THE ROLE OF THE SUPREME COURT IN SOCIETY

Ivan C. Rand*

Ivan Cleveland Rand was born in Moncton on 27 April 1884. Moncton was a railway town and his father was a railway mechanic. When Rand graduated from the Aberdeen High School, he joined the Intercolonial Railway as a messenger in the Audit Department at the rate of $96 a year. Five years later, with his savings in hand, Rand left Moncton for Sackville and Mount Allison University. He started in engineering, then switched to arts. In 1909 Rand graduated at the head of his class. Mount Allison led to Harvard where Rand went to study law. When classes began in the fall of 1909, Rand was ready. He had already read Blackstone's *Commentaries on the Law of England* several times.

In June 1912, Rand graduated from Harvard Law and went west to Medicine Hat. In October 1913, he married Iredell Baxter, a New Brunswicker he had met while in Boston. Rand began the practice of law. There was a boom on in the West and Rand's practice reflected that fact. Almost as soon as it began, the boom was over and many of Medicine Hat's leading lawyers began to leave town. By 1920, Rand was back in Moncton. Soon enough, he was working with one of the most prominent members of the local bar, C.W. Robinson. Law led to politics and, in 1924, Liberal Premier Peter Veniot appointed Rand Attorney General of the Province. It was necessary that Rand obtain a seat in the Legislature. His first attempt, in a by-election failed. A safe seat was made available and this time Rand succeeded. His time in politics, however, was short. In the the general election of 1925, Rand was defeated at the polls. It may have been a blessing in disguise. "Aloof," "austere," "remote," "forbidding," "shy," and "a gentleman" are among the words often used to describe Rand. On one occasion, according to his brother, Rand crossed the street to avoid getting into what he thought was sure to be a senseless and time consuming conversation with some of his constituents.

The short spell in politics was followed by a much longer one as in-house counsel to the Canadian National Railway. Moncton was regional headquarters and Rand was appointed Regional Counsel. This time Rand was paid $9,000 a year – a powerful evidence of the value of a legal education! Rand held this position until 1933 when he was appointed Commission Counsel and moved to Montreal. Rand liked the work, and he represented CNR at the Supreme Court as well as at the Judicial Committee of the Privy Council. Meanwhile, his reputation grew. By one account, Rand was considered for appointment to the Supreme Court of Canada in the early 1930s. Alas, Rand was a Liberal, and the government of the day was Conservative. When the government changed and a

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*Justice of the Supreme Court of Canada, 1943-59. Transcription of a lecture delivered before the students of the Faculty of Law, University of New Brunswick, in the early 1960s, edited and Introduction by William Kaplan, Faculty of Law, University of Ottawa.

Maritime seat again became available, it was offered to Rand who in 1943 was appointed puisne judge of the Supreme Court. Rand's time at the court is impressive both for what he accomplished as a judge and for what he accomplished in his extra-judicial career. This second career included acting as an arbitrator in the famous Ford Motor Company strike of 1945 and serving as Canada's representative to the United Nations Special Committee on Palestine. In his judicial career, Rand quickly established himself as an intellectual force to be reckoned with, and his decisions still resonate with the power of his mind. Rand's opinions in constitutional and civil liberty cases like *Boucher*,[1] *Saumur*,[2] *Roncarelli* v. *Duplessis*[3] and *Switzman*[4] have more than stood the test of time.

His time on the Court was, however, not long enough and in 1959, having reached the mandatory retirement age of 75, Rand was forced to resign. Resign did not mean retire. Later that year, Prime Minister Diefenbaker appointed him as a one-man Royal Commission on the Coal Industry in New Brunswick. He also headed an inquiry into the conduct of an Ontario Supreme Court Judge, Leo Landreville, and headed a Royal Commission on Labour Disputes in Ontario. He became founding Dean of the University of Western Ontario Law School, serving in that capacity from 1959 to 1964. His scholarly output, already impressive, increased in range and depth. Rand wrote and spoke about many legal topics. His students loved him, "gentle yet awesome" one student later recalled. It was a "privilege," another said, to be in his class.

While Rand's spiritual home was the Supreme Court of Canada, his temporal one was a house on Botsford Street in Moncton, and a cottage at Shediac just a few miles away. Every summer Rand would return to Shediac and when he retired, at age 80, as dean of the Western Law School, he moved permanently back home. In 1964 his wife Iredell died. Rand felt deeply this loss, and some say he was never quite the same again. But he continued to soldier on. Whether it was giving free advice to local lawyers, or responding to requests for help from prime ministers and premiers, Rand never lost his love of law or of work until his death in 1969.

Rand took a great interest in the Faculty of Law at the University of New Brunswick. In 1950 he was invited to give one of its sesquicentennial lectures. His subject was *The Student at Law School.* Much like the lecture reproduced below,

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[1]*R.* v. *Boucher* (1955), 21 S.C.R. 117, rev'g. 113 C.C.C. 221 (Que.S.C.).

[2]*Saumur* v. *Quebec (City)*, [1953] 2 S.C.R. 299, 106 C.C.C. 289, [1953] 4 D.L.R. 641, rev'g. 104 C.C.C. 706 (Que.Q.B.).

[3]*Roncarelli* v. *Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, rev'g. [1956] Que.Q.B. 474 rev'g. [1952] 1 D.L.R. 680 (Que.S.C.).

[4]*Switzman* v. *Ebling*, [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337, rev'g. [1954] Que.Q.B. 421.

Rand began with the observation that he was just as much a student of the law in 1950 as he was when he began his formal legal education 41 years earlier. In his sesquicentennial lecture Rand reached out to the students before him:

> I suggest you keep your imagination active and maintain the hopes and visions of youth. We all have different natural investments: but in the end, the question will be, have we made the best of them? To prepare yourselves for these responsibilities, should they offer, by quiet but indefatigable application to the mastery of your art, ought to be your first ambition; in the jargon of the day, raise your sights.
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> Here is my second purpose. With independence, with unremitting industry, with high standards and loyalty to public and private duties, we owe it to the people of this country to make of the legal profession an instrument of the highest competency in an enlightened administration of justice.[5]

Rand, the son of the railway mechanic, had raised his sights, and in that process made an inestimable contribution to Canadian life and Canadian law.

William Kaplan
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In dealing with the role of the Supreme Court in relation to common law we must keep in mind first that we cannot say that we have a common law of the Dominion, because Quebec has its own common law. The common law of Quebec is, to some degree, the unwritten customs of Paris which have been in large measure reduced to declaratory form in the civil code of that province.

Even in the other provinces there is no doubt that, in the course of their development as provinces and in their legislative provisions, they entered Confederation with different rules of what we may call the common law. We therefore deal with each province as an original legislative unit, and examine not only their legislative laws but those laws which were either brought to the country via settlement (as in the case of Nova Scotia), or those which by statutory declaration adopted the English common law. The Prairie provinces were specifically given the law of England as it existed in 1870, as a foundation upon which to build their legislative and judicial structures. In Ontario it was done by an act of 1792 after the *Constitution Act* of 1791. There you have express

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[5]I. C. Rand, *The Student at Law School*, Sesquicentennial Lectures, (University of New Brunswick: 1950) at 9.

legislative adoption of the unwritten law of England so far as it was applicable to the conditions in Canada.

So we must keep in mind that we are not endeavouring to establish a Dominion law of the common law, but we are to deal with the manner which is open to the courts to deal with law which is unwritten as distinguished from the written or legislative enactments. We have many statutes from England which were enacted in the centuries between 1265 and the middle of the 18th century which became common law in this country because the settlers brought them with them and accepted the customs of that time as their ruling regulation. The role of the Supreme Court then in relation to the common law depends upon dealing with each province as questions may arise.

It was only in the extreme special cases that an exception was made in the courts originated by Henry II and carried on by Edward I. One example is the special copyhold laws of one of the counties in England. These customary laws, which arose out of the life of the people in England, were gradually and consciously made common by way of adding to the centralization that was the object of William the Conqueror. He wanted a centralized government in Normandy and in the other duchies. There, a king was a mere figurehead. The powerful men were the dukes. He was the Duke of Normandy and he decided that he was going to be king in fact as well as in name and so the whole policy was directed towards a centralization of government – that these six kingdoms of Anglo-Saxons were to be welded into one kingdom.

What then should we keep in mind in examining the character of the common law? In the first place we must realize that the Romans left nothing in England except their great highways and a few evidences of their villas in summer resorts. It is an amazing fact that when they left around 476 they took with them all traces of their sovereign rule. When the Germanic tribes from western Europe came to England, they brought with them their institutions and their customs. Those features constitute the basis upon which over these fifteen hundred years has been erected what we now call the common law, that is, the law that is unwritten, the law that is enforced by courts and the law which derives its force from custom reinforced by the holdings of courts.

In the early days we must realize that civilization was very simple. The possession of land was the important thing. It was ownership that probably arose out of possessing, and not in the reverse order. As it is expressed, "possession is nine points of the law"; that conception of possession was real and effective and even today if you are in possession the person who tries to evict you must prove his superior right to that possession. Initially this was a simple social condition to deal with. The rules were not very complex because the situations were not complex. In the earliest days of the Germanic tribes, these customs were formed out of the necessities of the community life.

That was the situation until the Norman conquest and it is rather interesting that William the Conqueror, among his other promises, gave the assurance that the customs of the English people would be respected. That being so, we see there in the law up to that time, certain of the institutions and certain of the underlying conceptions of law which must be attributed to Germanic origin. That was an origin that has two aspects, one psychological and the other social.

Their king was elected as the chief of the chieftains. It is quite true that the ordinary rule would be that they would elect the son upon the death of the father, but that was not compulsory. If the son was unfit or considered to be unfit, he was passed over in favour of the second son. There was the concept of election, that a man as king was not a divine leader; he didn't rule by reason of divine law. There was nothing of that sort at all. He was elected by his peers. That being so you have that as a characteristic which seems to have persisted to the present day.

The law in those days was necessarily individual. It was the individual who was looked upon to complain that his rights had been invaded. It was the individual who was bound to assert his rights or they were not asserted at all. That is to be contrasted in substance with the civil law.

We call our law the 'adversary rule.' You are my adversary, and I complain to the courts of the country about your conduct towards me. The court acts, certainly in England and even more so in the United States, not as an inquirer into the justice of things, but as the umpire between two contestants. The umpire would see that certain rules are observed, just as the referee in a boxing contest. There are the rules of the ring. In many courts of the United States the presiding justice is tied down by so many rules that he is no better than an umpire. That is one of the conditions which accompanied the development of the common law and you can see that it is present today.

The Romans had in their classical period evolved some very powerful conceptions in which they would take a basic idea and develop it in an abstract way. That original idea would be an abstraction and with this structure of abstractions they would aim to discover into which cell or pigeonhole your particular case came regardless of the special circumstances which may have surrounded it. You can see that this was not the case in the common law. In the common law you decided that particular case as a case for the adjudication in law of its solution. In the civil law, as it is in Quebec, you have a code with many divisions with names which they attribute to each division, but it consists of a general abstract definition of a particular ruling of law. Every definition of that sort, and every ruling of a court has overtones of a prophecy in that it will be applicable in another case with perhaps differing incidental circumstances. The judgement under one of the articles of the French Code in France or in Quebec ends when it is pronounced. It is not looked upon as the establishment of law for the particular case. It is not looked upon as the establishment of a precedent.

When we begin to analyze the conception of precedent, we must ask ourselves, "Why is it a precedent"? How do you make it appear to be a precedent, because you never have two cases identically the same? We get into the distinction between the description of the case which has been decided and that which becomes, in effect, the law of the country for the time being. Now there may be an appeal which would wipe that out, but the only justification for following that as precedent is that it establishes some rule of law – a rule which is recognized in the polity of that country as establishing a rule subject to modification by a higher court – equivalent to statutory effect. It is law – it is not merely the decision of that particular controversy by a court acting under an article of an abstract nature.

One of the outstanding characteristics of the common law is that it is individual to the extent that it places upon the individual the duty of protecting his own rights. You have that in an astonishing degree in relation to the criminal law. Our criminal law is not enforced by an officer who oversees the well-being of a community. It is put in motion by a private individual. He lays an information – anybody not only can but is under some degree of imperfect obligation to see that the criminal law is enforced. That is not the theory underlying the criminal law of Rome as we have it in the civil law. That body of unwritten law which was built up of the decisions based on customs, the decisions of the courts and with certain modifications by the Legislature, constitutes the foundation upon which we have, for centuries been building as the society changed.

I think you can easily see that law does not precede social modifications. It is necessarily subsequent to modifications, because what is the object of law if it is not to suit the exigencies and the requirements of the social conditions to which it is applied? It is getting that regulation backed up by the force of the community which will enable life to be carried on in satisfaction of the greater amount of desire on the part of individuals with the least injury to other desires. We have various definitions but we cannot go beyond the fact that the object of the law is the reconciliation of the conflict of rights and interests of every sort. That being the case, the rule of law which gives the greatest satisfaction to that total reconciliation is the law which will prevail.

No law can be looked upon as either conclusive or without, at each end, possibilities of expansion or modification of change, because by its very nature it is indeterminate. It is sufficient for the conclusion of the present problem and application to other problems remains to be made by the courts. Now it is in the application of that more or less general concept of law that leads to the vast structure that necessarily follows the increasing complexity of social relations. When you contrast the day of nuclear energy with the day of the landing in England of the Anglo-Saxons and the simplicity of their lives then and the complication of life today, you can see that if law is to serve the purposes that it did in the early days and to serve the purposes which it must serve at the present

time, it too must become complex. It too must reduce these abstract rules to ones which will arise out of the necessities and the satisfactions of the desires or the objectives of the members of any particular community.

What is there in the common law which enables it to be modified according to the conditions of society? In the first place, those basic ideas of the common law arose out of the life of a community. Having arisen out of the life of a community, they depended upon certain factors which were known or assumed by the judges sitting in the seats of justice. There was, for instance, the open court. You will recall that in the county courts of England in the Anglo-Saxon period, the whole of the free men of a county constituted the court. And although they did not decide on the guilt or innocence of the party charged, they did decide something that was equally important: they decided who should bear the onus of proof and that proof would be either by the ordeal or by the oaths of so many men testifying to the veracity of the person complaining.

Modifications of law can take place, and do take place, by virtue of the character of that vein and stream of law which we call the common law. It has an organic influence within it which, being based upon the actual condition of the society to which it applies, necessarily possesses the capacity to change as that society changes. That may be done by statute but in certain respects it can be done in the courts of justice. It is quite true that the English rule is to apply very strictly the limitation of courts in modifying any rule of law in which only the objective features are taken into account – in which the social forces are disregarded.

It is only since the present century began that in England and in the United States an examination has been made into the character of our law. What is our relation to social change? You get the conception of natural law and you have what kind of conception there? You have a conception of a working system of ideas that are strictly out of touch with the actual life of the community to which it is applied. It is a structure that is purely an abstraction. It is deduced from the depths of the individual's intuition or perspective. It is a structure of law that is rejected as coming out of the life of the community. It is something that is absolute and eternal. It is like the subject of beauty in art. You will find it is argued, in some cases, that there is an actual objective standard of beauty in art. You will find others to say that it is wholly a subjective matter. Does it appeal to me, or you, or anybody else? If it appeals to the majority over a period of centuries, then we say, there is the evidence of beauty.

In the case of natural law, its justification may be said to be liberty of the individual but I think I would have to answer that by saying, well let us imagine an individual in the early stages of humanity. What law, at that time, is there to prevent him from exercising any of the faculties which his physical condition affords him? There is no prior law to prohibit actual conduct, behaviour or

expression. The physical and mental ability of the individual meets no obligatory rule against acting and, consequently, the civil law (as conceived to be in the broad sense) the law of mankind arises that puts limitations upon his natural freedom – a freedom which is the expression of his physical organism, his mental organism, and his emotional organism. You are bound to say that these so-called natural expressions are simply the manifestations of the life and the vitality that are existing in a human personality. That is a controversy I mention only in an incidental manner.

You may ask what means are there which justify modifications of the common law? It may be modified in very many ways. The common law is constantly suggesting new factors and I will endeavour to give you illustrations of how it has been applied by the courts and by the legislature, because we have two law-making institutions.

Law making, for practical purposes, especially where the basic ideas are concerned, has largely been left to the courts. It is true that in many respects the small areas of law have been codified. Those codifications are simply declaratory of those rules and the rulings that have been made by the courts. You cannot consider them in the same sense as you do the abstract conceptions that lie at the basis of the civil law. This shows a certain contrast between the two laws. We have had theories of the development of the common law beyond those which I have mentioned. There is the school of historical jurisprudence where you start with the basic idea which goes back to the 14th and 15th century, and that idea, through the course of the centuries, has evolved to meet the complexities of the social changes. The historical development is following the historical development of society – it is the historical development of ideas more or less detached from society. In that sense, it is somewhat like the natural law concept.

We also have the analytical school which was rampant in England during the 19th century and which conceived that all the basic ideas had already been mentioned and that all you had to do was analyze them sufficiently to make an appropriate application to the particular controversy that was presented.

Today, we have something else. We are introducing social considerations. We are beginning to see that the common law really is pushing forward under the urge of changing social demands and as it pushes ahead, it has behind it the accumulated judicial experience. We have had seven or eight centuries now of the judicial experience in settling disputes by men of high intellectual attainment familiar with the ancient customs, familiar with the changes in institutions and in social conditions. Look what we have today in the way of self-consciousness since the beginning of this century. People were not aware of it as a positive force influencing social conduct, influencing individual conduct. Not only that, but in the Western world – particularly in the United States – they became familiar with the modes of expressing certain human rights that were absolute. In the United States

they consider that their written Constitution is not the pale reflex of the law of nature. They could identify it with the divine law – it was there forever and it could not be disturbed, except by a constitutional amendment. It could not be disturbed by the courts. You saw that very clearly in the manner in which they dealt with contracts. The individualization in the conception of law was the paramount concept of the common law. The individual was everything. He was like William the Conqueror. He was alone, he could do what he pleased.

You have heard of 'yellow contracts' in the United States. These were contracts made by corporations of the magnitude of General Motors with an individual workman. The State Legislature of Illinois saw fit to say that in a contract of that sort certain provisions could not be made effective. It was not in violation of the constitutional provision to respect the validity of contract to say that these two were not in the same contracting position. One was an all-powerful group, aggregate of money power and the other was an individual who, if he didn't accept the conditions which were objectionable to him but which were required, would be left more or less on the street. He would be deprived, almost, of his economic life. The Supreme Court in the early days did hold that these provisions were in violation of the Constitution.

The same situation is found in respect to working hours. You could not put maximum working hours by any state legislature applicable to a particular enterprise. You could not deal with the employment of women under a certain age, or the hours of women for certain purposes. All of those were looked upon and argued almost to the last breath, as being violations of that conception of individualism which placed everything upon the will of the individual to do as he pleased, regardless of the social effect that if you were dismissed from General Motors you would find yourself unable to find employment anywhere else.

At the beginning of this century, these social conditions which play such a part in the individual life finally became recognized by the courts. I remember very well the *Northern Securities* case involving an agreement for virtual amalgamation of two trans-continental railways. Legislation dealing with certain features of it was declared *ultra vires*. Mr. Justice Holmes had been appointed by President Theodore Roosevelt on the basis that, coming from Massachusetts, he probably had a good sound liberal mind and was aware of the changes that were being made from time to time. But in that case the first-class lawyer disappointed the President and the result of that particular decision was an effort on the part of President Roosevelt to enact legislation or constitutional amendment to have the judgements of the Supreme Court of the United States passed upon by Congress. We had something similar to that in the 1930s when the existing court turned down a great many statutes of different kinds – both federal and state – on the ground that they were contrary to various provisions of the constitution and, in effect, nullified several of the most important pieces of legislation of President

Franklin Roosevelt.

His proposal was to enlarge the number of the court by having such a margin over the current number (nine), that he would have a majority of more liberal-minded members of the court. You will recall that was resented and rejected largely upon the force of the communication that was made by Chief Justice Hughes to the Congress. At any rate, it was a resistance to the quality of the thinking of the court at that time. As one of the humorists of the United States said, it now appears that the Supreme Court reads the newspapers. By reading the newspapers they seem to have come to a conclusion that some of those earlier decisions were not as sound as they might be. This was followed by a number of reversals of previous holdings dealing largely with, *inter alia*, matters of wages, matters of hours, employment of women.

The 'Brandeis brief' was the accumulation of a tremendous body of statistics which demonstrated – for instance – the capacity of women to work in certain areas such as laundries or in certain other occupations. That Brandeis brief was an innovation by an original mind in that these rules of law which you are enunciating or at least the decisions which you are making, based upon the Constitution, are inconsistent with the application of your law to this social state of the United States.

The introduction of social matters is not admitted – certainly in the courts of the United States – as a matter of course. That being the origin of the common law, individualism emphasized the obligation of the individual to protect his own rights and also to participate in the enforcement of law generally. Because the laws cannot change every day and the courts are bound to be proceeding backwards, they are looking at the past and are not anticipating possible changes but are viewing actual changes. We then come to see the scope that is open to any Court of Appeal as well as the Supreme Court to modify the law.

I would like to review several of the cases that have arisen within the last 25 years in which illustrations of modifications are seen. The first example can be taken from the area of contracts. It arises in the matter of the determination as to whether or not what is looked upon as a bargain is what we call a bilateral agreement or merely a continuing one. The case out of which it arose was a rather interesting one.[6] A mining engineer discovered some minerals of value. He reported it in the usual way and then was called away in connection with the war. Nothing was done for many years but that discovery became known by everybody who was interested. There was a great number of searches made by others endeavouring to locate this place. Finally a company got in touch with this chap who had found it and made a proposal that he come up – they would supply

[6]*Dawson* v. *Helicopter Exploration Co.*,[1955] S.C.R. 868, [1955] 5 D.L.R. 404.

him with an airplane and he would lead them to where this ore was. He agreed, he said: "yes, I will go up." The actual exchange was rather skeletal and the question was whether or not that was simply an offer by them that if you come up and show us the mine, we will give you 20 or 30% of the value which is reaped from that mine.

Was there an obligation on the part of the company? Could it the next day have withdrawn that offer? What did the circumstances dictate as to what the man himself had undertaken? Had he undertaken in consideration of some undertaking on their part – some promise on their part? Before the engineer could get up there, although he was within the time that he had mentioned, they sent their own man out who, fortunately for them, or perhaps unfortunately for them, discovered this mine. When the original discoverer had notified the company that he was ready to go and carry out what he thought had been bargained for, they said, "That's fine, we know where it is so it won't be necessary for you to come".

What implication could you make? Was there a bilateral agreement? Did the company agree to do anything? Did it agree to accept his services to the exclusion of any other person? Did they agree to forebear any search until he had had his opportunity to lead them to it? That is not an easy question to decide. It was either a bilateral or a continuing offer. Now you see that a continuing offer might extend up to the actual discovery and be revocable at any time until he said, "Here is the mine".

But where do you draw the line? There is no way of drawing the line at all unless you say that they agree that he should have that exclusive right to lead them to this mine if he could. And the Supreme Court held that that was a bilateral contract arising out of the necessary implication of what passed between the two parties. There was an emphasis placed upon the fact that a business relationship of that sort is intended to be effective and it can be effective by bringing out in objective form what is necessarily implied in the relations between them what was understood but not spoken. That is a good example of how the law of contract can be extended by implication from the actual circumstances of the dealings between the two men.

The United States Constitution has been developed out of what it meant in the early days when individuals were, more or less, individuals; where every man's work was almost sufficient unto itself, where there wasn't this immense combination of an aggregation of men and money to wield such power as today is represented. I think we shouldn't forget the fact, that in England at least, it was not until 1845 that full-scale organization of corporate power with limited liability was introduced. Limited liability made possible this tremendous empire that can be established: a corporate body. These modifications that have taken place in society have revolutionized the relation between individuals and these aggregates

– revolutionized the interest of the community. Our communities today are built up upon the assumption of these aggregates and their tendency to become monopolistic and the consequence is that once they do become monopolistic the common law steps in and says, "Well, you are subject to regulations."

That takes you back to the earliest stages of the innkeeper. He was under an obligation to serve anybody who is a traveller and he had to guarantee him against loss of his baggage. But that arose out of the necessities of life in those days and the change today arises out of the necessities of life today. We have in the United States these broad declarations of human rights that cannot be invaded. We have our greatest example in the legislative way of what can be done to infuse in those tremendous provisions the spirit of the common law which will deal with each case in its own facts and subjected to a view of to what that constitutional provision in its modern setting necessarily extends.

A similar situation exists in workman's compensation. That was looked upon as an invasion of a contractual right that if a man took a job, he took it subject to all the risks of the world. That judgement was delivered by the Baron of the Exchequer, Lord Abinger. I recall his words when he announced in that case that a master is not bound by the negligence of a servant towards another servant a triumph in legal and judicial expansion. Its triumph has not lasted to this day. It has been charged that this fellow-servant rule does not apply by legislative enactment. But why? Because it was recognized that it was impossible to maintain that in present day conditions it was one of the risks of the worker. The machine is liable to breakage, the machine is liable to get out of repair and you take the repair to the machine as part of the expenses of the production. But a man is injured in the same way at the same time the machine is and, of course, his loss must be borne by himself. That doesn't appeal to the intelligent person today, particularly the intelligent lawyer, and consequently we now know that workman's compensation is a legitimate expense of the workings of any industry.

In torts we have opportunity for the expansion and *Donoghue* v. *Stevenson*[7] is a good example. As Lord MacMillan said at that time, the categories of negligence are never closed. You have that expression 'negligence'. It is not a determinative definition or a word, it is indeterminate and consequently, it would be applicable to new cases as new situations arise. There is another case – a very interesting one. Most of you are familiar with it. It arose in British Columbia where a case of causation was raised.[8] In the early law it was the case of a man being injured. Who injured him? And it was the man who injured him and that man only who must be proved to have done the injury that created liability.

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[7]*Donoghue* v. *Stevenson* [1932] A.C. 562, 101 L.J.P.C. 119, 147 L.T. 281.

[8]*Cook* v. *Lewis* [1951] S.C.R. 830, [1952] 1 D.L.R. 1, affirming [1950] 2 W.W.R. 450, [1950] 4 D.L.R. 136.

In British Columbia there were a great many people who enjoyed shooting birds – shooting birds at short distances with guns that don't carry too far. One day, a holiday of some sort, there were a great many people shooting in not too large an area. A third person who was walking along on a lower level was seen by one of two hunters and he wasn't seen by the other. He was going forward to and reached a thicket of some size and just at the moment, a bird flew into the thicket and both these hunters fired. The response they got was a cry from this man who received gun pellets in the face. They could make no distinction between those pellets. The guns were the same calibre and they fired the same shell, the same size shot. What were you going to do? Here is a man who was very seriously injured.

If you apply the old rule, you have to prove which one of those two men had caused the shot in his shell to pepper that man's face. What would you have done? We have no general law that will step in in such a position and give assistance to the individual. He has to look after himself. I think the settlement in which there was a dissent was this: that one of them had been guilty of negligence. One of them had seen this man go towards that thicket and he, in that very fact itself, raised in his mind the apprehension that he might be in that thicket when he fired the shot. At this point, it would not be very difficult to say, "Very well, you were negligent in firing at all." You have to show that it wasn't your shot that did the mischief. That has been recognized certainly in all the textbooks that I know of and it is necessary that here we have an area of less than a quarter of a mile in which there are a half dozen men shooting at birds. Their shots wouldn't carry over 200 feet. Therefore, in those close quarters and under such conditions as were present then, you have to deal with the realities of it in the manner that will give satisfaction to the fair minded person who is looking upon such a scene. So you see there is hope for the expansion of tort.

Take another case. A person invites somebody to go with him from Saint John to Fredericton and back in his automobile. He wants company. You go and he is careless in driving. He is negligent and he injures you. Apart from statute, there doesn't appear to be any doubt that your claim against him is a valid claim. It would be based upon the normal condition that when he invited you, he impliedly gave you the assurance that he would drive reasonably and carefully. There we have an example of what I would call an undertaking.

The undertaking as connoted by the term 'assumpsit' was known in the 15th and 16th centuries. There was the farrier who undertook to shoe your horse. There was the doctor who undertook to cure you, and other undertakings – all of which involved this: that you voluntarily placed an interest of yours at the risk of the action of another. You put your horse in his possession and he said that he was capable of shoeing that horse in a proper way. Or he had professed to be a doctor. You submitted your body to him. You allowed him to do what he said would be sufficient to give you your health again. That was the undertaking which

is to be distinguished from a promise – which is to be distinguished from a contract. At that time the conception of promise as a binding contract hadn't evolved sufficiently to be attributed to the action of assumpsit. That word itself, in its earliest and proper use, as in the case of the common carrier or of the farrier or of the doctor meant the taking of an interest into their hands, and acting in relation to that interest carelessly and negligently.

In Nova Scotia there was a chap who was going to Windsor from Halifax and there was a young woman who was working in Halifax who was going home to Windsor and they evidently knew each other. He said "Come along with me and we'll go". There were two others, a young woman and man and they went together. In going along the road they stopped to get some liquor, and the driver became under the influence of liquor and began to drive recklessly. The result was that she was injured seriously, harmed for the rest of her life. The question was whether or not she assumed the risk.

The assumption of risk has a legitimate place where the danger is obvious. It is rather difficult for me to see how you can eliminate the question of that assumption. But here is a case now where you might say there was an invitation which is much the same case I have put. It was held that the driver had undertaken to use care. In that case, under the statute, the plaintiff must prove gross negligence and it is not a difficult matter to show gross negligence. But the essence of it was the burden of proving either gross negligence or that the risk was not assumed. It was a question of onus. The case stands for this: that where a person undertakes certain circumstances, to take an interest into his custody and expose it to his action, then he must in some way or other, by the circumstances or by express declaration, inform the person who is supposed to take that risk of negligence.

You can see, if there was an actual exchange, what the result would be. He would say, are you willing to take the risk of my negligent driving. If you are not willing, I cannot take you. You can imagine that as vocally exchanged between the two parties. If nothing is said, how are you willing to arrive at any satisfactory consensus if you don't look at what was necessarily understood by the parties? What did they take for granted? What did they assume? Of course that he would take this young girl to Windsor and that would mean that she would arrive in Windsor uninjured by careless or negligent driving.

You can easily imagine a case where you asked to be taken to Saint John. The driver says, "Well, I am in a hurry. If you want to come with me and take the risk that I take, all right. If you don't, then don't come". I think that there you have an interchange between the parties that negatives this assurance or undertaking of care. The person accepting that accepts it on those terms. I think that is a bit of addition to the common law applicable.

In ordinary phraseology, the assumption of risk was stated, "Did she assume the risk?" Generally the burden was on that person to prove that she or he had not assumed. But if you put the onus where it belongs – on the person who is in charge of the instrument of danger, the person whose management will determine whether or not the injury results or damage results – then it seems to me you satisfy the conception of the common law where evidence, in the 16th century at least, put the onus or obligation of discharging that burden on the proper person.

Consider the question of evidence. In the *Snyder* case, the question was whether or not in a criminal case evidence could be required from the Department of Justice pertaining to the income returns made by the accused. The objection to it was the Dominion had an interest in that and that interest would be impaired if the courts were allowed to order the production of such a document. I think you will agree that it was a ridiculous stand to take because these are not sacred instruments. The prohibition in the statute is inter-departmental so that the salaries that are reported will not become the subject of the gossip between parties working in the department. But you remember that the case of the lost submarine where the House of Lords decided that once you had a Minister of the Crown declare that here is a case where the interest of the Crown is involved which would be dangerous to disclose, that was conclusive and no qualification could be made. The evidence must be rejected. The Supreme Court declined to follow that. They said: we won't determine whether or not that is such a matter of public interest but we will determine this. Can it be a matter of such public importance? Is there sufficiency of evidence in negligence? Is there a sufficiency of evidence for the jury to find negligence?

There is always a question of interpretation: the interpretation of statutes, the interpretation of judgements, the interpretation of rules of law. Our whole process of study and scholarly work and adjudication consists of getting down deeper and deeper into the small and finer units of the essences of adjudication. Take the question of precedent. How are you going to determine, in the first place, that any case lays down law? A case lays down a decision, certainly. But is it a binding law? Is it looked upon as something that ought to be followed? It is subject to appeal, and it may or may not be appealed. If it is confirmed by a Court of Appeal, does it then become a law in the sense of an obligatory rule so that at least a coordinate jurisdiction or a lower jurisdiction will follow it? If it is law, if that decision does declare a rule which becomes a rule of law, then it ought to be obeyed by every other court except the higher court. There is that question, "When does a precedent become a rule and what is the rule?" Every precedent, so called, consists of a great many features of fact. There may be a dozen. What are the controlling facts? What can you pick out and say, "Now here is the essence of that case" and on those *A*, *B*, *C*, and *D*, of facts, that decisions rests and, therefore, when you have those four facts again, you will follow that because it is law. It has been laid down by this court and *ipso facto* it becomes a rule of

our common law.

That raises questions of some importance and all we can say, I think, at the present moment is this: that it must be in the judgement of the superior court what the essential ingredients of that so-called precedent were and what the case laid down. If there is no difference exhibited in the Court of Appeal, they will follow it as a rule of law – and not as in the case of the civil law, a mere determination of a particular dispute between A and B. We do have these questions that arise today in interpretation – we have to interpret the precedent, we have to interpret the facts, we have to come to a conclusion about what the essential facts were. We have to relate back to the decision and then we have the question of appeal. You cannot say that the only law that is laid down is that by the highest court – say the House of Lords or the Supreme Court of Canada. We live in the presence of what we look upon at least as law and, once the decision is made, the effort is to describe that decision in the form of a rule.

We also have the question of interpretation of statutes. Statutory interpretation is more vital than it has ever been and of the utmost importance particularly in a federalist state. There is the case in Saskatchewan that gave great opportunity for the younger members of the law school to excoriate the bench (which is a pleasing engagement, I have no doubt, but not perhaps as effective as it might otherwise be). It was a question of making use of the refusal to take a breathalyser test. Here is a statute of Saskatchewan that says that "In the case of an accident in which somebody is injured, if the driver of the car, who is looked upon a being responsible for the accident, refuses to submit to a breathalyser test, that refusal will be taken as one of the elements in determining whether or not his license will be suspended." I think if I may speak of him, the Premier of this province would be much in favour of applying that breathalyser test. I was rather pleased to hear him say the other day that drunken drivers would be dealt with, in effect, without mercy. I think that's the way they ought to be dealt with. But the younger members of the bar who are interested in individual rights – you know that safeguard that must be looked to beyond anything else – forgetting that our individual rights today are supported by the community – that we wouldn't have any rights at all if they weren't supported by the community. They have criticized that decision which held that the case was not in violation of s.289 of the Code which said, "No man shall be required to take a breathalyser test." The question was very simple. Did that word "require" extend to the fact that they might use that refusal, not as a justification of cancellation but as one of the circumstances that might be taken into consideration?

I haven't any doubt in the world that if a man who is known to be a teetotaller, a man who is not concerned with carelessness in any way, had in some emergency been guilty of causing an accident and, through a sense of his individual rights, he refused to take a breathalyser test, and he had been brought before a tribunal – whatever it might be – which would determine whether or not his

license should be cancelled, he would be believed when he said, "I had nothing to drink". So it was only in the situation in which it might turn the scales that it would be effective at all. In the decision of that case there was taking into account the fact that in the construction of the *British North America Act*, you are really engaging in an act of statesmanship.

Who was it that drafted the *British North America Act*? It wasn't merely a lawyer. Sir John MacDonald was a lawyer, but fundamentally he was a politician in the sense of a man of politics. He was concerned with human government from the political aspect. He was the man who was chiefly interested in drafting the provisions of that important statue. So, you see, statesmanship is involved. The last time I had the privilege of being here I read a short excerpt from an article written by Lord Haldane on Lord Watson, in which he spoke of the statesmanship of Lord Watson very properly. It is a statesmanship act that is performed when you say, "This legislation is constitutional or unconstitutional".

The province has exclusive regulation of the highways within the jurisdiction. It wants to see that drunkenness is eliminated from the operation of vehicles. Just yesterday, six people were killed on the highways of New Brunswick, so you see how serious this matter is. In the Saskatchewan case there was a question where the word "require" was ambiguous. It might mean that the driver might be put into a prison for contempt. He might be subjected to a fine or a penalty or some other thing. Then the question was whether that would extend in its general scope to this requirement that the fact would be taken into account. There you have an interpretation that does recognize, in my opinion, the provincial interest – the public interest – the interest of safety upon our highways. There you have where interpretation is concerned with or is responsive to certain elements of public interest where that element is of importance and of a character that must be regarded particularly in the present day.

There are people who object to that. I often think it might do them well to read the tale of Socrates' last days. Remember he was surrounded by bright young men who were interested in philosophy and they knew that the charge was made against him that he was corrupting the young minds of that age. They said, "We want you to leave Athens. We will guarantee you safe conduct beyond this country and your life will be spared. We think too much of you to have you go to your death on such a false determination as that". Do you remember his answer? He said, "If I have violated the law of Athens, I must submit to the punishment under the laws of Athens." It might be enlightening to some of these young people to realize that there has been a man of that sort on earth within the historical scope of the present day.

We have different means by which today the spirit of the common law is called upon to act in relation to new circumstances. Take the criminal law. We have a

perfect example of that in the *Boucher*[9] case. The *Boucher* cite case was one in which one of the worshippers of Jehovah was charged with seditious libel in selling one of those weekly papers. It denied and rather bitterly and furiously denounced the actions of the Roman Catholic clergy in Quebec. It was called forth by the Boucher treatment that had been accorded the French people who had joined Jehovah's Witnesses. Their meetings were interrupted, their property was confiscated and they were subject to every form of indignity. Up came this "blast", sold by a mild-mannered French speaking Canadian and he was charged with seditious libel. If this had been 200 years ago, there would have been no doubt at all that he would be found guilty because seditious libel was simply a criticism of those in charge of the management of society. He had criticized the Courts, he had criticized the Church, he had criticized the police. Everybody in some degree of authority had been criticized very severely. They had in fact been denounced. The law of seditious libel was criticism of those in authority. You had to accept what they did as the proper thing to be done. You were not permitted to use the instrument of the press – the instrument of writing and paper – to criticize your superiors (as it was called in England, your betters). That came up in the 20th century.

When criticism was looked upon as a crime, we had a conception underlying the minds of the people that the Governor had derived his powers from either the divine authority or some metaphysical matter which was incapable of close perception. Charles I and James did their best to establish the rule of divine law in the Sovereign at that time. But in the 18th century, after the French and American Revolutions, we began to talk about the democratic way of life and democratic government. We made the rule that the actual technical government, the Cabinet, must resign if it is defeated in the House of Commons. All of these different features of democratic government came to the front.

Particularly in the United States, the provisions of the Constitution came. You will allow me to refer to the Fifth Amendment in the Constitution of the United States, which prevents a man from being impelled to incriminate himself. It has become the knowledge of the mass of the people in the United States. It was illustrated perfectly when one man who was sentenced to death by the Mafia was seeking the protection of the law against the members of that clique. He consented to tell about their doings. In the course of his appearance before one of the committees of the Senate, in order to make sure he understood what he was doing, the chairman of the committee began to tell him about the Fifth Amendment. He said, "Oh, never mind that. I know all about it, I know all about it." So the crooks, the criminals of the United States, are well informed about the American Constitution on individual rights. They do not need any help from

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[9]*Boucher* v. *R.* [1951] S.C.R. 265, 11 C.R. 85, 99 C.C.C. 1, [1951] 2 D.L.R. 369 (S.C.C.), reversing 8 C.R. 97, 95 C.C.C. 119 (Que. C.A.).

the chairman of a Senate committee. It's an additional element, in effect, that the public today – particularly in the United States – is consciously informed, is consciously interested in these matters of the magnificent propositions that lie in that Constitution.

We have a century in which we have been gradually approaching the conception that the government is not the ruler of the masses, but is the servant of the masses. This means that in order to maintain the government of democracy, we must have criticism. Criticism is essential to aid in the security of honest and intelligent government and if we can't have criticism, we can't have democratic government. Once you have a fundamental change taking place in society, it becomes ridiculous to say that you cannot criticize. Consequently, the basis of the law of seditious libel has its foundation removed. The result is that once you have that element of discussion, of criticism, you are living the true life of a democrat, of a democratic society. The same thing is appearing in our treatment of responsibility.

Today, I doubt that any area of law is under closer scrutiny than the criminal law, because we have come to the field of metaphysics. What is the human will? What is its basis? What gives it the instigation to action? How is it to be defined or described? Because in some way or other we have assumed that the man with a will stands free and aloof from every external or internal influence – that the act he commits proceeds solely from the will and that will is as uninfluenced by the deeper passions as any action, voluntary or involuntary, that his organic nature can produce. Our psychiatrists and our psychologists have come to a different conclusion about some of these things. We realize now that you have an unbroken line running right from the idiot to the genius. Where do you draw the line and say now here is the point of responsibility? Anything above that and he goes to prison – anything below that and he is either confined in an asylum or he is subjected to treatment.

In the Province of Ontario they have established something that is of the utmost importance and that is an intermediate stage. A man is brought before the magistrate and he gives evidence *prima facie* at least that there may be some trouble with him. He may be a victim of a neurosis or a psychosis or something that goes to affecting his will. That idea gathers to itself the force of all the passion and emotion of which he is capable. A man may be in various degrees of that. He may be in a condition which is susceptible of cure or remedy. We do have means of treating a disturbed mind. The result is, in Ontario today, he can be sent for three months to an intermediate institution where he is studied by doctors; he is treated. At the end of the time they pronounce whether he has been cured and he has succeeded in eliminating this neurotic condition or psychotic condition or whether it is too deep for treatment of that sort. In the latter case, he is sent to an asylum. If he is pronounced perfectly in command of his faculties, he is returned to the magistrate. Then, of course, there is the

question of what was his condition at the time he committed the act. But the important thing is that they are drawing into law the science, the skill, the knowledge, the understanding that had been brought together in the other sciences so that our regulation of society by law, is looked upon as one – I think the most important – but only as one of the regulatory features of the governments of a democratic society.

Now you had a short time ago a meeting in Toronto of the Chief Justices of the Dominion, who were concerned with the question of sentencing. I suppose in that case you ask yourself first, what is the object of sentencing? What is the object of punishment? There is no doubt as to what the object was a thousand years ago. It was to punish a man the way you punish a child. It was to inflict upon him pain of some sort. It was a vengeance in effect and it was looked upon as a necessary ingredient in the subject of punishment. Professor Beale in his treatment of the criminal law emphasized that. He agreed with it. He said it is a punishment for doing an act. I agree that if the will of a man, of an individual, is independent of every other faculty and every other property of that man, and that he is as free in decisions to do as not to do an act, then you have a clear case of responsibility. But where a human will may be controlled by the internal conditions of his emotions, by his hate, by his love, by his anger from time to time, by the conditions which have infinite causes, then you must stop when you attempt to say that he is free from everything except that volition isolated from everything else.

I think it is nonsense to say that the will is isolated from everything else. It is part and parcel of the human organism as an entirety and it must be looked at and it is being looked at in that light today. The important thing is that here is an extension of the common law. It is largely by statute but it makes no difference. It is probably too great an extension for any court to undertake today but has taken place.

It seems to me that in this country, with our scholarship of schools and with our accentuated interest in the scholarly understanding and research in law, we are reaching the stage where we can safely trust our highest tribunal to the exercise, the application of our common law tradition as an instrument of modification.