THE INTERRELATION BETWEEN COMMON LAW AND STATUTE

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Introduction

For the Commonwealth lawyer the common law is the very quintessence of the legal system: it is a body of law built up by the judges from first principles into a set of remarkably detailed rules, certain enough to provide guidance, yet flexible enough to do justice in new cases which arise. It is perhaps not surprising that for centuries statute law, the creation of Parliament, received a much cooler reception from lawyers and judges. It was treated as a different kind of law, and the judicial tradition was to construe statutes strictly according to their letter, and at times even to give them a narrow interpretation so as to cause as little disruption as possible to the common law.[1] To use the words of Justice Harlan Stone, statute was for a long time treated as "an alien intruder in the house of the common law".[2] A result has been that our legal system has not really been a "seamless web". Statute law and common law have, as it were, been kept in separate compartments, and treated as different sorts of law, statute law as depending on its words, the common law as depending rather on ideas and analogy.

Yet with the passing of the years the volume[3] and importance of statute law have increased enormously. It is now the main instrument of social organisation, and huge numbers of statutes have laid the legal foundation for the modern welfare state. To this extent statute has shaped the very way we live. More importantly, statute law has proliferated at the expense of the common law. Statute is the modern instrument of change, and when the common law has petrified in a particular area, or has become unsuited to modern conditions, statute has made the necessary changes. There are very few branches of the common law which have not been mended by substantial statutory patches: contract,[4] negligence,[5] equity and trusts,[6] defamation[7] — all have been subject to statutory inroads. Some statutes, indeed, have

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1 See Pound, "Common Law and Legislation" (1907) 21 Harv. L.R. 383; Landis, "Statutes and the Sources of Law" *Harvard Legal Essays* (1934) 213 (reprinted in (1965) 2 Harvard Jo. on Legislation 7); Stone, "The Common Law in the United States" (1936) 50 Harv. L.R. 4; Amos, "The Interpretation of Statutes" (1934) 5 C.L.J. 163.

2 Supra, n. 1, 15.

3 In New Zealand more than 100 statutes are passed annually, although a large proportion of them are in amendment of earlier statutes.

4 E.g. Frustrated Contracts Act 1944; Minors Contracts Act 1969; Illegal Contracts Act 1970.

5 E.g. Contributory Negligence Act 1947.

6 E.g. Trustee Act 1956; Charitable Trusts Act 1957.

7 Defamation Act 1954.

swept away whole branches of the common law.[8] Current volumes of law reports reveal that the great majority of reported cases (something over three quarters) involve questions of the application and interpretation of statutes.

Such has been the weight of statute law in recent times that it will be of interest to renew the enquiry into the judicial attitudes to statute law, and in particular into the modern relationship between statute and common law.

I. The Influence of Statute on Common Law

First, what effect has statute had on common law, apart of course from the fact that it has reduced its bulk?

1. *The Speed of Change*

It is now openly admitted that judges are able to make changes in the common law. Not only may a higher court overrule earlier lines of authority, but there is ample scope for the extension or adaptation of the law within the flexible framework of general principle. Yet the judges do not exercise their undoubted power too readily, and there is certainly evidence to suggest that they prefer to leave signficant changes to Parliament if there is a reasonable prospect of legislative action. There is authority for the view that the boldness of judicial innovation is inversely proportional to the likelihood of activity by the legislature. Thus, in the *Suisse Atlantique* case, Lord Reid said:[9]

> Courts have often introduced new rules when, in their view, they were required by public policy. In former times when Parliament seldom amended the common law, that could hardly have been avoided. And there are recent examples although, for reasons which I gave in *Shaw* v. *Director of Public Prosecutions*, I think that this power ought now to be used sparingly . . . . [The point in this cases raises] a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament. If your Lordships reject this new rule there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation.

And in *Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.* Lord Diplock, delivering the opinion of the Judicial Committee, said:[10]

> If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus . . . as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers. Even among those nations whose legal system derives from the common law of England, this consensus may vary from country to country and from time to time. It may be influenced by the federal or unitary nature of the constitution, and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the law-making function of a non-elected judiciary.

8 Most notably the Accident Compensation Act 1972, which abolishes the common law action for damages for personal injury by accident.

9 *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 406.

10 [1974] A.C. 810, 820-821.

In the last decade and a half, when there has been unprecedented legislative activity in Parliament, there have been many cases where the courts have preferred not to indulge in lawmaking activity themselves, but have indicated rather that the question was one for Parliament. This has been particularly so in areas involving social issues rather than pure "lawyer's law", for Parliament can indulge in a form of consultation of affected interests in a way which is quite beyond the scope of a court.[11]

It is important not to overemphasise this trend, if trend it may be called, for of course there have been recent examples of bold judicial innovation[12] and, indeed, there has been a tendency in recent years to relax the bonds of judicial precedent—although these relaxations have probably not produced the imaginative decisions which some hoped for.[13] But statements like the foregoing by Lords Reid and Diplock demonstrate that there is a judicial readiness nowadays to see common law and statute as simply component parts of a single system and to assess the ways in which each can best contribute to that system.[14]

2. *Transference of Ideas*

The traditional view is that whereas the common law is a system where ideas and analogies are all-important, statute law is based entirely on words and their meaning. The effect of a statutory provision depends on its words, and the sole task of a court is to say what those words mean; it is quite unable to extend a principle found in a statute by analogy to a like situation, or to treat statutory principles as capable of being absorbed into the whole legal system and of influencing the common law.[15] To take an example, statutes like the Frustrated Contracts Act 1944 and the Contributory Negligence Act 1947 introduced into our law the beneficial conception of sharing of loss, a conception which was foreign to the common law. But those two statutes can be applied only to the situations expressly covered by their words. It would be impossible for a court to "borrow" this general notion of loss spreading and apply it to questions not covered by the words of the statutes in question; for example, which of two innocent persons is to suffer for the fraud of a third.[16] Indeed, when in *Ingram* v. *Little*[17] Devlin L.J. advocated a form of loss spreading in such a case he did not suggest that this could be accomplished without a specific legislative enactment.

From time to time complaints have been raised about this attitude to statute law. They have come most notably from the Americans

11 E.g. *Morgans* v. *Launchbury* [1973] A.C. 127; *Pettit* v. *Pettit* [1970] A.C. 777, esp. per Lord Reid at 795; *Ross* v. *McCarthy* [1970] N.Z.L.R. 449, esp. per Turner J. at 456.

12 E.g. *British Railways Board* v. *Herrington* [1972] A.C. 877; *Bognuda* v. *Upton & Shearer Ltd.* [1972] N.Z.L.R. 741.

13 The House of Lords has not made liberal use of its power, assumed in 1966, to depart from its own decisions.

14 It is probably also true that in earlier times judges were not quite so ready expressly to invite legislative action to correct deficiencies which they felt unable to correct themselves.

15 See the articles cited in n. 1 supra.

16 E.g. the "mistake of party" cases in the common law of contract.

17 [1961] 1 Q.B. 31, 73-74.

Pound, Landis and Harlan Stone,[18] all of whom wished to see the principles and ideas created by statute received fully into the legal system to be reasoned from by analogy like any other rule of law, and thus to enrich the system as a whole. Although these men wrote some years ago, an increasing familiarity with statute law in the meantime has not significantly altered the judicial approach:[19] the idea that the judge's function in relation to a statute does not extend beyond interpretation has been too firmly engrained by centuries of practice. It is, moreover, reinforced by the doctrine of judicial precedent: any notion that a statutory principle could be applied in an area of common law would probably involve over-turning established common law authorities in that area.

However even before Pound, Landis and Stone wrote, there were a few isolated instances of courts doing more than simply applying a statute according to its words. Since that time the list of instances has grown. It would be wrong to say that there has been any fundamental change of approach, but there now do exist a fair number of cases where statutes may be said to have had an indirect influence on the common law. The following are some examples:

(i) Nowadays the courts in negligence cases admit much more freely that the question of whether a duty of care exists depends not just on foreseeability but also on policy factors.[20] In deciding whether policy demands the existence of a duty, they have occasionally had regard to the fact that the legislature has laid down statutory duties in equivalent although not identical situations. Thus, in one Canadian case[21] the question was whether the master of a pleasure boat owed a duty to rescue a guest who had fallen overboard. The judge held that he did. In so doing he took cognisance of the Canada Shipping Act 1952 which imposed an obligation on the master of a ship to render assistance to any stranger found at sea in danger of being lost. Although the statute was not directly applicable, the judge took it as evidence of the "conscience of the community":

> The common law can be no less solicitous for the safety of an invited guest. . . . The common law must keep pace with the demands and expectations of a civilised community.[22]

(ii) Contracts may be held illegal and void if they are contrary to public policy. It has always been something of a mystery how the courts gauge public policy for this purpose: they are not to exercise their own predilections, but are only to act on definite principles which

18 See the articles cited in n. 1 supra.

19 See Diamond "Codification of the Law of Contract" (1968) 31 M.L.R. 361, 381; Lloyd, "Public Policy" (1955) 8 C.L.P. 42, 57.

20 E.g. *McCarthy* v. *Wellington City* [1966] N.Z.L.R. 481, 519-520 per McCarthy J.

21 *Matthews* v. *MacLaren* (1969) 4 D.L.R. (3d) 557.

22 Ibid., 563-564 per Lacourciere J. See the other cases cited by Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 528, 536-538. See also *Donaldson* v. *McNiven* [1952] 1 All E.R. 1213 (Firearms Act 1937 looked at to determine whether a father negligent in allowing his son to use an air rifle); and *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27, 38 per Lord Denning M.R. (legislative policy in respect of electricity boards causing economic loss applied to contractor causing similar loss).

the community as a whole has already adopted.[23] There have been tentative suggestions that the voice of the legislature in matters of like kind may be one way in which community standards may be judged.[24] The cases where this has actually happened are few enough, but some do exist. For instance in *Nagle* v. *Feilden*,[25] where the question was whether the practice of refusing to grant women trainers' licences was contrary to public policy, Danckwerts L.J. was prepared to give as one of his reasons for holding that it might be the fact that "the Sex Discrimination (Removal) Act, whether it applies to the present case or not, shows the position of present day thought".[26]

(iii) Sometimes the reversal by statute of a rule of common law may have an effect beyond its immediate purport. As one example, the maxim *cessante ratione legis, cessat ipsa lex* may mean that the statutory destruction of a common law rule will cause other common law rules which were based on that rule to fall with it. In *Rees* v. *Hughes*,[27] for instance, it was held that the common law rule rendering a husband liable to pay for the funeral of his deceased wife no longer existed; the effect of the Married Women's Property Act 1882 and related legislation was that there was now no difference in property matters between a married woman and a feme sole, so that the foundation for the common law rule had disappeared.[28] Likewise the reversal of a judicial decision by legislation may deprive of force the legal reasoning on which it was based.[29] The case of *Broom* v. *Morgan*[30] is of interest also, for it was there held that it was wrong for counsel to advance arguments derived from the doctrine of common employment after the statutory abolition of that doctrine.

(iv) While the courts of a Dominion will normally follow the decisions of the higher English courts, especially the House of Lords, on a principle of common law, it may be a ground for not so following them that the statute law of the Dominion is sufficiently unique to render the English common law on a particular point inapplicable there. Thus, it has been held that since, under the Land Transfer Act 1952, it is impossible to acquire an easement by prescription, there is no room in New Zealand for the common law doctrine that it is no legal wrong to cause the subsidence of a neighbouring building until an easement of support has been obtained.[31] And recent authority[32]

23 *Wilkinson* v. *Osborne* (1915) 21 C.L.R. 89, 97 per Isaacs J. Cf. *Blackler* v. *New Zealand Rugby Football League* [1968] N.Z.L.R. 547, 572 per McCarthy J.

24 In *Wilkinson* v. *Osborne* ibid., 98 Isaacs J. said that principles of public policy may "arise by statute *directly or indirectly*, for whatever a statute enacts is beyond all question to that extent, the policy of the country".

25 [1966] 2 Q.B. 633, 651.

26 See also *Re Drummond Wren* [1945] O.R. 778, 781-782 per Mackey J., discussed in a note by Willis (1950) 28 C.B.R. 1140.

27 [1946] 2 All E.R. 47.

28 Cf. however *Edwards* v. *Porter* [1925] A.C. 1, noting especially the judgment of Viscount Cave (dissenting on this point) at 13. See also *R.* v. *McKechie* [1926] N.Z.L.R. 1, especially the dissenting judgments of Stout C.J. at 8-9 and Ostler J. at 17.

29 *Thompson* v. *Moyes* [1961] A.C. 967.

30 [1953] 1 Q.B. 597.

31 *Bognuda* v. *Upton & Shearer Ltd.* [1972] N.Z.L.R. 741.

32 *Waring* v. *S. J. Brentnall Ltd.* [1975] 1 N.Z.L.R. 401.

suggests that because of the system of registered title to land under the Land Transfer Act 1952 there is little scope in New Zealand for the operation of the rule in *Bain* v. *Fothergill* restricting the damages available from a vendor for defect of title.[33]

(v) There are other miscellaneous examples. A Canadian court has held that, in accordance with the spirit of certain statutes removing disabilities from illegitimate children in specified instances, the term "children" in a private document should no longer be construed as limited to legitimate children;[34] some of the provisions of the Sale of Goods Act, in particular its division of contractual terms into conditions and warranties, have had an effect on the whole of the law of contract;[35] the conflictual rule in *Travers* v. *Holley*[36] in fact amounts to the application of a United Kingdom statute by analogy.[37]

In addition to these specific cases, however, there may have been more subtle influences. The common law must to a degree reflect the society it regulates. Yet statute law has played a significant part in shaping our society. To that extent there may have been an indirect influence of statute on common law. Thus the third party motor insurance rendered compulsory by the Transport Act, and the consequent knowledge by a court that the real defendant in a motor negligence

33 In *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878 "relevant differentiating local circumstances" were stated as a factor which would disincline the New Zealand Court of Appeal to follow the House of Lords: per North J. at 902 and Cleary J. at 917-918. Presumably statute could constitute "differentiating local circumstances". Cf. *Smith* v. *Wellington Woollen Manufacturing Co. Ltd.* [1956] N.Z.L.R. 491, 499; differences in tax legislation between Britain and New Zealand not sufficient to stop House of Lords decision applying in New Zealand.

34 *Re Hogbin* [1950] 3 D.L.R. 843, noted by Willis (1950) 28 C.B.R. 1140.

35 Cheshire and Fifoot, *Law of Contract* (4th N.Z. edition), 110. The implied conditions of fitness for purpose and merchantable quality (s. 16) have also been extended to contracts for work and materials: *Samuels* v. *Davis* [1943] K.B. 526. And see *Myers & Co.* v. *Brent Cross Service Co.* [1934] 1 K.B. 46.

36 [1953] P. 246. Cf. *Indyka* v. *Indyka* [1969] 1 A.C. 33.

37 There are other examples. In *Winn Bros. Ltd.* v. *Charlett* [1960] N.Z.L.R. 649, 652 McCarthy J. expressed the view that the Property Law Act 1952, s. 105 which declares all tenancies, in the absence of proof to the contrary, to be determinable at the will of either party by one month's notice, has had a far reaching effect on the express monthly tenancy in New Zealand: "I would also think that when a New Zealander speaks, in relation to property in New Zealand, of giving a month's notice to quit he generally means that that notice can be given at any time and so expire on any date. The tenancy to which s. 105 applies has become increasingly over the years the common form of tenancy in this country, and that fact must have an important bearing in the ascertainment of the meaning of words used in a New Zealand conversation relating to this subject." Also, the Contributory Negligence Act 1947 has probably had an indirect effect on the defence of *volenti non fit injuria*: *Morrison* v. *Union Steamship Co. Ltd.* [1964] N.Z.L.R. 468, 479 per Turner J. In *Knuller* v. *Director of Public Prosecutions* [1973] A.C. 435 the House of Lords rejected an argument that because homosexual acts in private had been legalised by the Sexual Offences Act 1967 it must therefore be legal to advertise for homosexual partners. One of their grounds was that certain sections of the Act showed that Parliament retained the view that homosexual activity could still corrupt; in particular one section of the Act made procuring illegal: see esp. Lord Reid at 457. See Cross, *Precedent in English Law* (2nd ed. 1968), 164-169 for more examples. Cf. *British Railways Board* v. *Herrington* [1972] A.C. 877, 898 per Lord Reid.

case was an insurance company, may have influenced the standard of care required in such cases.[38] The extent of nationalisation and state involvement in commerce (all the result of statute) may have had its effects too; it was assigned as a contributory reason for the New Zealand Court of Appeal's declining to adopt the rule in *Duncan* v. *Cammell Laird* in this country.[39] However in the end it must be admitted that although there may be more examples of the indirect application of statutes than there were, one is still principally confined to listing specific instances.[40] Nevertheless it is fair to say that courts today are prepared to accord the words of an act a more liberal interpretation than they once were, and if a statute is framed in sufficiently wide terms they are not averse to interpreting those words as generously as possible to give effect to the statute's object.[41] Thus, for instance, the Contributory Negligence Act 1947 has had a far reaching effect in New Zealand because our courts have been prepared to extend it beyond the tort of neglience to other torts such as conversion[42] and even assault.[43] However this has been possible only because the statute is drafted in broad general terms which are capable of extending thus far. More detailed, specific provisions would have precluded the possibility.

II. Statutory Encroachment on Common Law Areas

Increasingly statutes are being passed which cover, or encroach upon, areas which were once entirely the preserve of the common law. When this happens there is always a question of how much of the common law remains.

1. *Where the Act is a Code*

Some statutes expressly declare that they entirely replace the common law in the areas they cover. Others, although they do not expressly say so, are obviously enacted with the purpose of putting the existing common law into statutory form, and thus of being the sole repository of the law.[44] Such statutes are called "codes". However they can never be codes in the continental sense, for since they have been inserted into a common law system there will always be points at which they meet what is left of the common law. Indeed

38 See Fleming, *Law of Torts* (4th ed. 1971) 12.

39 *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878, esp. per Cleary J. at 917-918. Cf. also *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343, 361 where Denning L.J. suggests that the imposition of vicarious responsibility on hospital authorities for the negligence of their servants was influenced by the fact that hospitals are now supported by the state and public authorities, and not, as previously, dependent on voluntary contributions.

40 With respect, it is suggested that the authorities quoted by Cross in *Precedent in English Law* (2nd ed. 1968) do not support his conclusion at 168 that "in England, a legislative innovation is received fully into the body of the law to be reasoned from by analogy like any other rule of law".

41 New Zealand courts have shown a greater tendency in the last decade or so than ever before to cite the Acts Interpretation Act 1924 s. 5 (j). And see *Carter* v. *Bradbeer* [1975] 1 W.L.R. 1204, 1205-1206 per Lord Diplock. See also infra p. 594.

42 *Helson* v. *McKenzies Ltd.* [1950] N.Z.L.R. 878.

43 *Hoebergen* v. *Koppens* [1974] 2 N.Z.L.R. 597.

44 E.g. Sale of Goods Act 1908; Bills of Exchange Act 1908. These statutes merely provide that the rules of the common law continue in force so far as they are not inconsistent with the provisions of the Acts.

some of them expressly provide that common law rules remain in existence so far as they are not inconsistent with the "code";[45] even if they do not so provide, there will inevitably be a large area of residual common law with which they come into contact. Thus, the Minors Contracts Act 1969 has effect "in place of the rules of the common law and of equity relating to the contractual capacity of minors and to the effect, validity, avoidance, repudiation, and ratification of contracts entered into by minors and to any contract of guarantee or indemnity in respect of any such contract".[46] However in reality this Act covers only a minute part of the rules which apply when a minor enters a contract—doctrines like consideration and privity, and the rules of offer and acceptance, which are still common law, apply to minors' contracts just as much as to any other contracts. Even the Crimes Act 1961, which provides that nobody may be convicted of an offence at common law,[47] expressly preserves common law defences.[48] Moreover in applying sections of the Crimes Act it may be necessary to apply common law doctrines; for example, the question of whether a person is guilty of theft may depend on who owned goods at a particular time, and this may depend on whether the property in the goods had passed, a question which may only be able to be resolved by applying common law contractual principles.[49] It is for reasons of this kind that the interpretation of sections which declare the relationship of a code to the common law has often given rise to problems.[50]

It has sometimes been stated that if an act is a code and thus meant to replace the old common law, the proper approach to interpretation is to read its words in their natural meaning without traversing the old common law to find out what the law was before the act. As Lord Herschell said in *Bank of England* v. *Vagliano Bros.*:[51]

> The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was . . . .

Only if a provision be "of doubtful import" or if its words have acquired a technical meaning is it permissible to resort to the previous state of the law.[52]

However the common law has had a magnetic influence, and there has been a tendency in the courts, even in cases where it would be difficult to say that the provision under consideration was "of doubtful import", to interpret code provisions in the light of the pre-existing common law, and sometimes to hold that those provisions were merely intended to reproduce the common law. Thus, although section 5 (k) of the Acts Interpretation Act 1924 provides that a statute does not affect the rights of the Crown unless that is *expressly*

45 See supra, n. 44.
46 Minors Contracts Act 1969, s. 15 (1).
47 Crimes Act 1961, s. 9.
48 Ibid., s. 20.
49 Cf. *Lacis* v. *Cashmarts* [1969] 2 Q.B. 400.
50 E.g. *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572 on Sale of Goods Act 1908, s. 60; *In Re Cobb, Nash* v. *Nash* [1924] N.Z.L.R. 495 on Crimes Act 1908, s. 5.
51 [1891] A.C. 107, 144-145.
52 Ibid.

stated in the statute, this has been held not to change the common law principle that with certain exceptions the Crown may be bound by necessary implication.[53] Likewise, cases can be found on the interpretation of criminal codes throughout Australasia where the words of the code have been held to effect no change in what used to be the common law position.[54] The matter was thus expressed by Windeyer J. in the High Court of Australia in *Vallance* v. *The Queen*:[55]

> [The Code] was enacted when it could be said of the criminal law that it was 'governed by established principles of criminal responsibility'. And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a tabula rasa, with all that used to be there removed. Rather is ch. IV of the Code [dealing with criminal responsibility] written on a palimpsest, with the old writing still discernible behind.

However the strength of this tendency should not be exaggerated. A survey of recent authorities on the Crimes Act 1961 reveals that although common law authorities are often enough cited in the judgments they do not by any means prove an irresistible attraction. Thus between 1966 and the middle of 1975 there were 59 reported cases in which a provision of the Crimes Act 1961 was relevant. In 35 of these cases common law authorities were cited in the judgments, but in a majority of cases (18) either the authorities were distinguished, or it was emphasised that it was the words of the New Zealand statute which were of prime importance and not the cases.[56] Indeed sometimes the court deliberately rejected the common law cases as providing no guidance.[57] On the other hand in some cases reliance was placed on the common law authorities, although in only four[58] was it clearly stated that the statutory provision did no more than enact the pre-existing common law.[59] Thus, although the spirit of Lord Herschell's injunction in the *Vagliano* case is perhaps being breached

53 E.g. *Harcourt* v. *Attorney-General* [1923] N.Z.L.R. 686, 689-690 per Reed J. It may perhaps be given as a further example that despite the provision in the Land Transfer Act 1952, s. 182 that a purchaser of land is not to be bound to an unregistered interest by anything short of fraud, the courts have come very close to holding that he is bound by mere notice: e.g. *Webb* v. *Hooper* [1953] N.Z.L.R. 111. For English examples on the Sale of Goods Act see Diamond, "Codification of the Law of Contract" (1968) 31 M.L.R. 361.

54 New Zealand examples include *R.* v. *McKechie* [1926] N.Z.L.R. 1; *Murdoch* v. *British Israel World Federation (N.Z.) Inc.* [1942] N.Z.LR. 600; *R.* v. *McGregor* [1962] N.Z.L.R. 1069. For Australian examples see Calvert, "The Vitality of Case Law Under a Code" (1959) 22 M.L.R. 621; Baker, "The Codes and the Judicial Process" (1963) 6 U.W.A.L.R. 449.

55 (1961) 108 C.L.R. 56, 76. See also Windeyer J. in *Mamote Kulang* v. *R.* (1964) 111 C.L.R. 62, 76.

56 E.g. *R.* v. *Laga* [1969] N.Z.L.R. 417, 418 per Woodhouse J.; *R.* v. *Hyde-Harris* [1968] N.Z.L.R. 315, 317 (C.A.) per Turner J.; *Mead* v. *R.* [1972] N.Z.L.R. 255, 258 (C.A.) per North P.

57 For example *R.* v. *Dunn* [1973] 2 N.Z.L.R. 481, 483 (C.A.) per McCarthy J.; *R.* v. *Murray Wright Ltd.* [1970] N.Z.L.R. 476, 482-483 per North P., 484 per Turner J., and 485 per McCarthy J.

58 *Sweetman* v. *Industries and Commerce Dept.*, [1970] N.Z.L.R. 139, 147 per Richmond J.; *R.* v. *Lee* [1973] 1 N.Z.L.R. 13, 18 (C.A.) per Turner P.; *Taylor* v. *Mann* [1975] 1 N.Z.L.R. 285, 287 per Casey J.; *Blundell* v. *Attorney-General* [1968] N.Z.L.R. 341, 353 (C.A.) per Turner J.

59 See *R.* v. *Haskett* [1975] 1 N.Z.L.R. 30, 32 (C.A.) per Richmond J. and *R.* v. *Donnelly* [1970] N.Z.L.R. 980 as examples of cases where assistance was derived from common law authorities and principles.

in that there is still some "roaming" over the old authorities, the words of the act are clearly having the major influence. Reported criminal cases from earlier in the century do not suggest that the pattern was much different then.[60]

2. *It is Unclear How Far the Statute Replaces the Common Law*

The most difficult statutes are those which make provision in an area which was previously covered by common law, but do not make it clear what their relationship with the common law is. In such cases there is always a problem whether the statute is entirely in substitution for the common law, or whether it is only in part substitution (and if so to what extent), or whether the common law and the statute are to run in tandem. For the most part the courts have here, as in some cases discussed in the immediately preceding section, exhibited an attraction for the common law, and have been inclined to hold as much of it preserved as possible. There are even a few rather unfortunate cases where the courts, in seeming ignorance that a relevant statute existed, have applied the common law without referring to the statute at all.[61] But that is, of course, most exceptional. The bulk of the cases may be dealt with under two headings:

(i) *Where the statute appears to be contrary to the common law*

The courts have often interpreted acts derogating from the common law narrowly, so as to involve as little alteration to that law as possible. Statute sometimes can truly appear to be an "alien intruder in the house of the common law".[62] For example in *Viscountess Rhondda's Claim*[63] it was held that the Sex Disqualification (Removal) Act 1919, which provided that a person should not be disqualified by sex or marriage from the exercise of any public function or from being appointed to or holding any civil or judicial post did not entitle the Viscountess to sit in Parliament, or to receive a summons for that purpose. Viscount Cave's short judgment thus expresses the reason: the common law gave no right to a peeress to sit in the House; and the act of 1919, while it removed all disqualifications, did not purport to confer any right. "If the right to sit in this House is to be con-

60 Many of the early New Zealand cases in fact contain very short judgments in which no cases are cited at all. But one can find cases where the Crimes Act was held to effect no alteration in the common law (e.g. *R.* v. *McKechie* [1926] N.Z.LI.R. 1 (although there were two dissenting judgments) and *R.* v. *Parker* [1919] N.Z.L.R. 365 where the common law authorities were applied and the statute not even mentioned). However there are other cases where the common law was held not to apply in the light of the words of the Act (e.g. *R.* v. *Webb and McLachlan* [1924] N.Z.L.R. 934, 939 per Sim J.), and yet others where the court refused to have regard to the common law at all (e.g. *R.* v. *Hare* (1910) 29 N.Z.L.R. 641).

61 For a lengthy period the courts, instead of referring to the Acts Interpretation Act 1924 (N.Z.), s. 5 (j) preferred to rely on the common law rules of statutory interpretation; and until recently the English rules for the assessment of damages against a vendor who was unable to make title to land were assumed to apply in New Zealand, without apparent realisation that the system of registration under the Land Transfer Act might affect the matter: the earlier authorities are discussed in *Waring* v. *S. J. Brentnall Ltd.* [1975] 1 N.Z.L.R. 401. There are apparently cases on sale of goods where the Sale of Goods Act has not been mentioned: Diamond, "Codification of the Law of Contract" (1968) 31 M.L.R. 361, 377.

62 Supra, nn. 1 and 2.

63 [1922] 2 A.C. 339.

ferred on peeresses it must be by express words."[64] In *Leach* v. *R.*[65] it was held that a statute providing that the spouse of a person charged with certain offences might be called as a witness did no more than render the spouse a competent witness; it did not render him or her compellable, for it would take very clear words to change the ancient and fundamental principle of law that one spouse should not be compelled to give evidence against another.[66] Sometimes, indeed, statutes have been narrowly construed for the purpose not just of preserving the common law but of allowing its expansion: in the famous law-making cases of *Shaw* v. *D.P.P.*[67] and *Rookes* v. *Barnard*,[68] for instance, the law lords placed most restrictive constructions on two statutory provisions which at first sight certainly appeared to stand in the way of the common law's advancement.

However, while there is undoubtedly evidence of a presumption against alteration of the common law, it can be misleading to speak of it without qualification. For one thing there is also a leaning, although probably not so strong, against finding that a statute has impliedly repealed or modified an earlier statutory provision; there is some ground for asserting that the law, a necessarily conservative instrument, leans in favour of the status quo, whether that status quo is statute or common law. More importantly, however, not all principles of the common law are equally jealously guarded against statutory incursion. Many are elementary principles of justice and fair dealing; obviously there is a strong presumption that the legislature does not intend to make too great an inroad into principles such as these, simply because it is not to be readily assumed that the legislature would wish to bring about injustice. Thus the courts are always unwilling to find that a legislative provision cuts down the right of an individual appearing before a statutory tribunal to a fair hearing; the principles of natural justice, carefully developed by the common law courts, are commonly held not to have been excluded by the statute even though it may itself lay down some rules for the conduct

64 Ibid., 389.

65 [1912] A.C. 305.

66 Other strong examples are to be found in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014 (contract of service not transferred when undertaking of company transferred to another under statute); *Re Sigsworth* [1935] Ch. 89 (murderer unable to take under Administration of Estates Act on intestacy of victim); *Nolan* v. *Clifford* (1904) 1 C.L.R. 429 (common law power of arrest not extended by statute); *Beswick* v. *Beswick* [1968] A.C. 58 (doctrine of privity not abolished). In several cases it has been held that a statutory power to do something did not exclude common law liability if the power was negligently exercised: e.g. *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004. See also *R.* v. *Morris* (1867) L.R. 1 C.C.R. 90, 95 per Byles J.: "It is a sound rule to construe a statute in conformity with common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law." There are many dicta to similar effect.

67 [1962] A.C. 220.

68 [1964] A.C. 1129.

69 E.g. *George Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169 esp. per Lord Reid at 191; he expresses the presumption as being one in favour of *existing* law, not necessarily common law.

of the hearing. [70, 71] In addition to their desire to retain principles of simple justice, the courts have shown themselves particularly reluctant to find that a statute has deprived them of jurisdiction. Thus they have always accorded a very narrow interpretation to provisions which attempt to render decisions of statutory tribunals unreviewable in courts of law. Privative clauses have always been very strictly interpreted.[72]

However not all common law principles are of equal strength, and there have been some which the courts have been quite ready to see abolished by statute. That was certainly true of the old doctrine of common employment. The Contributory Negligence Act 1947 has also been generously interpreted at the expense of the rigid common law which did not allow apportionment of loss. Moreover, as pointed out earlier, there are certainly signs of a more purposive approach to statutory interpretation than in the past, and, particularly if a statute has a social purpose, it may well receive a liberal interpretation[73] even though this may be at the expense of what used to be the position at common law. For example it is clear that in these days of statutes which provide for increasing state organisation and control, the courts have somewhat relaxed the stand they used to take against government interference with a citizen's proprietary rights.[74]

(ii) *Where the statute does not run counter to common law*

Some statutes, instead of actually running counter to the common law, lay down rules which are very similar to the old common law rules, although they may differ in some particulars. The question is then whether these provisions are in substitution for the old common law, or whether the two run together in tandem. This is one of the law's more difficult questions. Sometimes there is held to be substitution: for instance statutes which empower public authorities to carry on works with provision for compensation of citizens who are injuriously affected are normally held to exclude any right of action for the common law tort of nuisance.[75] But just as often the two sets of laws are held to exist together, the one supplementing the other. Thus the Trade Marks Act 1953, providing for registration and protection of trade marks, has been held not to abolish the old concept of the common law trade mark, which of course can exist without registration.[76] Again, the Law Reform (Testamentary Promises) Act

70 The law is discussed in *Wiseman* v. *Borneman* [1971] A.C. 297.

71 Cf. *Furnell* v. *Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705 (P.C.); *Rich* v. *Christchurch Girls High School* [1974] 1 N.Z.L.R. 1; *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86, in which it was held that the statute laid down a code of procedure which excluded the common law rules.

72 De Smith, *Judicial Review of Administrative Action* (3rd ed. 1973), 314 et seq.

73 *Jones* v. *Secretary of State for Social Services* [1972] A.C. 944, 1005 per Lord Diplock.

74 De Smith, *Judicial Review of Administrative Action* (3rd ed. 1973) 86-87; Paterson, *An Introduction to Administrative Law in New Zealand* (1967) 21. Note Lord Wright's attack in *Rose* v. *Ford* [1937] A.C. 826, 846 on narrow interpretation to preserve common law rights at the expense of statutory policy, and the comments of Lord Simon in *Maunsell* v. *Olins* [1974] 3 W.L.R. 835, 849.

75 E.g. *Nobilo* v. *Waitemata County* [1961] N.Z.L.R. 1064.

76 *North Shore Toy Co. Ltd.* v. *Chas. Stevenson Ltd.* [1973] 1 N.Z.L.R. 562.

1949 does not deprive a promisee of any common law or equitable right he may have to enforce a contract to leave him property by will; the Act merely provides a supplementary cause of action which is more generous in that it extends to cases where the promise does not constitute a contract enforceable at common law or equity.[77]

Once again the courts have shown themselves to be very jealous of their jurisdiction, and are particularly reluctant to find that statute has limited their inherent jurisdiction. Indeed it has been said that:[78]

> . . . [T]he court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.

In a recent New Zealand case,[79] it was held that the court's inherent power to order that the names of witnesses in court proceedings be suppressed, and to punish for contempt should such an order be disobeyed, is not affected by statutory provisions also providing for suppression and laying down penalties for non-compliance.[80]

There are obvious difficulties raised by this possibility that statute law may exist side by side with pre-existing common law or inherent jurisdiction. First, if the two are held to exist together their respective spheres of operation may be rendered unclear. In one case, relating to the courts' power to make orders in the estate of a mental patient, McCarthy P. said:[81]

> I agree that a clearer situation would be preferable. The present confluence of the inherent and the statutory powers has resulted in a somewhat murky stream.

Second, although the ideal can never be perfectly attained, it is at least desirable that the law should aim in the direction of being easily discoverable and knowable. It is perhaps a little unfortunate in cases like *Taylor* v. *Attorney-General*[82] that a citizen can read what he believes to be his obligations in a statute, only to find that there is a much more ill-defined and less readily discoverable power residing in the court apart from the statute. Third, there is perhaps a danger, if the court may exercise jurisdiction either under common law (or its inherent jurisdiction) *or* under a statute, that it will prefer to rely on its common law power, and eventually develop it in a way which runs counter to the statute. It has been pointed out, for example, that the law of passing off has been applied in a way which is not easy to reconcile with the objects of the patents legislation;[83] and it may be said that the growing law of breach of confidence is being developed in a way which could depart from that same legislative policy.[84] How-

77 *Reynolds* v. *Marshall* [1952] N.Z.L.R. 384.

78 Jacob, "The Inherent Jurisdiction of the Court" [1970] Current Legal Problems 23, 24.

79 *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675. Cf. Adams, *Criminal Law* (2nd ed. 1971), para. 3621.

80 See also *Re R.* [1974] 1 N.Z.L.R. 399; *Re Ebbett* [1974] 1 N.Z.L.R. 392; *Re Martin* [1970] N.Z.L.R. 769.

81 *Re R.* [1974] 1 N.Z.L.R. 399, 406.

82 Supra, n. 79.

83 Evans, "Passing Off and the Problem of Product Simulation" (1968) 31 M.L.R. 642.

84 E.g. cases like *Seager* v. *Copydex Ltd.* [1967] 1 W.L.R. 923.

ever there are some signs that judges are becoming aware of the danger of expanding the common law in an area which is regulated by statute—particularly has this been seen in the field of industrial law.[85] Fourth, because of the lack of consistency in the decisions, until a court has passed judgment on the question it is sometimes very difficult to determine how far a new statutory provision does replace the common law. There are many such unsolved questions. For example, how far do the powers conferred on the police by the Crimes Act 1961 to enter premises[86] oust the common law rule in *Thomas* v. *Sawkins*?[87] How far does the Water and Soil Conservation Act 1967 oust the common law rights of a riparian owner to sue his neighbours for interfering with the purity and flow of stream water?

3. *Where the Act is Not Self-sufficient*

Many statutes, enacted against a background of common law, take a great deal of that law for granted, and are very far from self-sufficient themselves. A stranger wishing to know something about our company law would not do very well to begin by reading our companies legislation; for the Companies Act does not set out many of the most fundamental rules of corporate liability—the common law governs them.[88] Many statutes have to be thus supplemented by the common law. Indeed it has often been said that an Englishman (and no doubt a New Zealander) is quite incapable of drafting a complete and comprehensive code. Thus, our Land Transfer Act 1952 provides for a Torrens system of registration of title to land which is very different from the deeds system which it replaced. Yet the Land Transfer Act contains some strange gaps. There being no provision in the Act for the registration of restrictive covenants, and indeed no mention of them, what is the position of restrictive covenants in the system?[89] Again, while the Act provides that the Supreme Court is to resolve the question of whether a caveat on the title should be withdrawn to allow registration of a competing document,[90] it does not indicate the principles on which such an order is to be made; what are the principles applicable in such a case? Yet again, although the Act provides that a registered proprietor has an indefeasible title only in the absence of fraud,[91] what remedies lie against a fraudulent registered proprietor? The courts have had to supply answers to these questions, and not unnaturally they have applied the rules of equity and common law to fill the gaps. In other words the Act, not being a complete code, is to be read as supplemented by the pre-existing law. Yet this involves the danger that the common law thus applied might not fit comfortably into the scheme of the new Act. In applying the equitable rules about restrictive covenants,[92] the courts have engrafted

85 E.g. *Midland Cold Storage Ltd.* v. *Steer* [1972] Ch. 630, 648, per Megarry J.
86 Crimes Act 1961, s. 317.
87 [1935] 2 K.B. 249. Adams, *Criminal Law* (2nd ed. 1971), para. 2514 leaves the matter open, but inclines to the view that the section leaves the common law unaffected.
88 Gower, *Modern Company Law* (3rd ed. 1969) 8, 52.
89 They may, since 1952, be noted against the title (Property Law Act 1952, s. 126), but before this time there was no statutory provision relating to them.
90 Land Transfer Act 1952, s. 145.
91 Land Transfer Act 1952, ss. 62, 63, 182, 183. See *Efstratiou* v. *Glantschnig* [1972] N.Z.L.R. 594.
92 *Staples & Co. Ltd.* v. *Corby* (1900) 19 N.Z.L.R. 517.

a doctrine dependent on notice on to a system which in express terms repudiates notice for other purposes. In deciding that disputes between caveators and the holders of other competing interests are to be resolved by applying the equitable doctrine of "first in time prevails" there is a real danger that they have rendered the caveat a less effective protection than it was meant to be.[93] Yet as long as the draftsman leaves such important things unsaid, the courts have to supply some answer. And as long as they adhere to the view that they can do no more than interpret the words of statutes they will be reluctant to frame original answers based on the policy of the act; resort to the common law is thus the obvious solution. Yet it must be noticed that where a statute is passed in an area where there was previously no common law and where there is thus no ready-made reservoir of principles to fill gaps in the statute, the courts in fact have fashioned answers from the policy of the statute. This has happened, for instance, in the case of the numerous statutes conferring discretionary powers; the courts have created their own principles for the exercise of the discretion, and where possible have done so on the basis of the policy and purpose of the act.[94] Again, in the case of the Tenancy Act 1955 the courts were required to answer many questions about the statutorily protected tenant: could he maintain his occupation through his agent; what if he were confined in a mental hospital? These questions had, as far as possible, to be answered by relying on the purpose of the statute and the words used in it.[95]

III. Other Influences of the Common Law

Even in the case of statutes which do not deal with areas traditionally part of the common law the influence of the common law has made itself felt.

1. *Common Law Meanings*

Sometimes words and phrases used in statutes are given a meaning they have traditionally borne at common law. Often this is well justified, for the words and concepts have so long had a clear meaning at common law that this may be said to have become the technical legal meaning of the word: the definition of "land" as including things under the soil and things affixed to it is an illustration. But sometimes the common law meaning has been transferred a little too readily to the statutory context. Thus in a number of United Kingdom criminal cases the phrase "offer to sell" in statutes making it an offence to "offer to sell" certain things (e.g. flick knives[96] or protected birds[97]) has been given its strict contractual meaning, with the result that a shop window display and newspaper advertisements have been held not to amount to offers to sell. Likewise, a statute making provision for the carriage of passengers for reward has been interpreted as referring only to the carriage of passengers under legally enforecable contracts, that is to say contracts made with intent to create legal relations and

93 E.g. *J. & H. Just (Holdings) Pty. Ltd.* v. *Bank of New South Wales* (1971) 125 C.L.R. 546.
94 E.g. *Official Assignee of Pannell* v. *Pannell* [1966] N.Z.L.R. 324.
95 E.g. *Kingsroy Electric Ltd.* v. *Public Trustee* [1952] N.Z.L.R. 405.
96 *Fisher* v. *Bell* [1961] 1 Q.B. 259.
97 *Partridge* v. *Crittenden* [1968] 1 W.L.R. 1204.

supported by consideration.[98] This, with respect, is to introduce too much rigidity into the system, and to fail to realise that words can vary in meaning according to their context. Indeed in the case of both the examples cited, later cases have in fact departed from the rigid model of the earlier decisions[99] and held that the words must be looked at individually in the particular statutory context in which they appear.[1]

2. *Common Law Method*

Perhaps the most striking legacy of common law to statute is the common law method, and in particular the doctrine of stare decisis. There is no doubt that judicial decisions interpreting statutory provisions bind other courts at the appropriate level in the hierarchy. This ready adoption of stare decisis may be questioned. The doctrine was probably developed at common law because a system based on nothing but judicial decisions needed the strong cement of stare decisis to provide a firm foundation.[2] But this reason does not apply where a statute is concerned, for the statute itself provides the foundation. In code-based continental systems cases decided on the code are of no more than persuasive authority. There is in fact a strong argument for saying that if our statute law is to keep pace with social change, and thus to be deemed to be always speaking, a rigid doctrine of stare decisis can be a handicap. Yet it would seem that this essentially common law doctrine has been applied to cases involving statute law with almost increased vigour, the ostensible reason being that in statute law, where an ambiguous provision may mean different things to different men, there is the advantage of certainty in adhering firmly to one interpretation once decision has been given in that sense.[3]

Once a statute has been in force for a few years, a cluster of decisions begins to build up around it which bears some resemblance to the common law itself. The more general the provisions of the statute the more likely this is to occur. Thus in the Sale of Goods Act 1908 the phrases "merchantable quality" and "fitness for purpose" have been fully refined and elaborated by numerous judicial decisions. One of the great dangers is that lawyers trained in a common law system will come to attach more weight to the pronouncements of a judge interpreting a statute than to the words of the statute itself.[4] There are actually cases on the New Zealand Land Transfer Act where the relevant sections of the Act are not cited at all, reliance being placed only

98 *Coward* v. *Motor Insurers' Bureau* [1963] 1 Q.B. 259.

99 *R.* v. *During* [1973] 1 N.Z.L.R. 366 ("offer to sell" in context of Narcotics Act 1965 includes advertisement); *Albert* v. *Motor Insurers' Bureau* [1972] A.C. 301 (contract not necessary to constitute carriage for reward).

1 See also *Campbell* v. *Russell* [1962] N.Z.L.R. 407 (Government Railways Act 1949 interpreted in light of doctrine of privity of contract); *R.* v. *Storey* [1931] N.Z.L.R. 417 "reasonable care" in manslaughter provisions of Crimes Act 1908 accorded same sense as in common law tort of negligence).

2 Goodhart, "Precedent in English and Continential Law" (1934) 50 L.Q.R. 40, 62.

3 *Jones* v. *Secretary of State for Social Services* [1972] A.C. 944, esp. per Lord Wilberforce at 995.

4 In *Midland Railway Co.* v. *Robinson* (1889) 15 A.C. 19, 34-35 Lord Macnaghten said, in considering the meaning of the word "mines" in a statute: "It seems to me that on such a point the opinions of such judges as Kindersley V.C., Turner L.J. and Sir George Jessel are probably a safer guide than any definitions or illustrations to be found in dictionaries."

on former cases on the subject.[5] However warnings against this treatment of judicial dicta have become increasingly frequent in recent years.[6] Two developments in particular may help to restrict this practice. First, several judges, in particular Lord Denning, have asserted that the only thing which is binding in a case interpreting a statute is the decision actually applying the words of the act to the facts of the case; the case will thus be a precedent only in later cases on the same facts.[7] Other observations of the judge will not be binding. Second, the House of Lords in *Cozens* v. *Brutus*[8] recently declared that ordinary words used in a statute should not be paraphrased by the judge, but should be left to the jury or other tribunal of fact: "The meaning of an ordinary word of the English language is not a question of law".[9] While there must be room for considerable doubt how far it will prove practicable to take this last proposition, these latest decisions at least emphasise that what is of primary importance in a case on a statute is the words used in that statute.

IV. Summary and Conclusions

For centuries the attitude of the courts has been to treat the common law as the dominant partner in our legal system. There has been little transference to the common law of ideas originating in statute. But the common law has had considerable influence on statute: codes have sometimes been interpreted in the light of the common law; there is a presumption against legislative change of the more fundamental common law principles which has at times contributed to a narrow, literal interpretation of statutes; gaps in statutes tend to be filled by reference to the common law; common law meanings are sometimes given to words in statutes; and the common law method of stare decisis has been applied to cases interpreting statute law.

However with the increase in the volume and importance of statute law there do appear to be signs of at least the beginnings of a different approach.

1. The common law appears to be exercising rather less influence on statute law than previously, although the shift cannot yet be said to be of great magnitude.

(a) There are signs of a preparedness to interpret codes, especially the criminal code, with reference to their words rather than the common law which they were meant to replace.[10]

5 E.g. *Pearson* v. *Aotea District Maori Land Board* [1945] N.Z.L.R. 542 where the indefeasibility sections of the act are not cited (although certain other sections are). Findlay J. merely relies on former cases as establishing the principle of indefeasibility.

6 E.g. *Little Park Service Station Ltd.* v. *Regent Oil Co. Ltd.* [1967] 2 Q.B. 655, 672 per Russell L.J.; *Walker* v. *Walker* [1973] 2 N.Z.L.R. 7, 8 per Turner P.; *Ogden Industries Pty. Ltd.* v. *Lucas* [1970] A.C. 113, 127 (P.C.) per Lord Upjohn. And see *Damjanovic & Sons Ltd.* v. *Commonwealth of Australia* (1968) 117 C.L.R. 390, 408, 409 per Windeyer J.

7 *Ogden Industries Pty. Ltd.* v. *Lucas* [1970] A.C. 113, 127 per Lord Upjohn; *Paisner* v. *Goodrich* [1955] 2 Q.B. 343, 358 per Denning L.J. (dissenting); *London Transport Executive* v. *Betts* [1959] A.C. 213, 246 per Lord Denning (dissenting). See Cross, *Precedent in English Law* (2nd ed. 1968) 169-173.

8 [1973] A.C. 854.

9 Ibid., 861 per Lord Reid.

10 At times the strength of the reverse tendency may have been somewhat exaggerated: see supra, p. 591.

(b) There is an increasingly liberal approach to the interpretation of statutes and an increasing tendency to interpret them in such a way as to give effect to their purpose; this is sometimes done at the expense of the individual's common law rights. The more liberally a statute is interpreted the more extensive may be the inroads made by it into the common law.

(c) The most recent decisions seem to have been less ready blindly to accord phrases in statutes their common law meanings.

(d) There has been a move to ensure judicial reliance on the words of statutory provisions rather than on judicial dicta about them.

2. The list is lengthening of cases in which the courts have applied statutes by analogy, or in some other way allowed statutes indirectly to influence the common law. However it cannot be said that any fundamental change of approach is in evidence in this respect.

Despite these movements, we are still a considerable distance from the position seen as desirable by Lord Denning: "Statute law and common law should be interpreted as one law."[11] Despite the fact that at times the courts do take an overview of the legal system as a single entity[12] the two types of law still are, and probably always will be, approached in a quite different way. Common law is based on ideas and analogy, statute law on the meanings of words. Indeed, some of the movements noted in (1) above might be said to have accentuated this difference, for their essence is to insist that the words of the statute be regarded rather than the common law which they replaced. The very frequent injunction that one "must not treat the words of a judge like the words of a statute" is likely to express the quintessence of the difference between the two types of law for some time yet. Sir Maurice Amos put it thus:[13]

> I think it is true to say that in England or America when a judge or counsel finds himself faced by a statute, he instinctively performs a species of mental gesture, such as one does on the drill-ground when one stands to attention or slopes arms: he makes an appropriate and specific adjustment of his mind . . . .

11 *Broom* v. *Morgan* [1953] 1 Q.B. 597, 609.

12 See supra, pp. 586-589.

13 Amos, "The Interpretation of Statutes" (1934) 5 C.L.J. 163, 174.