profess to speak for my colleagues. Some, it may be all, would disclaim what I am going to say. I should add too, this further word of caution : I have time to speak of one aspect only of the Court's work ; one which is present in no more than a small minority of cases.

Law is about man's duty towards his neighbour : not his whole duty but those rules of conduct which society

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organised in a state will enforce by its collective powers of coercion. We all have views as to what those rules ought to be. None of us thinks them perfect as they are. We are all of us in favour of some degree of law reform. Whoever has power to determine what those rules of conduct shall be and what shall be the remedy for their breach is potentially a legislator. My purpose this afternoon is to examine the judicial process first to show that Courts by the very nature of their functions are compelled to act as legislators and secondly to make some suggestions as to how they should approach that task.

In speaking of legislation I shall confine myself to that which alters man's enforceable duty towards his neighbour; to what, if you happen to like the changes, you call "law reform." I exclude mere codification—although since ostensibly the Courts expound what the existing law is we pretend to be no more than codifiers. But this is legal fiction. No lawyer really supposes that such decisions as *Rylands v. Fletcher* in the last century or *Donoghue v. Stevenson* in this did not change the law just as much as the Law Reform (Contributory Negligence) Act, 1945.

At first sight litigation, which is the only business of the Courts, looks an unpromising source of legislation of this kind. Litigation is concerned with what is past and incidental—with a particular breach already committed by a particular individual of his duty towards his neighbour in circumstances which will never be exactly reproduced. Rarely are the Courts explicitly concerned with future conduct. Only when it grants an injunction does the Court say: "If you do this thing in

future certain consequences will follow." Never are the Courts explicitly concerned with what is general. The Court's order normally binds only the parties before it. Even a judgment in rem or as to status explicitly affects only a particular res or the status of a particular person. Yet implicitly every judgment delivered not under a palm tree but in a Court bound by the rules of precedent speaks to the future and speaks generally. It says not only to the particular party to the action but to all to whom the judgment becomes known: "If anyone does this kind of thing in the future this kind of consequence will follow." It is by that implicit content of every judgment that the Courts in performing a judicial function exercise a legislative power.

In countries where the rule of law prevails the judicial process is directed to three distinct functions. Two of them are essentially judicial whether performed by a Court of law or not. The third, although not necessarily judicial is generally undertaken by the Courts of law in a complex society.

The first is to settle disputes about facts—to find out what really happened. The second is to settle disputes about legal concepts—to decide whether what really happened amounted to a breach of one man's duty towards his neighbour. The third is to determine what is the remedy for that breach of duty. It is chiefly of the second function that I shall speak this afternoon.

True there are some substantive rules of conduct made by the Courts in the guise of rules of evidence. Examples are "estoppels," one type of which, "issue estoppel," is in the course of active development today. But to

say to a party to litigation: "These are facts which you will not be allowed to prove" is merely another way of saying: "Circumstances exist which render these facts devoid of legal consequences." It is not a dispute about facts; it is a dispute about legal concepts. A more controversial example is provided in criminal cases by "The Judges' Rules." When the Queen's Bench Judges say that they will not normally admit evidence of confessions unless they have been obtained in conformity with the Judges' Rules, they are not primarily concerned with the probative value of a confession as material for finding out what really happened: the common law rules as to the admissibility of confessions look after that. What the Judges' Rules are concerned with is to lay down rules of conduct to be observed by the police and to impose as a sanction for their observance the non-admission of a confession obtained in breach of these rules.

The third function, determining the remedy for a particular breach of duty, also has little legislative content. Because the Courts have no supervisory machinery all they can do in civil cases is to threaten the perpetrator by injunction or more usually compensate the victim by an award of damages. I hope I do not underestimate the social importance of this function or its difficulties. If monetary compensation—the only remedy the Courts can give for consequences of injuries which do not consist of monetary loss—is on a scale which does not accord with public sentiment, the judicial process is failing in its function. It fails also if monetary compensation is not predictable, for its true success is in inverse ratio to the number of cases which have to be brought to trial.

If it is working well parties to disputes can settle them without expending time and money on litigation, because they can foretell what the result of litigation would be. These problems of adequacy and predictability of monetary compensation we are only now beginning to analyse and to rationalise. They are exciting, they are controversial, but they fall outside my chosen field this afternoon.

It is the second function of the judicial process, deciding whether what really happened amounted to a breach of one man's duty to his neighbour, with which I am concerned. This must entail legislation wherever there is room for dispute as to what man's duty to his neighbour is. In the majority of cases there is none. Once it has been found what really happened—there is no dispute as to its legal consequences ; the relevant rule of conduct is plain. But there are also cases—many more than one would expect—where there is room for dispute as to what the rule of conduct really is. This is so as much with rules laid down by Act of Parliament as with those which have evolved at common law.

Let us start with Acts of Parliament and with the kind of legislation which historically and constitutionally lies within the exclusive functions of the elected legislature—taxation. You may suspect that judges share the common human failing of wanting to tell other people what they ought to do—to lay down the law. But in the fiscal field at least I have a clear conscience Except in its application to me personally, about which there is unfortunately no room for dispute, I am not interested in reforming tax law. It no more lies within the field of morals than does a cross-word puzzle. I would rather do a cross-word puzzle than try a revenue appeal. It calls for much

the same mental agility and the solution is more rewarding. Yet every revenue appeal that comes before the Court—generally after any dispute of fact there may have been has already been decided by the Commissioners —involves a dispute as to whether a particular kind of gain is taxable, whether a particular kind of document attracts stamp duty. Whenever the Court decides that kind of dispute it legislates about taxation. It makes a law taxing all gains of the same kind or all documents of the same kind. Do not let us deceive ourselves with the legal fiction that the Court is only ascertaining and giving effect to what Parliament meant. Anyone who has decided tax appeals knows that most of them concern transactions which Members of Parliament and the draftsman of the Act had not anticipated, about which they had never thought at all. Some of the transactions are of a kind which had never taken place before the Act was passed: they were devised as a result of it. The Court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic oracle. But whoever has final authority to explain what Parliament meant by the words that it used makes law as much as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it.

Let me illustrate that by an example. In 1891 Parliament passed the Stamp Act providing for the imposition of ad valorem stamp duty upon various classes of documents. Written agreements for the sale of simple contract debts owed by debtors outside the United Kingdom made between 1901 and 1931 were liable to ad valorem stamp duty. That was because in a case decided in 1901

the Court of Appeal interpreted the relevant words of the Stamp Act 1891 in one way. Its judgment stood until 1931 when it was overruled by the House of Lords, who interpreted the same words in the opposite sense. The effect was the same as if a section had been inserted in the Finance Act 1901 imposing ad valorem stamp duty on this kind of document, and a section inserted in the Finance Act 1931 repealing it. Parliament appears to have been equally content with both "interpretations" of its intentions. Like the dog in the night it did nothing.

I do not suggest that the Courts provide a suitable source of legislation in this field. Not only for the conventional reason that taxation is the responsibility of an elected legislature but also for the reason that a taxing statute in particular should not be retrospective. People should be able to arrange their affairs with knowledge of what their resulting liability to tax will be. But because the Courts in legal theory are merely expounding the meaning of words used by Parliament when the tax Act was passed, even though the exposition as in the example I have given comes forty years later, the only law the court can make is retrospective law. This should be borne in mind when one complains of the complexity of taxing statutes. They should be drafted so as to leave no room for dispute as to their application to particular transactions. The history of tax legislation is thus the history of an attempt to deal specifically with the liability to tax of every kind of financial transaction which people enter into And it is a history of failure. No-one reading the Income Tax Act 1952 could complain that Parliament had not done its best to cover the whole field by legislation

so as to leave no room for differing " interpretations " of its intentions. Yet subsequent Finance Acts, many sections of which are designed to alter " interpretations " by the Courts of sections of the Act of 1952, show that in the face of human ingenuity in devising new variants of transaction, this aim is impossible of achievement.

It is worse. It is self-defeating. Where an Act of Parliament is relatively simple it is generally possible to discern in it some principle capable of being applied and adapted to particular cases. Where this is so the Courts can fulfil what I shall endeavour to show is their appropriate function as legislators, not only in the field of lawyer's law but also in those fields of human conduct in which Parliament has thought it desirable to intervene. The general rule of conduct is laid down by Parliament in the Statute, the sub-rules for the application of the general rule to particular kinds of conduct are laid down by the Courts. This was once true even of legislation about income tax, those rules of conduct which determine how much an individual should contribute to the collective expenditure of the State. In 1901 Lord McNaghten could be pardoned for saying that income tax was a tax on income and treating that as a principle by which the liability of particular transactions to income tax could be determined. That would be unpardonable now. There was room for dispute then as to whether the gain arising from particular kinds of transactions fell within the concept of " income." Decisions of the Courts in these kinds of dispute laid down sub-rules which determined what classes of transactions attracted liability to tax. Some of those sub-rules excluded from liability to tax gains which Parliament later thought

ought to be taxable: and by subsequent legislation it so provided, not by reference to any general principle but by specific provisions taxing gains from the particular class of transactions described. By 1952 the Income Tax Act, codified in that year, occupied 520 pages of the Law Reports volume of Statutes. When an Act attempts, as this one does, to deal specifically with every class of transaction which the draftsman can foresee, it becomes difficult indeed to extract from the mass of detail any principle which the Courts can say with confidence Parliament intended to be applicable to any class of transaction which the draftsman did not foresee. This is what drives the Court to adopt the narrow semantic approach. We cease to ask ourselves: "What did the users of these words intend"? and ask ourselves: "What, as a matter of semantics, do the words they used mean?" These are different questions and may result in different answers.

Let me give you a horrible example. Before 1933 the House of Lords decided that the annual surpluses made by a mutual insurance company upon transactions with its members were not assessable to income tax. By Section 31 of the Finance Act 1933 Parliament made a provision which was intended to make such surpluses taxable. That such was its intention was clear and acknowledged in the speeches in the House of Lords in the case in which they declined to give effect to it. For unfortunately for these intentions the draftsman of the section believed that such surpluses would be taxable under the existing law if they had arisen from transactions with non-members, and he chose to give expression to Parliament's intention by words which assimilated transactions with members to transactions with non-members.

His belief was wrong, and accordingly the words which he used as a matter of semantics did not mean what he and Parliament intended them to mean. In 1946, in *C.I.R.v. Ayrshire Mutual Insurance Co. Ltd.* [1946] 1 All E.R. 637, the House of Lords so held. " The legislature," said Lord Macmillan, " has plainly missed fire." I venture respectfully to suggest that if, as in this case, the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit : not merely to record that it has been missed.

Here is judicial legislation at its worst. It came I think at the high-water mark of the narrow semantic approach. The tide, I believe, has begun to recede. It was in any event an exception for there was no room to doubt what the users of the words did intend. But in the majority of cases arising out of statutes of this kind it is not possible to know what Parliament intended should be the rule of conduct in particular circumstances not dealt with specifically in the Act, and this for the very good reason that Parliament simply had not envisaged those circumstances at all. Here there is no alternative to applying the rule of literal construction ; to making the purely semantic choice between possible meanings of the words used by the draftsman and to apply the Statute as so construed to the particular circumstances. To make that choice is to legislate, but it is not legislation of a kind for which judges or the judicial process are particularly suited.

I see no other solution when the Courts are confronted with a Statute which is drafted in this way. But perhaps an even greater misfortune is that so much of the work of the Appellate Courts, and particularly of the House of

Lords which is the final authority on statutory interpretation, is concerned with statutes of this kind ; statutes dealing with taxation, with town and country planning, with housing and the like. It is never easy to avoid forming habits of mind. I suspect it becomes no easier with advancing years. Our approach to statutory interpretation is conditioned by the kind of statutes which we have most frequently to consider, and if those are statutes which drive us to the purely semantic criteria we tend to apply the same criteria to statutes of a different kind which do contain clear indications of general principle or policy which ought to qualify the sense in which particular words or phrases are understood. I think that on the appellate bench there is a growing consciousness of this danger. I think that we on our side are trying to correct it, for it creates a vicious circle in that it compels the Parliamentary draftsman to try to state specifically in the Statute the rules applicable to every kind of conduct which Parliament desires to regulate, to draft indeed a Statute which is not susceptible of anything but the narrow semantic approach. This in its turn limits the field in which the Courts can exercise their appropriate legislative function and reinforces in the judiciary those habits of mind which are inimicable to its proper exercise.

For what I want to suggest to you this afternoon is that there are wide fields of human conduct in which the legislative function can appropriately be performed or supplemented by the Courts. When we talk of the common law we are referring to law which is made by judges. There are some areas in which Parliament has not intervened at all—much of the law of contract, most

of the law of tort. There are others where Parliament has merely recorded the general principles of judge-made law —the great codifying statutes of the turn of the century, the Sale of Goods Act, the Marine Insurance Act, the Bills of Exchange Act; others where Parliament has intervened to adapt judge-made law to modern social conditions, either on the grand scale as in the property legislation of 1925 or on the minor scale as in the miscellaneous Law Reform Acts of the last thirty years. There are yet others where wholly new principles have been laid down which bear no relation to existing judge-made law—rent restriction, restrictive trade practices, national insurance.

In all these fields the rules of conduct apply to human relationships between all sorts and conditions of men. They fall to be applied in an infinite variety of situations none of which is the exact facsimile of another. It is this feature, not the absence or existence of Parliamentary intervention in the field, which makes such rules of conduct suitable subject-matter for judicial legislation. I am not conscious when adjudicating upon a contract for work and labour or affreightment of adopting an approach different from that which I adopt towards a contract for the sale of goods or of marine insurance. I do not think that when sitting in the Restrictive Practices Court I was doing anything different in kind from trying a complicated action for negligence or breach of contract at common law. It is the inherent differences between the legislative process of Parliament and the judicial process of the Courts which determine the kind of legislation which is appropriate for each.

Let me suggest to you two basic differences between the Parliamentary process and the judicial process which

dictate the kinds of laws which each is best fitted to make. Parliament when it makes law, unless it happens to be a retrospective law, is inevitably indulging in crystal-gazing. It is trying to foresee how human beings will react in the future to a new rule of conduct in circumstances which of necessity will be different from those which existed before the law was passed. For they must be different at least in this : that after the Statute comes into force there will be a new rule of conduct to which human beings will be compelled to conform. How they will react to it, what its effect will be on their conduct in other respects, only a prophet can foretell. This would be so even if social conditions changed as slowly as they did before the industrial revolution. Today when technical advances cause social and economic changes more rapidly than ever before, an Act of Parliament will quite soon be operating in what is in effect a different social environment which those who passed it could not have accurately foreseen.

Judge-made law on the other hand, because litigation is concerned with what is past and incidental, is based upon actual experience of what human beings have in fact done and what were in fact the consequences of their doing so. The Courts have thus the material to piece together a rule of conduct by induction from particular instances of how men do in fact behave in particular circumstances, none exactly the same though common elements in each can be discerned. Such a rule of conduct based on the recognition of the common elements in the actual behaviour of men in their environment is one which potentially is flexible not rigid, adaptable to changing circumstances, not fixed for ever in the fetters of the past.

The law which Parliament makes is ascertainable only from the words the draftsman of the Act has used. If they are inapt, if they are understood in a sense that Parliament did not intend, Parliament has no opportunity to explain its meaning—short of passing an amending Act. The Parliamentary process of the United States and of most European countries does enable the Courts to refer to preparatory material in explanation of what the legislature intended to achieve by the actual words used in the Statute. But save in rare cases, of which the various Law Reform Acts based upon reports of the Law Reform Committee are the best examples, the normal stages through which a Bill passes in the United Kingdom Parliament do not provide material other than the Act of Parliament in the form in which it is ultimately passed upon which a reliable view of Parliament's intentions could be based. Parliamentary law is the slave of the precise words which the professional draftsman chooses to express its will.

Judge-made law, on the other hand, is less constricted. Because a rule of conduct which the Courts lay down is pieced together from the statements by individual members of the Courts of the reasons why in particular circumstances a particular decision was reached, there is no exclusive linguistic formula in which the rule is expressed. Being thus emancipated from the tyranny of language a rule so made is potentially more flexible. It should for this reason too be more adaptable to changing circumstances if judges have the percipience and the courage to use its flexibility.

How wide then is the appropriate field of judge-made law? There was a time, when we were a simple almost

static society, that the common law—judge-made law—was adequate for our social needs. Today in a highly complex swiftly changing society most changes are organisational and involve the creation of new or the adaptation of existing administrative organs to carry them out. This Parliament alone can do ; the Courts cannot. Their coercive powers are essentially negative. They can enjoin, they can award punishment or exact compensation for breaches of their rules of conduct : but that is all. There are thus today wide areas of legislative activity for which the Courts are unfitted by the very nature of the judicial process. The Courts could never have created the Welfare State. In any event it is not the business of the judges in a democracy to decide how society shall be organised ; whether, for instance, steel shall be nationalised or not. But organisational changes do not destroy human relationships, they only alter the framework in which the individual, whether within the organisation or outside, performs his duty to his neighbour. It is the regulation of those human relationships within the new framework that I suggest is the proper field of judge-made law. When it comes to the day-to-day dealings between members of the management of the steel industry and those employed in it, between one employee and another, between the management and those who buy its products or those from whom its raw materials are bought, then whether the industry is nationalised or not it seems to me that judge-made law, if judges will make proper use of its potentialities, is the only practicable way of laying down rules of conduct appropriate in the unforeseeable variety of circumstances which will in fact arise.

If I am right in suggesting that the broad organisation of society is for Parliament; the regulation of human relationships within the framework of that organisation for the Courts; what changes in attitude are called for so that each may perform its appropriate task the better?

To Parliament, as will already have become apparent, I would suggest only this: that in defining new duties, whether they are to be performed by new organisations established for the purpose such as hospital boards, or by existing organisations such as local authorities or by classes of private individuals such as landlords, it should define those duties on broad general lines. I say this with diffidence for it invites three criticisms of judge-made law. The first is that whereas law should be knowable in advance, judge-made law is law made in arrear: it is known only after it is broken. The second is that whereas law should be readily comprehensible judge-made law is difficult to ascertain and often complicated. The third is that judges by training, temperament and age are too averse to change to be entrusted with the development of rules of conduct for a brave new world.

I recognise the force of all these criticisms. I think that we, particularly in appellate courts, do require to change our attitudes if we are to do our task well in modern conditions. The three criticisms are inter-related for each reflects the conflict inherent in the judicial process between the need for certainty and the need for change.

If one of the products of the judicial process is to be the laying down of rules of conduct, there must be some regard to precedent. Unless men know what the rule of conduct is they

cannot regulate their actions to conform to it. It fails in its primary function as a rule. Men must therefore be confident that the rule of conduct applied by one Court in one decision will be applied by another Court in subsequent cases arising in similar circumstances. But judge-made law, as I have pointed out, is in theory retrospective. A precedent which reverses or modifies a previous precedent is applicable in all cases which are tried subsequently even though they arise out of acts done before the new precedent was laid down. This is unjust, and because it is unjust it is itself a factor which makes the courts more hesitant than they would otherwise be to correct previous errors or to adapt an established rule of conduct to changed conditions. And yet the rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of a legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, to reflect whether we should discard this fiction.

On some occasions in the last few years the Supreme Appellate Courts of States in the United States of America have announced, in delivering a judgment which has departed from a previous line of judicial authority, that the new rule laid down will be applied only in actions brought in respect of acts done after the date of the judgment. This is open to the criticism that the actual party to the judgement is treated differently from others who have already acted in the same way as he has. Justice is not being applied uniformly. The rule of conduct is not retrospective only in the case of other men. But at least the victims of the retrospective element in judge-made law have been reduced from many to one. This is

a development which I think deserves consideration on this side of the Atlantic. It is a logical corollary to the recognition more readily accorded in the U.S.A. than here at present that the Courts do change the law.

This brings me to the second criticism—the obscurity and complication of judge-made law. I venture to suggest for your consideration that obscurity and complication, whose existence I acknowledge in some branches of the law, are the product of the past failure of the Courts to act with courage when it became apparent that a rule of conduct laid down in earlier decisions had become out of date. Let me take two examples in illustration. The first is the duty owed by owners and occupiers of property to persons sustaining injury as a result of conditions existing on their property. Trace the history of this duty through the cases, as I did as a member of the Law Reform Committee considering the report which led to the passing of the Occupiers Liability Act, 1957. It is reasonable that the nature of the precautions which an occupier ought to take to prevent a visitor from sustaining injury should depend upon the circumstances and purposes of the visit. Unfortunately, when this branch of the law was developing in the latter half of the nineteenth century the actual circumstances of two leading cases which happened to fall for decision in 1866 and 1867 led the Courts to divide visitors into two classes and no more and to formulate different standards of care for each class. These standards which should have been flexible, became first rigid and then fossilised by the doctrine of precedent. In the attempt to make them work justly in individual cases arising in changed conditions, the Courts resorted to subtle distinctions in

forcing visitors in various circumstances into the alternative strait-jackets of "licencee" or "invitee," and to ingenious verbal analyses of selected phrases in the precedent judgments in an attempt to escape the rigours of this artificial classification. All this would have been unnecessary if the Courts in the twentieth century had the percipience to see where the slavish acceptance of the literal wording of earlier judgments and limitation of categories of visitors were leading them, and the courage to adapt to the physical and social environment of the new century rules of conduct made when the interests of property-owners were held in greater esteem.

Common employment is my second example. In the mid-nineteenth century when this curious doctrine was first developed, there was something to be said for the view that in the environment of domestic service a servant accepting employment took the risk of injury from the negligence of his fellow-servants as one of the ordinary hazards to which men working together were exposed. Since the doctrine of vicarious liability was itself in course of development one cannot legitimately complain at a reluctance to extend it for the benefit of a fellow servant of the same master. It was the rationalisation of the refusal to extend the principle of vicarious liability by basing it on an implied term of the particular contract of employment between the master and the servant, followed by its extension to all contracts of employment under modern industrial conditions, that transformed it into a rule of conduct offensive to the social conscience of ordinary men and of judges in the twentieth century. By the time the courts realised where these successive decisions were leading them, a too rigid application of

the doctrine of precedent had fossilised the general rule. Lacking the courage to review the general rule the Courts devoted themselves to devising exceptions to it : to inventing an artificial concept of duties personal to the master which he cannot delegate to a servant although, since the master is generally a limited liability company, he can only perform it through a servant. Such a concept is unreal. It cannot fail to produce anomalies and complications.

These examples, and there are many others, of what I characterise as lack of courage or misuse of precedent lend point to the third criticism. Do they show that by reason of their temperament and training judges are too averse to change to be entrusted with the development of rules of conduct in a society where social and economic conditions are so rapidly changing? At least it was not always so. Where do you find the sources of the common law today? In the bold imaginative judgments delivered by a great generation of judges between the sixties and the nineties of the last century. It was these rather than the activities of Parliament which transformed man's duty towards his neighbour as he emerged from a static, agricultural and aristocratic society to a dynamic, industrial and democratic one. True they made some errors. The doctrine of common employment dates from this period. True these changes reflected the current social and economic philosophy of the nineteenth century which is no longer representative of majority thought today. But had the same attitude survived into the twentieth century, the same process of change would have continued to adapt the common law to the needs of contemporary society without the need for intervention

by Parliament. Yet, somehow, at the turn of the century the Courts seemed to have lost their courage. In the clash between precedent and flexibility precedent seemed to win the day. What in the nineteenth century was done by judges to adapt the common law and equity to the needs of contemporary society has in the last thirty years had to be done by the Law Reform Committee, upon whose reports nearly a score of Law Reform Acts have been passed to alter judge-made rules of common law and equity. Each of these Acts announces the twentieth-century failure of the judges to show courage and imagination.

Yet if Law Reform Acts of this kind reflect past failures of the Courts to fulfil their proper function they have given us today a fresh chance to do so. They at least are limited to laying down general principles capable of being adapted to the particular circumstances of individual cases. The abolition of the old doctrines of no contribution between joint tort feasors, of contributory negligence, of common employment and of occupier's liability has released the Courts from the self-imposed fetters of precedent which had led to the creation of sub-rules of conduct whose artificiality bore little relation to modern needs: the " last chance " rule in contributory negligence, the range of duties personal to the employer in common employment, the rigid classification of licensees and invitees in occupier's liability. These Acts, as they have been applied by the Courts, have in the last decade transformed man's duty of care towards his neighbour and are, I like to think, transforming, though more slowly, the Courts' general approach towards their function of adapting general rules of conduct to modern

conditions and particular instances and of discarding those which have ceased to be relevant. I hope that you will find in recent decisions a growing tendency to tackle the new problems and to evolve new principles to solve them. Within the last few years we have at last discarded the obsolete distinctions between negligence and unintentional trespass to the person. There are important developments in the law of contract too. A re-examination of the classification of contractual stipulations as conditions and warranties and a fresh attempt to meet problems of contracts of adhesion by the development of the concept of fundamental breach. Promissory estoppel, liability for negligent mis-statement, issue estoppel, a dozen other concepts are being evolved from the older rules. These are outside the field covered by the Law Reform Acts ; they are evidence, I hope, of a reversion by the Courts to the bolder attitude of the nineteenth century judges : a reaction from the timid years of the first half of the twentieth when precedent became the master of the judicial process instead of its servant.

If I am right in diagnosing a change in the Courts' attitude to purely judge-made rules of common law and to Law Reform Acts which alter common law, this cannot fail to be reflected also in their attitude to all other statutes which are so drafted as to permit of the same approach ; to statutes which, in making changes in the organisation of society, lay down the new rules of conduct which those changes require in terms of general principles to be applied to particular cases as the particular circumstances of the case require.

I find this an exciting time to be in the Court of Appeal. There is a new interest in law reform. New machinery is being created to hasten it. This is all to the good. But I believe there still remains a wide field of law reform in which the old machinery of the judicial process still has a valuable if unspectacular part to play.