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The Place of Certainty in the Law

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THE PLACE OF CERTAINTY IN THE LAW*

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Every person, if he is a normal individual, realizes that a complex social group such as ours could not operate without some form of social control. There must be a political organization of some sort, and a framework of law to make it function—to induce or compel some individuals to conformity with the mores of the group.

Each of us would like to feel that the law is certain—that if his rights, as defined by law, have been infringed, by appeal to lawyers, courts and law enforcement officials, he will secure an adequate remedy for injury sustained or restoration of rights of which he may have been deprived.

The purpose of this paper will be to determine the function and place of certainty in the administration of justice.

Before proceeding further it is obvious that some definition of terminology is essential. For example, these questions come to mind: What do we mean by the term "law"? What is "justice"? What relation does certainty in the law bear to justice as a felt need of mankind?

Suppose we take a simple and rather pragmatic view by saying that law consists of a body of rules laid down by a duly constituted government. Its obvious purpose is social control, although the law is not the only means of social control. We cannot overlook custom and usage, the family, school, church, and public opinion; but we should all agree, I think, that law is a most important method of obtaining order in society. To make the law effective we need to know what the law is; some institution must exist with authority to apply the law to particular cases; and we must have law enforcement officials to carry out the decisions of that institution.

Now our ideal would be a system of law that would result in just decisions. Under that ideal system, legislative bodies would declare the law, courts would interpret and apply it in particular cases, and law officials would enforce the judgments of the courts so that a just result would always be obtained. *But what is Justice?* Is Justice even a necessary element in a system of law? Would any of us deny that the citizen of Soviet Russia lives under a

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system of law? But, from what we know of that system, would we consider that Soviet citizens lived under a system of law that dispensed justice? For example, the story of the creation of collective farms or of the condemnation of political deviates to slave labor camps fills us with a sense of horror and should make us thankful that we live in a different political climate and under a philosophy of law that would not tolerate such means to accomplish an end, whether we considered the end justified or not.

I submit that I cannot answer the question what is justice! I do know that I want to live under a system of law that purports to operate under just rules. We express the idea by saying that we have a government administered under rules of law, not under the rule of men. A partial truth, but a hopeful one. Certainly our courts purport to administer justice. Like you and I the judges have a feeling about justice. I assume those feelings are based on our childhood training, the experience encountered in church, school and social contacts in the neighborhood. Certainly the legislator also attempts to avoid making unjust rules, for his very office depends upon meeting acceptable social standards.

One aspect of justice certainly involves the idea of equal treatment before the law. Another, the formulation of rules of law, or legislative enactments that meet the approval of the community —shall we say the majority—or should we say the vocal portion of the community. It must be admitted that this involves rather vague standards of value, but it does not mean that those standards are not there. They are evident in customs, usages and practices that have found acceptance in the group. It is evident that these standards are constantly changing and growing, that the law may lag behind at some points and in others may surge ahead, and that the struggle for justice in law is an unending struggle and will constantly defy any attempt to nail it down to a preconceived set of precepts.

Hans Kelsen sums up what I would like to say in these words:

> "I started this essay with the question as to what is justice. Now at its end I am quite aware that I have not answered it. My only excuse is that in this respect I am in the best of company. . . . . I do not know, and I cannot say what justice is. . . . I must acquiesce in a relative justice and I can only say what justice is to me. . . . Justice to me is that social order under which the the search for truth can prosper. 'My' justice, then, is the justice of freedom, the justice of peace, the justice of democracy—the justice of tolerance."[1]

1. Kelsen, What is Justice? Collected Essays 24 (Univ. of Cal. Press 1957).

Then we may well ask what relation certainty bears to law and concepts of justice—for surely no discussion of any aspect of law is fruitful unless it aims toward the attainment of justice.

First, and most obvious, the speed with which law is administered has a direct bearing on justice, and on certainty of remedy. Jurists are perfectly willing to admit that justice delayed may operate as a denial of justice. A serious problem in the administration of justice exists here, but it is not directly within the scope of this paper.

Second, can the law be made certain in the sense that it becomes predictable? Here, I think, we have the problem to be probed. Let us pose the matter in this way: A client brings a problem to his lawyer and asks for advice and guidance. Whether he wishes to draft an instrument, form a partnership, or determine his rights against another person who has injured him or his property, his lawyer may need to consult statutes, administrative regulations, and court decisions, and be able to deduce therefrom a plan of action—or non-action—for his client to follow. How certain can the lawyer be that the plan agreed upon and advised by him will adequately protect the rights of his client? Is it essential that he should be absolutely certain, or is relative certainty sufficient? From the viewpoint of both the lawyer and his client the greater the certainty the greater the satisfaction on their side; but we must not forget that what the client wishes to do may approach areas where the law has not been previously declared, or he may seek to do things which, although not morally wrong, have not yet received the stamp of legal approval. He may even seek to do something that the law says cannot be done, at least in the ways familiar to the lawyer.

Any lawyer worthy of his salt delights in meeting a challenge of this type. A vast area of growth in the field of commercial law grew out of precisely such a situation. For hundreds of years the common law courts had held that a chose in action (a contract right) was a strictly personal thing that could not be bought and sold like other property interests.[2] Were that rule to exist today in its full strength the whole field of commercial law that has been the backbone of our economic development could not exist in its present form. But the common law lawyer devised a scheme to avoid the rule—he simply utilized a familiar device and put it to a new use, the familiar power of attorney.[3] By making the

2. 4 Corbin, Contracts § 586 (1951); 2 Williston, Contracts § 405 (Rev. Ed. 1936).
3. 4 Corbin, *op. cit supra* note 2; 2 Williston, *op. cit. supra* note 2, at § 408.

purchaser of the claim his attorney to collect, and agreeing that he could keep what he had collected, he made it possible for the assignee of the claim to sue in the name of the assignor. From this original circumvention of the law developed a recognition of the field of negotiable instruments by the common law courts.[4] Notes, checks and trade acceptances, the modern instruments that relieve men from the necessity of paying their debts with money in hand—and the field of installment sales that enables the poor man to buy things before he has the means to pay—grew rapidly because merchants could sell the contracts to banks and finance houses.

Third, we must distinguish between justice used in the broad sense, and justice as commonly used by the lawyer and judge. In the broad sense we question the policy behind statutes or decisions. We attempt to make an application of ethical standards by applying a value judgment. We say that this law is unjust, it is oppressive; it is morally wrong to enact such legislation. Lawyers are constantly attacking both statutes and cases on such grounds. Not infrequently a court will overrule a precedent of long standing frankly stating that the rule as laid down was unjust in operation.[5]

On the other hand, when a judge or lawyer speaks of something as lawful or unlawful he measures that thing by the law itself. If a statute is attacked as unlawful or invalid it is attacked on constitutional grounds; we say it is beyond the power of the legislature to enact such a law. Or if a case is attacked, we commonly say that it is not in accord with precedent.

While it is in the last sense that justice will be used in this paper, the lawyer and the judge always, either consciously or unconsciously, have on tap this broader concept of justice. Many times one finds that strictly legal results do not accord with either economic needs of the community nor with moral standards commonly accepted. That courts recognize this fact is evidenced by the ever increasing flow of dissents, and by frequent judicial statements that legislative action would be appropriate to correct the evil found by the court. Of course the reference to the defect

4. Britton, Bills and Notes § 2, pp. 5-6 (1943).

5. Frye v. Hubbell, 74 N.H. 358, 68 Atl. 325, 334 (1907) ("The rule that the payment of a less sum can never sustain an agreement to discharge a greater, because without a consideration, however well supported by the authorities, is contrary to the fact at the present time, whatever the fact was when the rule originated, is based upon misconception, is not founded in reason, and cannot be followed without abandoning the greater principle that reason is the life of the law.") *Accord,* Rye v. Phillips, 203 Minn. 567, 282 N.W. 459 (1938).

in the law is sometimes a back-handed one. The judge says, "If a defect exists, it is the business of the legislature to correct it", but the hint is plain.[6]

Here one might pause to ask, "Is this justice to the litigant who lost the case?" For the literal minded judge the answer must be in the affirmative. He considers himself bound by precedent. This was the law and remains so until a legislature sees fit to change it. It also means *certainty* in an important sense. Lawyers can advise clients of this pitfall and seek to avoid the application of the rule. Woe betide those who fail to consult competent counsel since all men are bound to know the law.

Fourth, it seems clear that a distinction between types of law is pertinent to the subject at hand. One popular idea certainly is that law is a command and to be effective must be backed by sanctions. Those who disobey the law are to be punished by the state.

But of equal, if not greater importance in the hierarchy of the law, is that body of the law that defines the rights, powers and privileges of citizens. In effect this branch of the law tells the citizen: "If you wish to do this particular act, you must follow these steps." Thus, businessmen seeking to unite in a common venture, by following prescribed steps, may form a corporation, or a partnership or even enter into a common venture. Agency, contract, commercial law, trusts and the law of wills are all instances of this type of law. It might be said that this type of law is a tool which the lawyer uses to accomplish the ends desired by his client. Thus, through a will he enables a client to control disposition of his property after death. The law of contract permits men to lay down their own rules governing a particular transaction. And so it goes. The thing to note is that in this field of law the elements of command and sanction, in the direct sense in which they exist in the field of criminal law, are lacking.

A further classification of law that is practical for our purpose is the distinction between case law and legislation. One might think because of our constitutional division of power between the executive, legislative and judicial branches of the government that it is the business of the legislature to declare the law and that of the judicial branch to interpret it with enforcement in the hands of the executive branch. In other words, that courts would only act upon the basis of prior declared law. But such is not the

6. State, for Use of Warner Co. v. Massachusetts Bonding & Ins. Co., 40 Del. (1 Terry) 274, 9 A.2d 77, 81 (Sup. Ct. 1939).

case under our system of law, and the reason is in part historical. The original states made no attempt to set up a systematic code similar to the civil code found in non-English speaking countries. Rather because their heritage was English, they dipped into the past and accepted the common law, that vast body of case law which had developed in the motherland. Thus we find the law in the United States made up of two elements, statutory enactments and case law.

From its very nature case law is full of uncertainty. The first and most obvious reason for this uncertainty lies in the fact that a court cannot declare the law except in relation to the facts of the case before it. This means that if certain classes of problems are not brought before the court the law as to those sets of facts remains unknown. When faced with this situation a lawyer can do one of two things—he can either attempt to predict what the court will do when faced with such a state of facts, or seek a legislative declaration of the rule to be followed in the future. It is here that we find a basic difference between legislation and case law. Legislation can be planned in advance, and seek to remedy problems before they become too serious. If the remedy adopted by the legislature proves inadequate, the law can be amended. If the legislation proves unworkable the law can be repealed. A court, on the other hand, acts only after the injury has occurred—retrospectively. The rule of law is laid down as to the facts before the court and goes no further. That rule, theoretically, becomes the law for all time, unless changed by legislative action. Because of the doctrine of precedent, if the same facts come before the court twenty years later, the same law should be applied. There is no direct way to amend or repeal the rule where changed conditions make its application at the later date unjust.

Truly, to the layman this must seem both unscientific and unjust. Even the lawyer and the judge must admit that the system works unfairly at times in so far as the particular litigant is concerned. Certainly it creates situations where the lawyer cannot advise his client on a particular course of procedure with any feeling of certainty that his advice is correct.

But there are other aspects to this problem that must be examined before we pass judgment. The matter might be put in this way: Would it be possible to draft a code of laws that embodied all the law on every subject, leaving to the courts only the function of construing that code and applying it to the facts before it?

I suggest that a negative answer must be given. One reason is the difficulty of the task. No legislative draftsman could envisage all the social needs that would arise even within a single generation. In a field of law which lends itself quite readily to codification, the area of commercial law, the ablest legal brains in the country have labored for ten years to draft a Uniform Commercial Code—and it is still being revised while awaiting adoption in the various states.[7]

Of course, you say, we will constantly be amending our suggested code. We will repeal those portions that have become unsuited to the changing needs of the community and adopt new provisions where necessary. But then we must begin by admitting that this code never was and never will be a perfect code. That means also that when new situations arise which the legislator did not forsee, the appeal to the court for justice must be based on the law as it stood at the time the injury was suffered. Hence it must be true that a court must decide the case without the aid of our all-inclusive code. Whether or not we term this "legislating" is not too important; the important thing is to realize that a court must decide the issue before it whether a statute exists to aid it or not. Relief must be given or denied, and a reason assigned for the action taken.

It appears obvious then that under a code system a body of precedent will develop for two reasons. First, the code itself must be applied by the court to varying fact situations of which the legislator had little understanding when he drafted the code. Secondly, the statute in question may not cover the particular fact situation at all. Exactly that state of affairs exists on the continent today.[8] Of course, the French judge, let us say, is not hampered by the doctrine of *stare decisis*.[9] But surely he must give some reason why he refuses to follow a prior decision exactly pat on the facts. And, what of the decision of a court of superior juris-

7. "That amendments to the revised Uniform Commercial Code would be proposed has been anticipated. No act as comprehensive as the Code could possibly be drawn in such a way as to render any change unnecessary." Uniform Commercial Code, *Foreward* by H. F. Goodrich (Supp. 1958).

8. Letourneur and Drago, *The Rule of Law as Understood in France*, 7 Am. J. Comp. L. 147, 158 (1958). "A judge having cognizance of a dispute for which he finds no applicable law, may be called upon to extend by analogy a text which does not provide in its terms for the case raised by such litigation. But he may even have to formulate himself certain rules of law which he shall apply, the same as he applies the written law.

"In private law . . . judicial tribunals . . . have at times created veritable jurisprudential theories when it appeared to them that social needs made it imperative to supplement the legislative solutions. One may cite, for example, the very remarkable theories of abuse of rights and of unjust enrichment, which are without legal foundation in any article of the Civil Code."

9. See Pound, *The Law of the Land*, 1 Dak. L. Rev. 99, 109 (1927).

diction? Facing a threat of almost certain reversal—human nature being what it is—could we not predict that the average judge would follow precedent?

If codification of the law leads to the development of case law glossing the statute, and a pure system of common law leads to the growth of statutory law—and such would seem to be the case —we may well ask, wherein lies the solution to our question, how to obtain certainty in the law?

From what has been said up to this point it appears evident that we must live with case law despite the element of uncertainty that always exists therein. This is not necessarily an evil. We must have courts to apply law to specific problems. I think we can go further than that and say that without courts law would operate unjustly. No two legal problems are alike in all details, and a few illustrations will demonstrate nicely how the body of case law grows and expands, both in the common law field and in the application of statutes by the courts.

One hundred and sixty-eight years ago, a man named Oxley proposed to sell goods to a Mr. Cooke for a stated price. Mr. Cooke wished time to think the matter over, and asked Mr. Oxley if he would hold the offer open until four p.m. that same day. Mr. Oxley agreed to do so. When Mr. Cooke returned, prior to four p.m., and informed Mr. Oxley that he would accept, the latter informed him that it was too late since he had already sold the goods to another at an advance in price. Mr. Cooke consulted a lawyer who brought suit for damages contending that a contract came into existence the moment Mr. Cooke spoke words of acceptance, it being prior to any communicated revocation by Mr. Oxley.[10] That, of course, raised two issues: Does an offer have life? Can an offer be revoked by a mere change of the offeror's mind?

At the time of the case the law of contract was in a state of flux. From our present vantage point we can see that the court might take either of two views. First, it might say that an offer is an operative fact—it creates a power in the offeree to whom it is directed to convert it into a contract by speaking the words "I accept" at any time prior to communication of a revocation by the offeror. Second, it might say that an oral offer has no life—a contract can never result unless there is an immediate exchange of offer and acceptance; hence, unless accepted at once while the parties are face to face, the offer dies. Thus, when Cooke returned prior to

10. Cooke v. Oxley, 3 T. R. 653, 100 Eng. Rep. 785 (K. B. 1790).

four p.m. Oxley had a perfect right to treat the attempted acceptance as a new offer which he, Oxley, could accept or reject as he saw fit.

To predict a decision in his favor, the lawyer for the plaintiff in *Cooke v. Oxley* had little to go on. Contracts prior to this date were usually in the form of sealed instruments and the law had only recently begun to recognize that a parol agreement could result in binding obligation, but the plaintiff's lawyer was undoubtedly convinced of the justice of his client's claim.

Why then did the court decide in favor of the defendant? Surely because precedent to support the other view was lacking. Judges are conservative people. Here was a new and untried theory; the danger of fraud might be great. The judge must have thought to himself—words are transitory things; they evidence a state of mind at the time they are spoken—since the parties were in the presence of each other why did not the plaintiff give his acceptance at that moment? After all, the plaintiff could have converted this into a binding option by making the offer itself into a contract. He could have said to the defendant, "I offer you a shilling to keep this offer open until four p.m." Had the defendant accepted the tendered money the offer would have become irrevocable. Or the plaintiff could have requested a written statement under seal of defendant's promise to keep the offer open. Since case law at this time had gone no further than to hold that an immediate exchange of offer and acceptance creates a contract the judge must have felt that he was rendering a just decision by refusing a recovery under the stated facts.

But law never stands still. Just 27 years later a different set of facts came before the court.[11] In this instance the offer was contained in a letter, to be answered in course of post. To further complicate the matter, the sender had misdirected the letter so that it was delayed in reaching the offeree. The offeree promptly posted an acceptance in course of post (from his point of view), assuming him to be unaware of the delay or that since the delay was due to to the agency selected by the offeror it was legally in course of post, and proceeded to resell the goods to arrive. Not having received an answer in course of post (from the offeror's point of view) the offeror resold the goods to another and subsequently refused to fill the order of the offeree, contending that the reply was not received in course of post and hence no contract came into exis-

11. Adams v. Lindsell, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

tence. The offeree, plaintiff, brought suit to recover the damage sustained because he had to go on the market and buy the goods to fill his resale contract at a higher price.

Had the court applied the rule in *Cooke v. Oxley,* only one result would be possible under these facts—no contract! Since the rule in that case required a simultaneous exchange of offer and acceptance, the offer must have died during the time lapse bound to occur during the process of communication through the mails.

But the needs of commerce certainly required development of a rule that would permit making a contract by mail. Of course, as to future cases, Parliament could be asked to enact a statute governing the question. We must remember, however, that the court must decide this particular case either for the plaintiff or the defendant, and it must seek to do justice. In this instance the judge was fully aware of the fact that the mail is commonly used by business men to reach an agreement on important business matters. In meeting the argument of defendant's counsel, that until the plaintiff's letter of acceptance reached the defendant there was no contract and defendant was within his legal rights in selling the goods to another, the court said, "if that were so no contract could ever be completed by post."

In short, the court held that there was a good contract, completed upon the posting of the answer by the plaintiff. To meet the objection that an offer had no life the court resorted to a fiction. The opinion states that the offer was being repeated every instant of time the letter was traveling through the mail. If that were expressed in modern terms we would say that the delivery of the offer to the plaintiff created a power in the offeree that survived for the agreed length of time. To avoid the rule in *Cooke v. Oxley,* that an offer would be revoked by a mere change of mind by the offeror, the court said that the post office became the agent of the defendant to accept the offer; thus, the contract was complete when the acceptance was posted, although the defendant would not become aware of this fact until he actually received the letter. To complete the picture, 61 years later the English court held that although the letter of acceptance was lost in the mails a contract would result and liability be imposed on the offeror.[12] The court had carried the rule to its logical conclusion; and it would appear that though the letter miscarried, or the offeree withdrew it from the mail, a contract would come into existence upon posting.

12. Henthorn v. Frazer, 2 Ch. 27 (Ct. App. 1892).

These early rules on offer and acceptance survive today. That they are not immune from attack is evidenced by a 1955 case in the United States Court of Claims.[13] That court held that when the Post Office Department, by a change of regulation adopted in 1933, made it possible to withdraw a letter from the mails the reason for the former rule that a contract became binding upon posting of the letter of acceptance no longer prevailed and an acceptance would not result until the letter of acceptance was received by the offeror.

This result is opposed by the great weight of modern authority and seems clearly wrong. The basic assumption upon which the decision is based — that the important thing is placing the letter beyond the control of the offeree—is false. But this case does illustrate how judges decide cases. A court seldom comes forward and says that the prior decisions were wrong from the beginning. Thus, in the case which first considered offers by mail,[14] the court did not say that *Cooke v. Oxley* was wrong. Rather, the judge recognized that the earlier case involved different facts. It avoided the rule of that case by resorting to a fiction. Later cases simply disregarded the decision, and as time went by it became of interest only to the legal historian.

Many years passed before a new set of facts brought courts to the realization that posting a letter created a contract—not because the offer was being repeated over and over as it passed through the mails, and not because the post office was the agent of the offeror to receive the acceptance for him—but, because an offer is an overt act that creates a power in the offeree to create a contract. It is the "power" that has life and survives, not the spoken words; and it survives because the law says it will survive. The case that brought this most clearly to the attention of lawyers and judges involved a problem of mistake. Let us assume that A submits a wire to a telegraph company for transmission to an offeree, prepaying the charges. The company makes an error in transmitting the message as to the price to be charged for the goods. It is a mistake that would not be obvious to the receiver. Will a contract result when an answering wire contains an unqualified acceptance?

Two views have been advanced to answer this question. Under the view accepted by English courts no contract exists because the court now recognizes that the medium of communication, in

13. Rhode Island Tool Co. v. United States, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955).
14. Adams v. Lindsell, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

this instance the telegraph company, is really not the agent of the sender at all.[15] If anything, the company is an independent contractor over which the sender has no control. It is unfair to charge the sender with the errors made by such a contractor. Hence the message as transmitted was an unauthorized version of the offer which cannot be converted into a contract by an attempted acceptance.

On the other hand, American courts purport to find a contract under the assumed state of facts on the theory that the offeror selected the medium of exchange and hence was bound by its mistakes.[16] This view results from a balancing of conflicting interests. In effect the judge asks himself whose act made this loss possible and throws the blame on the man who created the power of acceptance by making use of the particular medium of communication. The judges feel that an objective standard applies and compels this result. American courts do not differ from English courts in rejecting the theory of agency, etc.

Conceivably, having rejected the agency fiction as the basis for the rule as to offer and acceptance by mail, the courts might have scrapped the rule itself; but rejection of the fiction did not lead to rejection of the rule. Business men had relied upon it for many years, and courts had found it to be a workable rule. As between the offeror and the offeree, judges still feel it is just that the man who put the power in motion—who created it by making the offer—should be the one to bear the uncertainty of not knowing whether or not the offer was accepted until the letter of acceptance reaches him. To say that no contract results until the letter is received simply shifts that uncertainty to the offeree.

Either rule would work. In fact, on the continent the letter of acceptance must be received by the offeror before a contract is created.[17] For them the rule operates justly because they have a compensating rule which we do not have—the offer is irrevocable for the length of time required to transmit an answer, or for an agreed length of time. Since that compensating rule is not the law of England or the United States it is quite logical that we retain our old rule.

Just as common law precedent is built up by the gradual process of building case upon case, reasoning from case to case,

15. Henkel v. Pape, L.R. 6 Ex. 7 (1870).
16. Ayer v. Western Union Tel. Co., 79 Me. 493, 10 Atl. 495 (1887).
17. 1 Corbin, *op. cit. supra* note 2, at § 38, p. 120.

so also has a vast body of case law accumulated in the process of applying statutes to specific fact situations. In some respects this body of case law is colored by a definite bias on the part of lawyers and judges in favor of the common law; and this, of course, is an important factor in relation to certainty in the law. This bias is accentuated under the American constitutional system because our courts, unique in that respect, reserve to themselves the prerogative of determining the constitutionality of legislative enactments. It is accentuated further because our judges and lawyers are trained primarily by the case method and tend to view statutes as a necessary evil—to be tolerated, but at the same time to be kept within defined limits.

A brief look into the history of the law will help to orient the reader and introduce the subject of the legislature as a paramount and distinct party in the law making process.

Until late in the middle ages, Plucknett[18] informs us, a feeling existed that interpretation of statutes properly belonged to the power that ordained the law. In fact such a view was espoused in 1259 when a counsel of bishops, earls and barons placed an interpretation upon the great charter in the following language: "In view of the fact that the interpretation of laws and customs belongs to us and our nobles. . . we of the counsel forbid you . . . to put any interpretation on them contrary to the law and customs current in our realm."[19]

Even the courts accepted this theory, but for a special reason. Judges at that time were looked upon as a branch of the executive. Not infrequently the monarch would issue specific instructions to the judges. It was natural then when judges were in doubt to go directly to the King or his council and ask for an interpretation of the law. In addition, in some instances, the judges themselves sat on the council and even proposed legislation. A famous jurist once rebuffed counsel by stating: "Do not gloss the statute for we know better than you; we made it."[20]

Had this view prevailed in England it would have been necessary to create a special branch of the Parliament to interpret statutes. But the evolution of the law eventually led to separation of the judiciary from both the executive and legislative branches. Parliament came to be supreme in the legislative field, eventually

18. Plucknett, A History of the Common Law 297 (1929).
19. *Id.* at 298.
20. *Id.* at 299.

winning the right to impose its will on the executive; the courts stood on the outside, and thus were able to develop independently.

It is in this gradual evolution that judges and lawyers picked up an attitude toward legislation as something foreign to the body of the common law. As the courts were gradually forced out of their position as a branch of the executive department and a partner in the field of legislation, they lost the power to say—this is the law because we made it.

But in the beginning of this period of law making the new statutes did not have the sanctity that surrounded the statutes of the past. For one reason, new statutes were not always readily available for proof in court. They could be found only with great difficulty, and when found the judge could not always be sure that the proof submitted established the existence of a law because the procedures surrounding the enactment of statutes were highly irregular. Thus in the beginning, Parliament would petition the King for legislation curing some grievance—in another instance the King would act through his council—and in still other cases the statute appears to be by royal prerogative without any action by council. In addition, there were even instances in which text writers were cited loosely as statutes.[21]

Another serious difficulty arose from the fact that after Parliament began to function as a legislative body the enactments of each session would appear as one huge document, probably divided into chapters, but without title headings in the modern sense, and unindexed. Finally, no uniform practice existed as to citation of statutes, and courts might require that a lawyer seeking to prove a statute secure a certified copy under seal—possibly a difficult thing to do and involving considerable expense.

It is not surprising then that judges developed little sense of respect for these new enactments. Around the older statutes was the aurora of sanctity—they had received a judicial gloss—and in many instances, a meaning far different from that which the literal language of the act would justify. In the case of new statutes, courts simply bent them as justice appeared to require with very little regard to the language of the act itself.

But as the strength of Parliament grew and its practices became more uniform, courts were forced to recognize that a statute was the law of the land. They could no longer disregard the language of the act with impunity, and to achieve the ends of justice it was

21. *Id.* at 295.

necessary to construe the language used to ascertain the ends sought to be achieved by the legislation. Over the centuries a complicated body of rules developed to guide courts in this process of construction. It would profit us little to even attempt a brief outline of those rules. After all they constitute a group of tools available to counsel and the court in determining what construction to place on doubtful language. The court can choose among these tools the one that will give the result it desires—it is not bound to use one rather than another, and hence when applied in a seemingly mechanical way, their use may conceal the fact that the decision may in fact result from judicial bias rather than an honest attempt to carry out the policy indicated by the statute.

For the purpose of this paper we will take a broader view, one advanced by a wise court some 300 years ago. Because the principles laid down in *Heydon's Case*[22] in 1584 are brief I will set them out in full:

> "And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:—
>
> 1st. What was the common law before the making of the Act.
>
> 2d. What was the mischief and defect for which the common law did not provide.
>
> 3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> and, 4th. The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico.*"

While this rule of construction has merit in that it avoids a mechanical process of construction, it has been criticized on an important ground. Can a legislative body be said to have a discernible intent — one that exists outside the specific language of the statute? We must ask the question because lawyers are constantly assuring judges that such is the case. And some judges, where the facts at issue are not clearly within the language of the statute, bring them within it on exactly this theory. Are these judges in fact applying the test of what a reasonably prudent legislator would have done if the facts of this case had been brought to his attention? It is certainly true that the legislature as a body politic cannot be said to have an intent after it has passed a statute. Its

22. Heydon's Case, 3 Co. 7a, 76 Eng. Rep. 637 (Ex. 1584).

function is then performed—the act becomes a part of the whole body of existing law and is intended to govern future conduct although the legislators themselves never thought of its application under those facts. The legislators go home and forget in a short time that the measure ever came before them. By the time the act comes before a court for construction the membership of the legislative body may have changed greatly. To say that such a changing body had a specific intent beyond the language of the statute was impossible at common law because early legislative bodies kept no records. In a modern legislature, however, there are available to the lawyer and the judge the journals, amendments, committee reports, and in some instances records of debates that may serve to clear up ambiguities in a statute. Most courts admit proof and argument on the basis of these materials and they have been extensively utilized by the United States Supreme Court and the lower Federal courts, perhaps to a lesser degree by most state courts. But even where such materials are lacking, diligent counsel may still find legislative intent in a course of legislative enactments over the years, indicating a trend toward the position he is asserting before the court.

And now we return to our central problem: how to achieve a degree of certainty in predicting what courts will do in applying statutes to specific fact problems. Just what are the problems we face here?

First, let us consider the problem of legislation as such. The lawyer, so far as each new crop of statutes is concerned, must read, construe and apply the particular statute before him without the aid of judicial construction. Even if we could assume that each legislative enactment were drafted by an expert, and that is certainly not the case, it is submitted that counsel would frequently run into cases where grave doubts as to proper construction would arise.

To illustrate, in 1933 the legislature of North Dakota enacted legislation outlawing deficiency judgments.[23] At that time we were in the midst of a grave depression and the statute was unquestionably designed to relieve farmers of their burden of debt after they had lost their means of livelihood by foreclosure. After the enactment of this statute Mr. Burrows, owner of farm land, contracted to sell the property to Mr. Paulson. Because the parties were in doubt as to the meaning of the new statutes regulating foreclosure,

23. N.D. Sess. Laws 1933, c. 155.

the lawyer who drafted the sale agreement inserted a special clause to the effect that although a note and mortgage were to be given to secure Mr. Burrows, Mr. Paulson agreed that Mr. Burrows should not be limited to the proceeds obtainable on a foreclosure sale, but should have a right to enforce collection of the debt by any other remedy available at law. The agreement further expressed the fact that the parties were uncertain as to the meaning of the law, and agreed that if it in fact did prohibit an independent suit at law for a deficiency the contract would be subject to rescission by Mr. Burows, who agreed to refund all money received by him in exchange for a reconveyance from Mr. Paulson.

Mr. Burows and his counsel thereafter concluded that the statute did in fact bar any remedy other than foreclosure, and gave notice of rescission. Paulson, refusing to reconvey, Burrows brought suit in equity to obtain cancellation and a reconveyance, thus posing to the court a problem of statutory construction.[24]

This case illustrates the difficulty experienced by counsel very nicely. In the beginning he thought the statute would not destroy his client's right to collect the claim in full. But within a matter of weeks his point of view changed completely. There was no case law in North Dakota to guide him because this pattern of things was brand new in our brief history as a state. Never before had the legislature gone to the extent of denying to a creditor the right to collect his debt in full. The idea advanced in the Frazier-Lemke Act,[25] that the mortgagee should be satisfied with the land—had never been the view point in our legal system. Whether or not the legislature had in mind this specific idea could be gathered only from the language of the Act itself—and that language is apparently clear —the Act did not say that a separate action at law would not lie, but simply that the court could not enter a deficiency judgment in a foreclosure action as such.

The same dilemma faced the court that considered the statute. For a moment we will consider the various approaches it might have taken to this problem, for it in fact could apply any one of a number of broad general rules in reaching a decision.

First in point of time is the rule permitting construction according to the equity of the statute.[26] By this, the lawyer in the early

24. Burrows v. Paulson, 64 N.D. 557, 254 N.W. 471 (1934).
25. 49 Stat. 943-945, 11 U.S.C. § 203 (1935).
26. Eyston v. Studd, 2 Plow. 459, 465, 75 Eng. Rep. 688, 695-696 (1574). In the reporter's note the following statement is made: " . . . It is not the words of the law, but the internal sense of it which makes the law, and our law, (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law."

history of the common law meant that adjustment which is necessary when applying a general rule to a specific case. The rule in its present form does not permit a court to disregard the language of the statute, rather it calls for an exercise of judicial power to include within the language of the act the same type of fact situation it was intended to govern although not within the literal meaning of the words used.

The second rule to develop is that of literal interpretation.[27] This rule sprang into existence as a natural consequence of the development of a legislative body that began to speak with authority. It was natural for the courts when faced with this phenomenon —unfriendly as they were to legislation in general—to adopt the view that the language used spoke for the legislature and nothing could be taken by intendment. If a court elected to take an extreme point of view this might be viewed as purely a mechanical process —lacking specific language to cover the facts of the case, no matter how just it might be to apply the statute, the court considers that it has no discretion.

The third, or mischief rule, developed in *Heydon's Case* in 1584 introduced this topic. The final approach is represented by what has been termed the Golden Rule. It was thus stated by Justice Parks in *Perry v. Skinner*:[28]

> "The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so as to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done."

If we contrast the Golden Rule with the mischief rule, it is evident that the former combines with the literal approach, a limited judicial discretion to avoid a misapplication of the statute, while the latter looks to the legislative purpose, as it were, as a part of the whole scheme of the law. Dean Pound suggests that courts may approach this problem in four ways:[29]

> "(1) They might receive legislative innovations fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior

27. See Plucknett, *op. cit. supra* note 18, at 299. "Finally, as we approach the middle of the fourteeenth century, the judges have separated from the Council to such an extent that they treat legislation as the product of an alien body, of which they know nothing save from the words of the statute itself, and from that wording alone can they infer its intention—and with the rise of this idea we reach the modern point of view."

28. Perry v. Skinner, 2 M. & W. 471, 476, 150 Eng. Rep. 843 (1837).

29. 21 Harv. L. Rev. 383, 385-6 (1908).

> authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them.
>
> (2) They might receive it fully into the body of law to be reasoned from by analogy the same as any other rule of law . . . as of equal or co-ordinate authority in this respect with judge-made rules . . . .
>
> (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.
>
> (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly."

Dean Pound states the fourth hypothesis represents the orthodox common law view; while (2) and (3) represent the position toward which we are tending.

And now we can return to our suit by *Burrows v. Paulson.* Conceivably, had the court taken the broad view which the mischief rule purports to lay down, the court might have found that the statute did indeed indicate a purpose to foreclose any form of action to recover a deficiency in a mortgage debt claim. After all this particular session of the legislature was much troubled by the problem and two other enactments bore upon it. In one the legislature ruled out further foreclosures by advertisements, and in the other it extended the time for redemption from mortgage sales to two years instead of one. Taken together these enactments indicate a general legislative policy to give relief from mortgage foreclosures by relieving the farmer from his burden of debt and giving him additional time to make up for the default by redeeming after foreclosure. We must note that his right to redeem cost him only the amount bid at the foreclosure sale plus interest and costs. Thus the whole scheme of legislation seems to indicate a legislative intent that the mortgagee take the land in full satisfaction for his claim.

But if the court took this view it would then face the charge of judicial legislation, and it takes a courageous judge to meet that challenge. In holding Mr. Paulson was within his legal rights in refusing to reconvey the land it would seem that the court was applying the Golden Rule. The court concluded that the statute was unambiguous—it only purports to bar entry of a deficiency judgment in the foreclosure action and leaves undisturbed the other older statutes governing suits at law on the debt. It must

follow then that if foreclosure results in a deficiency a separate action at law will lie to enforce payment.

And now the time has come to gather together our loose ends and try to reach a conclusion on our topic—the place of certainty in the law. Perhaps that can best be accomplished by stating an arbitrary proposition! Law, whether judge-made or statutory, operates most justly at some point short of absolute certainty. The life of the law lies in its ability to solve specific problems—in its application to the facts of life. Without some degree of flexibility law could not grow, as it must grow, to meet the needs of people. Law must never become an end in and of itself, but must always remain a tool to be used for the satisfaction of human needs. In one case it means restraint; in another it means accomplishment. The balancing of interests between men, between groups, is the unending struggle with which the law constantly comes to grip.

On the other hand, neither legislator nor judge can safely be trusted with arbitrary power. In fact the layman might suspect from the general remarks in this paper that the judge has arbitrary power. That is not so. A judge is a person like you and me and, consciously or not, strains to meet the approval of those in his own profession. His written opinion is his justification in the eyes of his fellow lawyers. Many jurists deliberately try to overcome personal bias and seek that which is just and right according to the dictates of conscience. The vision of the jurist may be a great vision, or it may fall far short of statesmanship; but the judge's power is never arbitrary—nor can it ever be so. His oath of office, his years of training, and all the things that go to make up his personality shackle him more effectively than could any statute attempting to spell out the limits of his power.

Nor is the position of the legislator vastly different, for the similarities outnumber the differences between his functions as opposed to those of the lawyer and judge. Just as a judge follows precedent, so too does the legislator. He fears the consequences of ill-considered legislative action even more than the judge who dares to overrule precedent. In the United States he must be ever conscious of constitutional limitations; and, like the judge, but perhaps to a greater degree, he is influenced by public opinion. Arbitrary action may mean political suicide.

Now we ask—how do we obtain that degree of certainty that enables law to function at its highest efficiency? There are many things we can and are doing! Our first problem, of course, is to

secure properly trained men to fulfill the function of judge and legislator. Education is the first problem of democracy. The second is to seek constantly for the improvement of the adminstration of justice. This can be accompanied with better methods of selection of judges, better internal organization in the court system itself. The third is to seek improvement in court procedure. The problem of making the courts as available to the poor man as to the rich, of making justice turn not upon the clever manipulation of procedural rules but upon the merits of a case, are posed again and again in varied forms. For example, on April 25, 1957, North Dakota adopted new rules of civil procedure,[30] the first complete revision of our court rules since 1862, with a view to the improvement and simplification of procedure in a court of law. Fourth, justice is advanced if uniformity of law between states can be secured. In this area the Uniform State Law Comission and the American Law Institute have labored and will continue to labor for years to come. Finally, the law must be made accessible through adequate reporting of decisions and better indexing methods. Despite tremendous growth in the body of the law, our system of reporting and indexing has done a marvelous job, but here again we cannot let down our guard.

In the field of legislation a similar struggle for improvement goes on. Because legislators are selected from the citizenry at large, and qualifications do not include training, the same control over selection of properly trained men and women cannot be exercised in this field. Perhaps that is proper in a democracy; or perhaps something remains to be done to awaken a political conscience in this respect. Certainly our schools and colleges are aware of this problem and seek to to train for leadership.

Passing to the law-making process we find the modern legislative body making use of many aids. Bill drafting services and interim committees to carry on research while the legislature is not in session indicate that the modern legislator is aware of the complexity of social problems in a highly competitive society. Here too uniformity of legislation is receiving greater attention as is evidenced by the wide adoption of uniform acts promulgated by the Uniform State Law Commissioners. And the modern legislator is aware that law must be knowable. Thus a current project in North Dakota is the republication of our statutes with proper annotation to the existing case law.

30. N.D. Rules of Civ. Proc., N.D. Rev. Code (Supp. 1957).

If we let our guard down for a single moment on any one of these things justice suffers—democracy is endangered. The struggle for justice—for certainty in the law—is an unending struggle; it is democracy in action!