THE JUDICIAL DEVELOPMENT OF THE LAW

By Dr. E. G. Coppel, Barrister-at-Law

A Meeting of the Medico-Legal Society of Victoria was held on the 25th July, 1938, at the Medical Society Hall. The President, Sir John Latham, Chief Justice of the High Court of Australia, occupied the chair.

Dr. E. G. Coppel delivered an address on "The Judicial Development of the Law."

Dr. Coppel said: My purpose this evening is to discuss the part played by the legal profession in developing the law, and in particular the opportunity which our present system affords to Judges of the superior Courts to keep the law in harmony with those ideas of social justice which are accepted by the community as a whole.

But at the outset I am confronted by a difficulty. Medical members of this Society may not already appreciate how the development of the law can be affected by the action of the legal profession; and there may even be some disagreement among lawyers as to how far this process goes in practice. In the discussions which take place at meetings of this Society it has not infrequently happened that medical members have criticized the state of the law upon some given topic, and have suggested that for the shortcomings of the law the lawyers are themselves responsible. And on more than one occasion I have heard eminent members of my own profession whose official position makes it not only presumptuous but imprudent for me to criticize them in any way, explain that neither the practising lawyer nor the Judge makes the law what it is, and that the only path to legal change is through the action of the legislature.

Such a pronouncement silenced criticism of the legal profession, but it left the state of the law open to be shot at by anyone who feels it sufficiently profitable to aim at an abstraction for which no one will accept responsibility.

There may have been present on such occasions other lawyers who felt some misgiving that their profession should have no better weapon of defence than this.

And those whose studies of legal theory did not stop short at the end of the last century must have felt some surprise at the resurrection of this ancient heresy.

However, the very fact that such views have been expressed with an appearance of authority in this room makes it necessary for me first of all to say something upon the subject of judicial legislation.

I ought to have prefaced this paper with an apology to medical members for speaking on a purely legal subject. But if what I am about to say deprives my own profession at future meetings of this Society of what I can only describe as a "controversial dugout," that may perhaps be some consolation to medical members for the fact that my subject is somewhat remote from the concerns of their own profession.

I shall try to make my remarks as non-technical as I can, though by doing so I may run the risk of failing to please members of either profession.

Everyone knows that there were law courts in England deciding legal controversies according to rules of law before such an institution as Parliament existed. These controversies could not then have been decided by any rules of law which Parliament had laid down. There were a small number of royal pronouncements which may be said to have occupied a position corresponding to that of a modern statute or Act of Parliament. But legal controversies were decided by reference to what was called the "Common Law." So far we are on safe ground. But the moment someone asks "What is this common law?" perhaps a medical man, who does not realize in his ignorance that there are some questions which are simply not asked, we begin to get into difficulties.

An eminent French jurist begins his recent work on the English Legal Tradition thus—

"The two significant words Common Law, the mere sound of which thrills the hearts of all good English lawyers, involve those of the Continent in a maze of difficulties, many of which seem insuperable."[1] Some of these

difficulties arise from the fact that we lawyers, who are always so ready to criticize others for their inexact use of language, persist in using the term "common law" in several different senses. But I think that for our present purposes we may define the common law as that body of legal rules which is to be found, not in legislative enactments but in the decisions of the Courts.

This gets us on to firm ground again and it is at this point that the question arises—Have the judges made the law which is to be found in their reported decisions?

Modern writers on jurisprudence or legal theory seem to be all agreed that the answer is in the affirmative.

The contrary view I may perhaps best express by two quotations from Blackstone's *Commentaries*, for it is probably due to Blackstone that anyone can be found supporting such a view to-day.

Blackstone speaks of "the first ground and chief corner stone of the laws of England, which is, general and immemorial custom or common law, from time to time declared in the decisions of the courts of justice, which decisions are preserved among our public records, and digested for general use in the authoritative writings of the venerable sages of the law."[2] There you have it in a nutshell. The common law is no more than immemorial custom which the judges declare. The duty of the judge is further defined by Blackstone in the following passage: "It is an established rule to abide by former precedents, where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to waver with every new Judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter or vary from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law but to maintain and expound the old one. Yet this rule

admits of exceptions, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent Judges do not pretend to make new laws, but to vindicate the old ones from misrepresentation . . . The doctrine of the law is this: that precedents and rules must be followed, unless flatly absurd or unjust."[3]

These quotations, as you see, assume a body of rules existing from time immemorial which the Judges merely declare or expound. Hence this view is sometimes called the declaratory theory: which as Professor Levy-Ulman says is "to-day generally abandoned."[4]

Indeed it could never survive the pointed question of the American jurist John Chipman Gray, who asked—"What was the law in the time of Richard Coeur de Lion on the liability of a Telegraph Company to persons to whom a message was sent?"[5] The modern English view is thus stated by an Oxford lecturer: "It is perhaps unnecessary to refute the argument that judges do not 'make' the law. So ambitious an interpretation of their office has been denied alike by the jealousy of writers and by the diffidence of Judges themselves. The law, it is said, like the conjurer's rabbit, 'is there all the time,' and the professional's business is to expose it, with suitable incantations, to popular view. It is true that the operations of the judges extend, in theory at least, over a more restricted field than those of the Legislature. Parliament may project into the future a revolutionary principle unembarrassed by the existence of the past. The judges are powerless until their co-operation is invited by the accidents of litigation, and, in response to the invitation, they are hampered if not by the necessity of conforming to accepted doctrine, at least by the recollection of professional tradition, but within these limits they are, despite their reluctance to own the soft impeachment, as truly authors of the law as the most arbitrary of legislators. Nor is it necessary to confine their operations to the development of existing doctrine."[6]

One more citation will perhaps be sufficient to establish

that the reality of judge-made law is now admitted. Dicey, who held that chair at Oxford of which Blackstone was the first occupant, wrote thus in 1905: "As all lawyers are aware, a large part and, as many would add, the best part of the law of England is judge-made law—that is to say consists of rules to be collected from the judgments of the Courts. This portion of the law has not been created by Act of Parliament, and is not recorded in the Statute Book. It is the work of the Courts; it is recorded in the Reports; it is, in short, the fruit of judicial legislation. The amount of such Judge-made law is in England far more extensive than a student easily realizes. Nine-tenths at least of the law of contract, and the whole, or nearly the whole, of the law of torts are not to be discovered in any volumes of the Statutes. Many Acts of Parliament, again, such as the Sale of Goods Act or the Bills of Exchange Act, are little else than a reproduction in statutory shape of rules originally established by the Courts. Judge-made law has in such cases passed into statute law . . . Nor let anyone imagine that judicial legislation is a kind of law making which belongs wholly to the past, and which has been put an end to by the annual meeting and by the legislative activity of modern Parliaments. No doubt the law-making function of the Courts has been to a certain extent curtailed by the development of Parliamentary authority. Throughout the whole of the 19th century, however, it has remained, and indeed continues to the present day in operation. New combinations of circumstances—that is, new cases—constantly call for the application, which means in truth the extension of the old principles; or, it may be, even for the thinking out of some new principle in harmony with the general spirit of the law fitted to meet the novel requirements of the time. Hence whole branches, not of ancient but of very modern law, have been built up, developed or created by the action of the Courts. The whole body of rules with regard to the conflict of laws (or, in other words, for the decision of cases which contain some foreign element), has come into existence during the last 120 years,

and, as regards by far the greater part of it, well within the last 80 or even 70 years. But the whole of this complex department of law has neither been formed nor even greatly modified by Parliament. It is the product of an elaborate and lengthy process of judicial law-making."[7]

I have, I hope, shown sufficiently that the declaratory theory of the judge's function is now wholly discredited and ought never to be brought forward even in defence of the legal profession in this Society. But though now exploded, the declaratory theory had its vogue, and has given rise to some consequences which may prove embarrassing in the development of the law.

If, as Blackstone stated, the judges merely made known or declared the law which already had a disembodied existence of its own, it would necessarily follow that once such a declaration was made, it would never be altered by any later judge. Of course a Court of Appeal has always the privilege of saying that the Judge in the Court below has gone wrong. But once the final Court of Appeal has spoken it follows logically from Blackstone's theory that no change can be made. You are no longer, in his view, able to say that the Court was wrong, because that could not be done without altering the immemorial and sacred common law. If once this theory is given full play, it is obvious that the range of judicial development of the law will be severely curtailed. Now Blackstone was an Oxford professor who became a Judge of the Court of Common Pleas and his lectures were published in 1765-69 under the title of *Commentaries on the Law of England.* This was the first systematic treatise on English law which had appeared for 150 years and even its severest critics have praised its style. The work became and remained for several generations the staple diet on which were nourished students of the English Law, and its influence on the development of English legal thought has been enormous.

I offer the suggestion that one of its results has been the acceptance in English law of the doctrine that no Court is

permitted to depart from the prior decision of a Court of equal or higher authority.

A good deal of historical research has gone on in recent times into the vexed question of when first decided cases became binding as authorities. I do not propose to venture into this field to-night, for lack of qualification as well as for lack of time. Mr. C. K. Allen sums up the position as it was at the end of the 18th century, thus—"The application of precedent is powerful and constant, but no judge would have been found to admit that he was 'absolutely bound' by any decision of any tribunal."

"To-day," says Mr. Allen, "the accepted doctrine is the reverse. Whatever a modern judge may think of a decision of the House of Lords, yet if it is clear and unambiguous he would never consider himself at liberty to depart from it with a view to amplifying justice. How has the change come about? It is certainly a product of the 19th century, but I do not think it is possible to put one's finger on any precise point of time at which the modern doctrine became finally established . . . In some respects the final doctrine is not beyond controversy until quite late in the 19th century. In a number of cases it is still debated whether the House of Lords is bound by its own decisions, and as late as 1898 the Lord Chancellor thinks this matter still sufficiently controversial to require an *ex cathedra* pronouncement . . . But the general principle is now unquestionable."[8] So within the space of little more than a century you have these steps taken. Blackstone states his theory that the judges do no more than ascertain and declare those rules of law which have existed from time immemorial. He adds as a corollary that once the rule is so declared, it must be followed by subsequent judges unless clearly contrary to reason or divine law. (I leave it to others to define what these exceptions mean.)

The declaratory theory never was more than the theory of a leading University professor and so there has been nothing to prevent its rejection under the influence of modern criticism.

But meanwhile the corollary has been adopted in judgments of the highest Courts, and so has itself been subject to its own operation; and has now become embedded in our legal system, notwithstanding the disappearance of its logical and historical foundation.

My own view, which no doubt would not be universally held among lawyers to-day, is that this process by which the judges clipped their own wings has had and will continue to have a bad effect on the development of the law.

Before I deal with the reasons supporting this view, I propose to adduce two examples of judicial law-making—one from the far off days when the judges regarded themselves as free to mould the law to suit the ends of justice and one from our own time.

My first example of judicial legislation is from the late 17th century. It will show that even an Act of Parliament did not deter the judges of those days from giving effect to what they, and no doubt the community generally, regarded as the claims of justice.

In 1623 Parliament passed an Act which among other things provided that "all actions of debt grounded upon any lending or contract without specialty . . . shall be commenced and sued . . . within six years next after the cause of such actions . . . and not after." This is the first of our Statutes of Limitations. It may seem strange that if money is owed it cannot be recovered unless action is taken within six years from the date fixed for repayment, but the explanation probably lies to some extent in the state of legal procedure. At that time and for some three centuries later the parties to an action were not permitted to give evidence on their own behalf. The theory was, apparently, that the temptation to advance his own cause by false swearing was likely to be too strong for the average litigant; and so it was thought better that injustice should be done in this world rather than that the souls of litigants should be tormented in the world to come.

It followed from this rule of procedure that where there was a dispute whether a loan had been repaid or not the

most common method of settling it was the production or non-production of the lender's receipt. And in the absence of any time limit within which actions might be brought, a borrower who had repaid the loan but lost the receipt could in all probability be compelled to pay a second time. This state of affairs fully justified the imposition of a time limit within which action must be taken to recover money and so the Parliament of James I fixed upon six years as the period.

But within a generation England was involved in civil war and for many years it must have been a practical impossibility for adherents of the Stuart monarchy to sue for money owing to them. Upon the return of Charles II to England the Restoration lawyers were brought face to face with two things: a multitude of debts still unpaid but long irrecoverable owing to the civil war, and a Statute, which in terms left the creditor without remedy. Mere considerations of logic would not suffice to prevent English lawyers from overcoming this injustice to right thinking Monarchists. So the Judges evolved a doctrine that if within six years before the action was brought, the debtor had either expressly promised to pay the debt, or had acknowledged its existence so as to imply a promise to pay, the Statute did not prevent the creditor from recovering. "When first new promises and acknowledgments came into recognition, and why, we do not know, but ultimately it became necessary to invent an explanation, where a simple and existing rule of practice had to be extended to complex cases. Logically, if not chronologically, a succession of Courts reasoned thus. The Statute is a derogation of a common law right to sue for a debt, so long as it remains unpaid. It cannot therefore be so universal as its words import. What is its object? To prevent a debtor, who has paid but has lost the evidence of the payment, from being made to pay again. What if the debtor himself says that he has not paid? Why, then, he ought to pay, since he admits himself that he ought to pay."[9]

And so the judges undertook what Lord Sumner has

described as "the task of decorously disregarding an Act of Parliament" and the precise nature of the acknowledgment which will take a case out of the Statute of James I was still under discussion in the House of Lords in 1922 and gave rise to some difference of opinion in our High Court last year. But in the meantime so well established had the judge-made doctrine become that Parliament in 1828 passed an Act (9 Geo. IV, c. 14) which made it essential that a promise or acknowledgment should be in writing and signed by the debtor before it sufficed to render a debtor liable where otherwise the remedy against him would be barred by the Statute of 1623. I said before that this example was an extreme case. You have an Act of Parliament quite general in its terms, then a Judge-made rule which renders the Act inoperative in many cases which fall within its plain words and then a further Act of Parliament, recognizing the validity of the Judge-made rule but limiting its operation for the future.

I doubt whether the most enthusiastic supporter of judicial legislation to-day would approve its being pushed to these lengths. But before inviting you to consider whether the power of the judges to alter the law should not be exercised more consciously and perhaps more freely than many modern judges seem prepared to do, it may be as well to review an instance which lies at the other extreme —the extreme of judicial timidity.

The example I choose is one that has already been discussed at some length before this Society, but as it appears to have a peculiar attraction for many medical men I make no apology for reverting to it.

I should point out first of all that even the most ardent supporters of the binding authority of judicial precedent acknowledge certain limitations.

Thus although the decision of a superior Court is regarded as binding upon all inferior Courts, no statement made by a judge however eminent is binding if made extra-judicially (i.e., outside the performance of his judicial functions), or, even though made during the conduct of

judicial proceedings, if it does not form an essential part of the decision of the case in hand. Such statements, or dicta as they are called, are regarded as mere expressions of personal opinion and no Court is compelled to adhere to them.

In 1843 Daniel McNaughton attempted the life of Sir Robert Peel, but succeeded in killing his secretary instead. This was the latest of a series of political murders or attempted murders which had taken place within a comparatively short time; and McNaughton was not the first of those accused to raise with success the defence of insanity. But while Queen Victoria might be shot at and missed without much public outcry, the noble statesmen of the House of Lords could not contemplate with equanimity the sudden removal of an indispensable private secretary. Accordingly they summoned 15 judges before them, and requested them to answer three questions upon the effect of delusional insanity upon criminal responsibility, and a fourth question upon the propriety of expert evidence being received from a medical man who had not personally attended the accused.

I do not think that the judges were under any obligation to answer these questions, and if they had refused to do so I cannot imagine what the House of Lords could have done about it.

In our own time the judges of the High Court of Australia have declared unconstitutional an Act of Parliament which sought to impose upon them the duty of answering abstract questions of law at the request of the Government of the day.[10]

And this attitude appears to be in line with judicial tradition. But unfortunately the judges answered the four questions put by the House of Lords after McNaughton's case. I say unfortunately, because then began the controversy as to what the answers meant, and in the heat of that controversy I am not sure that the disputants always remembered what the questions were.

Both questions and answers were trenchantly criticized

by Sir James Fitzjames Stephen—one of the greatest English authorities upon criminal law. Amongst other criticisms he pointed out that both the questions and the answers were based upon the assumption that the supposed offender's disease consisted exclusively in the fact that he was under a particular delusion, but that apart from the subject of this delusion he had the same power of controlling his conduct and regulating his feelings as a sane man.

Stephen had no difficulty in demonstrating the futility of the answers if they were limited to this type of insanity —should it ever occur; and he expressed the view that uncontrollable impulse caused by mental disease constituted a defence in law.[11]

But before the end of the 19th century these abstract answers of the judges seem to have been treated by many lawyers as applicable to all forms of insanity, whether delusional or not, and as having in some way become invested with the quality of rules of law. They became the pattern in accordance with which most of the judges charged juries in cases of insanity, though Stephen J. refused to be bound by them, and his example was followed by other judges of a liberal turn of mind.

In 1922 a Royal Commission which included several very eminent lawyers expressed the opinion that Stephen's view of the law relating to uncontrollable impulse was correct, while conceding that the Court of Criminal Appeal had not adhered to it.

In view of the fact that the abstract answers of the judges in 1843 were not rules of law in any proper sense of the word, one might have thought that this expression of expert opinion would have some effect upon the judges in the Court of Criminal Appeal. But in November, 1925, the opportunity came, and was not so much lost as contemptuously rejected. The judgment of the Court was delivered by Lord Hewart C.J. and the only way to do justice to it is to quote verbatim.

"The Court has to-day had a repetition of an argument which from time to time is heard here, with an ingredient

added that is not common, viz., that, according to the experience of counsel for the defence, His Majesty's judges are continually summing up to juries on the question of insanity in the way for which he has contended. That statement is surprising. No such summing up is known to this Court." I pause here to say that at least four cases are recorded in which such a summing up was used, and one of them (Ronald True's case) had been before Lord Hewart on appeal only three years before. The Lord Chief Justice, after stating the limited view of the McNaughton rules, continued thus: "In the present case the judge at the trial fully and clearly explained the law to the jury, but it is said that he misdirected the jury, as he omitted to direct them that a person charged criminally with an offence is irresponsible for his act when it is committed under an impulse which the prisoner is by mental disease in substance deprived of any power to resist. In other words, the complaint against the judge is that he did not tell the jury that something was the law which was not the law. The argument of counsel for the defence began with the proposition that the law was as he represented, but, as it proceeded, drifted into the different position that the law ought to become, or ought to have become, what he represented. It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive. It is not yet part of the criminal law, and it is to be hoped that the time is far distant when it will be made so. The jury may well have thought that the defence of insanity in this case, as in so many cases, was the merest nonsense."[12]

And so, gentlemen, with this calm, dispassionate judicial statement the answers of the judges to those abstract questions in 1843 became in their narrowest interpretation part of the law of England.

Neither here nor in England can you now hope for any assistance from the judges to bring into line with accepted medical opinion the attitude of the law with regard to the responsibility of the insane criminal. For lawyers the

question is closed, and I have not referred to it to open up a subject of discussion this evening. My purpose is far different. It is to point out to you that in 1925 a courageous Court of Criminal Appeal, not emotionally stirred by the fear of introducing a doctrine "merely subversive" could, if it had not been for this notion that a course of judicial practice however bad must be followed, have examined the questions put to the judges and their answers with a fresh mind, and could have put upon them the liberal interpretation suggested by Stephen many years before. But a judicial refusal to venture creates the rule of law for the future, and in this case definitely threw the law out of harmony with enlightened public opinion. A refusal to depart from previous decisions is often defended upon the ground that the judges cannot legislate, they can only expound the law as they find it. But take the case we have just been considering. There was no actual decision of any court of higher authority than the Court of Criminal Appeal which compelled the judges to come to one conclusion or the other. As a matter of strict law it was in my humble opinion open to the Court to decide either way. If the Court had been constituted on that particular day, as it well might have been, of judges who did not think that in many cases the defence of insanity was "the merest nonsense," the decision might have gone the other way. But whatever the decision, its effect upon future cases can not be denied. The court which confirms a previous decision is legislating every bit as much as the court which finds a means of overcoming its predecessor's mistakes.

It is because it obscures this undoubted fact that I venture to think that the outmoded doctrine of the 18th century is doing grave harm to the development of our law. If it were recognized and openly admitted that every judicial decision upon a question of law has some effect upon the development of the law, we should, I think, be doing some service to the law and to the community.

When a judge whose temper and outlook are conservative is faced with the choice between extending or

checking the development of a certain legal principle, is there any reason why he should not say—"I think this doctrine has gone far enough and though an argument has been put to me which would carry a step further the doctrine as it has so far been developed, I think it is wiser to check this process of development at its present stage"?

You will not find such candour in the law reports; what you will find is something like this—"An ingenious argument has been put to me by Mr. Haddock for the defendant, and one which no doubt would produce substantial justice in this and many other cases. But he cited no authority which went the length for which he contended, and my duty is not to make new law but simply to expound the law as I find it in the decisions of my predecessors."

Experienced counsel will recognize this language at once; just as they know that in this context an "ingenious argument" means "one to which I can find no logical answer, but which I am determined nevertheless not to accede to." In common fairness and so that it may not be thought that I am criticizing only one particular school of thought, I should put before you the formula which is used in the opposite type of case—the case where the ingenious argument of Mr. Haddock finds a judicial welcome. "It is true, as counsel for the plaintiff pointed out, that no reported case can be found which precisely supports Mr. Haddock's able argument for the defendant. But I think the principle of Williams v. Dogsbody is wide enough to cover this case and I propose to apply it accordingly." Never by any chance in these modern days will you hear it judicially stated that the principle of Williams v. Dogsbody is a very salutary principle which ought to be extended and developed.

Too seldom is it recognized that both sides to a legal controversy appeal to principles which are to be found in the reports of decided cases. In the domain of popular proverbs one appeals with equanimity to the caution "Look before you leap" or to its opposite "He who hesitates is lost," depending upon which course of action one prefers.

So, too, in the law one often has a choice between opposite principles. Writers of legal treatises have no compunction about setting the two principles side by side, with only a "but" or a "however" between them for the sake of decency. But in the actual decision of cases the choice between conflicting principles is likely to depend on unstated considerations.

This aspect of the judicial function has received far more attention in America than here or in England, and has been recognized not only by theoretical writers but by the greatest of American judges.

Medical members may be interested to learn that the New England physician, who was world famous half a century ago as the exponent of the Philosophy of the Breakfast Table, had a son—also called Oliver Wendell Holmes—who ranks as one of the greatest of American judges of all time.

Notwithstanding many years spent on the Bench first in the State of Massachusetts and later in the Supreme Court of the United States, Holmes remained acutely conscious of the realities behind the process of deciding legal controversies. Let me give you his attitude in his own words.

"The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds—often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community, or of a class, or because of some opinion as to the policy, or, in short, because of some attitude of yours upon a matter not capable of founding exact legal conclusions . . . I think," he says, "that the judges themselves have failed adequately to recog-

nize the duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first came to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that they were taking sides upon debatable and often burning questions."[13]

To lawyers trained in the reticences which the Victorian era imposed even on its legal system this frankness savours of indecency.

But why should a judge endeavour to conceal from himself the political or social views which are in competition behind the dry question of law as it is presented to him for decision? We are particularly fond in this country of asserting that the judges should have no political affiliations. In fact, one sometimes hears it suggested that they should have no political views at all—though I suspect that that remark is usually made in relation to a Judge whose known political views are at variance with those of the speaker. Where this notion came from I have no idea—it is certainly not part of the English legal tradition. In England judicial appointments are commonly made from among the legal supporters of the government of the day, and the highest judicial officer is also a member of the Cabinet.

No one has any compunction about discussing the political views disclosed in the judgments of a particular Judge after he is dead—though all profess to be unable to see them during his lifetime.

Thus Dicey states: "The judges when acting as legislators, are of course influenced by the beliefs and feelings of their time and are guided to a considerable extent by the dominant current of public opinion. Eldon and Kenyon belonged to the era of old Toryism as distinctly as Denman, Campbell, Erle and Bramwell belonged to the age of Benthamite Liberalism."[14]

Surely no one imagines that the leading members of the Bar do not hold strong political views, or that in some mysterious way what views they hold fade from their minds and cease to influence their attitude towards current problems of the day when they accept judicial office. Yet there seems to be some idea that it is only by a pretence of being inhuman that the judges can attain impartiality.

Impartiality, though admittedly most desirable, is not in my view rendered any easier of attainment by hiding from view the springs from which prejudice is most likely to flow. Lord Justice Scrutton, now that he has been dead for three years, may be frankly described as a robust exponent of *laissez faire* liberalism, but not the least of his merits as a judge was that he was fully alive to the effect this had on his mind. He was aware of the difficulty of attaining impartiality. "I am not speaking of conscious impartiality," he said, "but the habits you are trained in, the people with whom you mix, lend to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish."[15]

The best guarantee of impartiality is afforded by the character of the individual judge, by his professional training, by the pride of his office and by the publicity given to his work.

This, however, is somewhat of a digression. The main attack on the view that the judges should develop the law, not unconsciously as so often happens at present, but with conscious regard for social advantage, is that such a course would destroy that certainty which is assumed to be one of the fundamental attributes of a developed system of law.

This at once raises two questions—(1) How far is there any certainty in our law? and, (2) How far is certainty desirable or capable of achievement? Upon the first question Cardozo J., of the Supreme Court of the United States, confesses to "a mounting sense of wonder that with all our centuries of common law development, with all our multitudinous Courts, and still more multitudinous decisions, there are still so many questions, elementary in the sense of being primary and basic, that remain unsettled even now . . . One wonders how one has attained maturity without getting oneself into trouble, when one has been so uncertain all along of the things that one might do in affairs of primary concern. Take such fundamental privileges or claims of privileges as these—the privilege to employ force against another who threatens one with bodily harm; the privilege to employ force to effect a recaption of chattels taken from one's custody; the privilege to employ force to effect an entry upon land. It is astonishing how obscure and confused are the pronouncements upon these fundamental claims of right."[16]

Anyone who has had occasion to take the opinion of counsel will share this view of the uncertainty of the law. I understand from those more conversant with such affairs than I am that it is quite impossible to advise with any certainty upon the meaning of the simple words "absolutely free" as they appear in S. 92 of the Commonwealth Constitution.

The only real sense in which it can be said that the law is certain is this—that when particular litigants have exhausted their rights of appeal the final decision is in favour of one or other of them and is inescapable by both.

Whether that decision will be applied to the next similar case or not is a question which is often difficult to answer. Whatever the similarities between the two cases there are usually some points of difference. Lawyers know full well that there is a vocabulary and a technique for restricting decisions to the particular facts of a case, and thereby "distinguishing" any new case and destroying the value of

the older decision as a precedent. There is also, of course, as I have endeavoured to illustrate earlier, the other formula by which wider principles may be drawn from a decision, which in turn may be applied to cases further and further removed from the original decision. The lawyer, when called upon to advise his client, has often to guess which of these two fates lies in store for the decisions nearest in point to his client's case. And I hope I am not being too frank when I say that the wise lawyer does not omit to take into account the personality of the judges before whom the matter is likely to be argued.

Such frankness is not regarded as out of place in America, as is shown by another pronouncement of Mr. Justice Holmes. He says, "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience . . . Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the Courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics, or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English Courts are likely to do in fact. I am much of his mind. The prophecies of what the Courts will do, in fact, and nothing more pretentious, are what I mean by the law."[17]

Let us turn to the question whether certainty is a desirable or a possible condition for any system of law.

If it were possible to have a code, well indexed, to which any reasonably intelligent man could turn, and discover his legal position in relation to any of the events of his life, I suppose most people would regard that as a happy state of

affairs. The cynical would rejoice, if for no better reason, because it would mean the extinction of the legal profession. But, of course, the mere idea of such a legal system presupposes a static society in which it could operate.

Now I suppose the greatest revolution in human thought which has taken place for centuries lies in the recognition of the truth that in every department of human knowledge, in every sphere of human action, there is and can be no final and authoritative rule. We are accustomed to view without concern the effect in certain of the physical sciences of this idea, which is often said to date from Darwin's biological researches.

Under the influence of Einstein and his followers the nature of the physical universe has, I believe, been subjected to the same rule of uncertainty. The political and economic institutions, which were thought by many a generation ago to be final and immutable, are being challenged on every hand, and whatever the merits of the particular challenge no one seriously imagines that it is possible to avoid change.

Human ideas, human affairs, human institutions never have stood still for any length of time and never will. The law is a human institution which is concerned with the orderly regulation of life in a civilized community. And as the ideas about life in a given community change, so must the law change with them or perish.

That is why it seems to me to be of supreme importance that the progressive development of the law by lawyers, which did so much for the advancement of English society in bygone days, should not be checked or fettered at a period when rapid changes are likely to be called for.

It is true that when the judicial development of the common law was at its height, His Majesty's judges were regarded as part of His Majesty's Government to an extent which to-day would be regarded as remarkable.

Thus Lord Guildford, as Lord Chief Justice of the Common Pleas, was employed by Charles II as a member

of that inner Council which corresponded with the modern cabinet.[18]

To-day, although the Lord Chancellor is a member of the British cabinet, it would not be regarded as in accordance with constitutional usage for the judges in this country or in England to be consulted on matters of policy. And yet it might be argued that the separation of the powers of Government into three watertight compartments has in this respect entailed some loss. It has been said that "the making, interpretation and enforcement of law are merely three aspects of sovereignty which can never be wholly divorced one from the other."[19]

And perhaps conscious realisation by judges that they are taking an important part in the government of the country would tend to bring out more prominently the legislative aspect of their functions.

"The judge, of course, must pursue the ordinary processes of thought, but these will not automatically produce a decision. The law cannot live by logic alone: convenience impairs the authority of the syllogism. A judge has to balance conflicting rights, to weigh the profit of the individual against the interest of the State, to interpret the canons of morality, to apply, in short, his own version of public policy. Wherever the issue is doubtful, it is not only inexcusable but inevitable that he should impart a bias to the argument. The function of precedent is not to fetter his discretion, but to create a tradition whose influence, as a professional man, he will cheerfully acknowledge."[20]

Within that tradition it should still be possible to preserve that flexibility which enabled the judge-made common law of England to serve the changing needs of every generation from the 12th century to the 20th without a single break in the continuity of its development.

Before I close, let me make a disclaimer which should be unnecessary. In this critical discussion of the judicial process need I say that I am concerned entirely with

principles and that I have not in mind any particular Court or the members or any Bench here or abroad.

I have more than once this evening availed myself of the judicial wisdom of Oliver Wendell Holmes. I shall conclude by adopting as my own his description of the judicial function.

"I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. Indeed precisely because I believe that the world would be just as well off if it lived under laws that differ from ours in many ways, and because I believe that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle, I am slow to consent to over-ruling a precedent and think that our important duty is to see that the judicial duel shall be fought out in the accustomed way. But I think it is most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, both of which cannot have their way. The social question is which desire is stronger at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."[23]

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5. "The Nature and Sources of Law," s. 222.
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8. "Law in the Making," pp. 144-46.
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DISCUSSION

The President said the meeting was greatly indebted to Dr. Coppel. It must be remembered, however, that while the law provides rules for the conduct of citizens in their manifold activities, it is only comparatively few of the innumerable transactions that occur in the community that come before the Courts. The law is not an indeterminate morass of uncertainty, and law as seen in the Courts belongs to the pathology rather than the physiology of the law. The citizen is entitled to be tried and to have his affairs determined according to law, and not according to the arbitrary will of an individual. The resistance to the determination of rights according to arbitrary will has been a characteristic feature of the history of English law.

If the law is out of touch with contemporary needs it is for Parliament to alter it. The doctrine of precedent provides a certainty which is essential to the legal system.

Mr. P. D. Phillips said that Dr. Coppel had advanced most heretical notions. The comfortable theory is that Judges merely apply legal propositions, and that the application of these propositions is independent of the personality of the Judge. In Dr. Coppel's view, Judges should approach the matters which come before them in the full consciousness that they are not and can never be mere logical machines.

Law is not merely a series of rules or precepts. More often than not judges are not applying rules, but are applying standards. What we call a legal rule is often only a standard, and there necessarily is a wide field of choice in most cases of the selection of the standard which is to be applied. The American school of realistic jurisprudence insists that judges should show rational grounds for the choice they make.

The real difficulty about the conscious adoption of Dr. Coppel's views lies in the ultimate effect on society. The

justification of sociological jurisprudence rests in its claim that the application of its principles will have a liberalizing effect on the Courts. The danger is, however, that it will have the opposite effect. The Courts may prove conservative and the time lag between the progressive needs of society and the decisions of the Courts may become more marked.

Judges perform a threefold task; they apply precepts, apply standards, and interpret Acts of Parliament. There is little room for idiosyncrasies in applying precepts, but there is more room in applying standards, and still more room in interpreting statutes. The intellectual approach of lawyers to Acts of Parliament is marked by an absence of co-operation or helpfulness, and very often judges limit Acts of Parliament so as to make them inoperative or ineffective.

In moving a vote of thanks to Dr. Coppel, Mr. Justice Lowe said he was happy to have the opportunity to thank Dr. Coppel for his stimulating paper. Judges were once more ready to formulate rules than they are now. With the Revolution of 1688 came the firm establishment of the doctrine of Parliamentary supremacy. It may well be that to follow the suggestions which Dr. Coppel had made would mean a return to the position as it was before 1688.

Dr. John Kennedy seconded the motion, and observed that doctors, after listening to Dr. Coppel, had now the comforting realization that inexactness and uncertainty in prognosis was not confined to the medical profession. The lucidity of Dr. Coppel's presentation of his subject awakened in him personally feelings of the highest admiration.

The motion was carried by acclamation.