

PUTTING SENATOR DAVIES IN CONTEXT

Grant Gilmore*

Senator Davies, by his own testimony, stands convicted of having committed an original idea. The Nonprimacy of Statutes Act is something new under the sun. By way of analogy it is tempting to think of the first appearance of such major heresies as the ideas that the earth is round and revolves around the sun. The temptation must, however, be resisted. The size, shape and mobility of our planet have presumably always been much as they are today; there is no reason to believe that they will ever change appreciably, short of the apocalyptic moment when the laws of thermodynamics impose their final solution. But ideas about the law (or about legal systems) do not have such a comforting aura of eternal truth.

Most jurisprudential discussion starts, and frequently ends, on the level of platitude. For openers, let me suggest this: ideas about the reform of a legal system arise in a particular society in response to what Holmes called the felt necessities of a particular time. Senator Davies proposes to reverse all our thinking about the proper relationship between court and legislature, between judicially determined rules of law and legislatively mandated rules of law. Such a proposal, if it had been made fifty years ago, would, I dare say, have been taken by all qualified observers as a piece of lunacy. Perhaps fifty years hence it will seem equally absurd. But we need not concern ourselves with the ideas of the 1920's, which we cannot recapture, or the ideas of the 2020's, which we cannot foresee. What is there about our legal situation in the 1970's which can throw light on why Senator Davies should have made his proposal in the first place and why academics like Guido Calabresi and myself should, as we do, take it seriously?

The theory of legislative supremacy and judicial subservience, which most of us accept as an article of faith, is one of our legacies from the late nineteenth century. In earlier times English and American courts had given the meagre legislative product short shrift. The leading maxim of statutory construction was that statutes in derogation of the common law were to be strictly construed.

* Professor of Law, Vermont Law School.

That maxim, in effect, assumed ultimate judicial supremacy: whatever statutes the legislature might enact would be tested against, read in the light of, the vast and slowly changing body of the common law, which would not be suddenly reshaped to meet a legislative whim. Indeed statutes which received a hospitable welcome in the courts were themselves translated into common law principles and no longer treated as statutes. The sixteenth century statute of Fraudulent Conveyances and the seventeenth century Statute of Frauds are the most celebrated examples of this process of "judicialization": the courts borrow a principle, initially statutory, erect a common law structure around it and forget the statute. However, as the nineteenth century wore down into the twentieth, the idea of judicial supremacy weakened and lost out to the opposite idea of legislative supremacy. Before World War I Dean Pound was eloquently making the case for an expansive reading of statutes and pouring scorn on the "derogation of the common law" maxim.

The nineteenth century reversal of roles between judiciary and legislature took place in the course of the first concerted rush to the statute books in our history and was obviously related to it. The new style of industrial capitalism which flourished after the Civil War posed a host of novel problems whose immediate solution seemed a matter of urgency both to those who opposed the new dispensation and to those who supported it. Both radicals and reactionaries stormed the state capitols, petitioning for redress of grievances.

On the whole the radicals—who once styled themselves populists, then progressives, and finally liberals—seem to have embraced the idea of legislative solutions even more enthusiastically than their opponents. Take, for example, the problem of industrial accidents. The judicial response, as might have been expected during a period when civil liability was being cut back on all fronts, made the case of the injured factory or transportation worker all but hopeless. To the existing common law defense of contributory negligence, which had emerged earlier in the century in a non-industrial setting, the courts quickly added, for the employer's benefit, the defenses of assumption of risk and fellow servant. The progressives championed statutory workmen's compensation systems which were put forward as a mutually beneficial tradeoff: the injured factory worker gave up his (almost nonexistent) right to recover a large damage award from

a sympathetic jury; the employer accepted liability without fault and without regard to the common law defenses, limited to the schedules of awards which were written into the statutes. The triumph of the workmen's compensation movement, after it had successfully run the constitutional gauntlet, was hailed by the progressives as an example of the law at its best: reactionary judges being put in their place by forward-looking legislatures.¹

The progressives can hardly be faulted for not having foreseen in the 1900's that a persistent inflation would be one of the notable features of twentieth century capitalism. The statutory award schedules (frozen into place by legislative inertia) thus became almost pathetically inadequate to deal with the problem. The transportation workers, who managed to stay out of the workmen's compensation system, have fared much better than their brothers in the factories. Under the Federal Employers Liability Act of 1908 (which, as originally enacted, covered only railroad workers but was extended to cover seamen by the Jones Act of 1920) they retained their tort action for damages, free of the three common law defenses. The FELA (or Jones Act) plaintiff did have to prove the defendant employer's negligence but in time, both on land and at sea, the statutory criterion of "negligence" evolved into something indistinguishable from liability without fault.²

The reactionaries were not far behind the radicals in turning to the legislatures. The codification of commercial law, which began with the Negotiable Instruments Law (NIL) of 1896, was carried out under the auspices of the American Bar Association with the enthusiastic support of the bankers. Indeed the only adverse reaction to the NIL came from Dean Ames of Harvard who had a number of (as it turned out, well-founded) technical objections to what he conceived to be a miserably drafted statute. But, despite the enormous academic prestige of the Dean of the Harvard Law School, the

1. For the detail of the developments rehearsed in this paragraph, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 261-64, 568-88 (1973). The proposition that "civil liability was being cut back on all fronts" during the post-Civil War period may not command a universal suffrage. For my own thoughts on the matter, see G. GILMORE, *THE DEATH OF CONTRACT* (1974); G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

2. On FELA, the Jones Act and the dilution of the negligence criterion, see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 6-20 to 6-28, 6-34 to 6-44 (2d ed. 1975).

NIL, which essentially codified New York banking practice, promptly became the law of the land.

We are apt to think of a successful codification as reformist, as bringing the law up to date, as putting the clock ahead. The NIL is a useful reminder that it need not be that at all. The common law rules of negotiability had been put together during the first half of the nineteenth century; they represented, as of that time, a remarkably sensitive judicial response to mercantile (as well as, although to a much lesser extent, banking) needs. By the end of the century the courts were beginning to question whether the old rules continued to make any sense in the light of the transformation of our economic (including our banking) system. The bankers, however, who had become the principal beneficiaries of the old rules, wanted them preserved without change. What they wanted, and what they got in the NIL, was a statutory formulation of the pure (or pre-Civil War) common law of negotiable instruments. The courts, of course, continued to nibble away at the statute as they had previously been nibbling away at the common law rules themselves.³

My point is that from the 1890's through the 1920's the idea of statutory reform linked with the principle of legislative supremacy became popular across the entire range of the political spectrum. Liberals and radicals vied with conservatives and reactionaries in upgrading the legislative and downgrading the judicial process. That the future belonged to the legislatures (and to the administrative agencies which they created in their own image) and that the courts would play a progressively more trivial role in our society were propositions which no one seems to have disputed. Indeed the Legal Realist movement of the 1920's and 1930's, which was taken both by its friends and its enemies as a liberal, even a radical, approach to law, was essentially a critique of the shortcomings of the judicial process; the Realists all shared what now appears to be an embarrassingly naïf belief in the "expertise" of legislative bodies and administrative agencies. It was no accident that Karl Llewellyn, the proto-Realist, later became, under eminently respectable

3. The two preceding paragraphs summarize the content of an article on *Formalism and The Law of Negotiable Instruments* which is to appear in a forthcoming issue of the CRIGHTON LAW REVIEW.

auspices, the Chief Reporter for, and principal draftsman of, the Uniform Commercial Code which remains the most massive project of private law codification undertaken in this century.⁴

At the time when the legislative supremacy principle was becoming enshrined in the consciousness of lawyers (and judges), the statutory harvest was still, by present standards, miniscule. The state legislatures had intervened, to reform or to codify, in only a few areas. The federal Congress had established the first regulatory agencies, notably the Interstate Commerce Commission, and, with the Sherman Act, moved to control the "trusts". But we still lived, mostly, in a common law universe. (It is worth noting that the procedure for reorganization of insolvent corporations, invented by the federal judges after the Civil War, remained a judicial specialty until the enactment of the 1938 revision of the federal Bankruptcy Act.)⁵ Furthermore, the drafting style which prevailed through the early part of this century was, again by present standards, extremely loose: even when the legislature had spoken, there was plenty of room for argument as to what it was that the legislature had said. And, finally, the legislatures were not overburdened with work: year-round sessions of the federal Congress, for example, did not become a feature of our political life until just before World War II. If the legislature made a mistake one year, there was no great difficulty in correcting the mistake the following year. For all the reasons that have just been rehearsed—no doubt others could be added—the proposition that judges were, and should be, entirely subservient to the legislative command did not have, as late as the 1920's, anything remotely like the meaning the same proposition had acquired a generation later.

The floodgates burst in the 1930's. We associate the phenomenon with the New Deal and liberalism but I dare say the same thing

4. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). For my own, not necessarily consistent, thoughts about Realism and Llewellyn's role, see Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037 (1961); Gilmore, *In Memoriam: Karl Llewellyn*, 71 *YALE L.J.* 813 (1962); Gilmore, *Book Review*, 22 *AM. J. COMP. LAW* 812 (1974); G. GILMORE, *THE AGES OF AMERICAN LAW* 68-98 (1977).

5. On the history of the federal equity receivership, see 6 *COLLIER ON BANKRUPTCY* ¶ 0.04 (14th rev. ed. 1972). One of the earliest cases in which a receiver was appointed to manage the affairs of an insolvent railroad pending its reorganization was *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872).

would have happened if Herbert Hoover (who campaigned as an economic interventionist) had defeated Franklin Roosevelt (who campaigned as a budget-balancer) in 1932. There were, Heaven knows, a sufficiency of problems to be solved in the crisis spring of 1933. Conservatives and liberals alike had come to think that the road to salvation was paved with statutes. So the draftsmen set to work. In the event, the New Deal draftsmen were people who had served their apprenticeship in such progressive experimental laboratories as Wisconsin under the La Follettes and Pennsylvania under Gifford Pinchot or in the law schools where they had taken part in the Realist movement (as professors) or been influenced by it (as students). But if the election had gone the other way and the draftsmen had been mostly people who had served their apprenticeship in the great law firms, the United States Code would have swelled and bulged at exactly the same rate.

The style of drafting which came in with the New Deal on the federal level—and later trickled down to the state level—may have had even more serious consequences than the simple piling up of statutory text. Draftsmen now aimed at an unearthly precision of statement and scorned the cheerful ambiguities of their predecessors.⁶ Needless to say, they did not achieve their goal but they did succeed in making the process of adjusting their statutes to changing circumstances a great deal more difficult than it need have been.

The reasons why the new drafting style triumphed are mysterious. One possibly relevant fact is that much of the drafting was done by people—for example, former law professors—who during the 1920's and 1930's had been captured by the mystique of the social sciences. They thought of themselves as engaged in a scientific endeavor. They were not real scientists, not even real social scientists; they were, we might say, scientists *pro hac vice*. But they affected what they conceived to be the scientific style, which has caused us all much grief.

By the 1950's our legal system had been effectively transformed from a predominantly common law system to a predominantly sta-

6. For the use of the term "cheerful" in this context, I am indebted to Professor Arthur Corbin who was accustomed to say that draftsmen should approach their task in a cheerful spirit and not worry too much (or at all) about precise definitions.

tutory system. This revolution had been carried out with extraordinary rapidity and our new statutory corpus juris consisted in large part of statutes which had been drafted during and after the 1930's. But the world of the 1950's was at a far remove from the world of the 1930's and many of the statutes dating from the New Deal era were already showing distinct signs of age. To make matters worse, the once leisurely pace of legislative activity had accelerated enormously. In a polarizing society in which crisis had become endemic, it was no longer possible to draw legislative attention to any but the most urgent problems of law reform. We had, legally speaking, managed to put ourselves into a box from which there appeared to be no way of escaping.

Future historians will find American case law of the period which begins with the 1950's uniquely fascinating. The long period of voluntarily accepted judicial restraint was succeeded, almost overnight, by what has already become a lengthy period of judicial activism, which has been quite as notable in private law as in public law and in the state courts as in the federal courts. A great many judges in a great many courts seem to have begun casting around in the hope of finding, like so many Houdinis, the way to escape from our statutory box.

Even during the period of conceded legislative supremacy the judges, of course, always had available the technique of statutory misconstruction: an excellent example of the successful use of that technique was what the courts did to the NIL early in this century. But misconstruction is a technique of limited usefulness at best and its usefulness progressively diminishes as we become hemmed in by statutes artfully drawn to be judge-proof. And, as we know from sad experience, it is a bad technique which leads only to confusion and jurisprudential *déspair*. By the 1930's the law of negotiable instruments, to continue with that example, had become a chamber of horrors after a generation during which the judges had practiced their black arts on the NIL.⁷

A new technique, which seemed to spring up like Jack's beanstalk during the 1950's, was that of "constitutionalizing" the issues

7. See the article referred to in note 3 *supra*.

thought to be presented by unpopular statutes.⁸ This technique was mostly used to get rid of statutes of fairly ancient vintage—for example, the nineteenth century birth-control and abortion statutes—but could perfectly well be used without being so limited. It was also used mostly by judges, perceived as “liberals”, who were doing in statutes thought to be left-overs from a repressive age; it could, at another period, equally well be used by “conservative” judges to sweep away the debris left over from a bygone age of liberalism. After a relatively brief experience most people seem willing to concede that the technique of constitutionalization is even worse than the technique of misconstruction. It gets us out of one box only to put us into another, which, given our national obsession with constitutional principle, will be even harder to get out of.⁹

No court, to the best of my knowledge, has yet stated unequivocally that it has power to nullify statutes on other than constitutional grounds. But more than one court has equivocated on the edge of the precipice.

In a series of personal injury and death cases within the admiralty jurisdiction the Supreme Court of the United States during the 1950's and 1960's in effect nullified the Jones Act criterion of negligence for shipowner's liability and furthermore held that harborworkers (who were not Jones Act seamen) could also recover full damages under the Court's doctrine of unseaworthiness with ultimate liability being borne by the harborworkers' employers (who

8. See Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979). My own attention was first drawn to this idea by Guido Calabresi in his forthcoming book *THE COMMON LAW FUNCTION IN THE AGE OF STATUTES*. See also Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979).

9. Another judicial “technique” for avoiding unwanted statutes is, of course, to decide a case without acknowledging, in the opinion, the existence of a relevant statutory provision. No doubt this technique was more common fifty years ago than it is today. In the Uniform Sales Act case law, the statute was almost never cited (reference being made instead to S. WILLISTON, *THE LAW OF SALES* (1909), Williston having been the draftsman of the Act). For a relatively recent example involving the Sales Act, see *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949). For a more current example on an exalted level, see *The Heron II* (*Kaufos v. C. Czarnikow, Ltd.*) [1967] 3 All E.R. 686 (H.L.) (the missing statute, not referred to in any of the many opinions delivered in the case, is the Carriage of Goods by Sea Act). As a matter of fact, the relevant COGSA provision (on “deviation”) would have been helpful in reaching the decision which all the judges in the House of Lords wanted to reach; perhaps the law lords were simply in a common law mood.

were thus stripped of their limited liability under the Longshoremen's and Harborworkers' Compensation Act of 1927).¹⁰ These cases were decided by a bitterly divided Court, received a bad press in the law reviews and, as to the harborworkers, called forth a Congressional rebuke in the form of amendments to the Compensation Act enacted in 1972.¹¹

In 1970 the Supreme Court took a further step down the road to statutory nullification. In *The Harrisburg*¹² the Court had held that no remedy for wrongful death was provided by the general maritime law. In time that "gap" in the maritime law was filled in and the missing remedy was provided under state and federal statutes. However, various "anomalies", to which the Court itself contributed, developed in administering the now exclusively statutory remedy for wrongful death occurring on navigable waters. In *Moragne v. States Marine Lines, Inc.*¹³ a unanimous Court, in a magisterial opinion by Justice Harlan who had regularly dissented from the Court's Jones Act and harborworker cases, announced that it was making a fresh start by overruling *The Harrisburg* and establishing a remedy for wrongful death under the general maritime law. In fashioning the new remedy, Justice Harlan explained, the federal courts were not to consider themselves bound by any of the statutes, state or federal, which had for the better part of a century been the exclusive source of the recovery. *Moragne* was universally praised in the law reviews as an act of judicial statesmanship.

The Supreme Court admiralty cases are, as I suggested, equivocal. Article III, § 2 of the federal Constitution extends the "judicial power of the United States" to "all causes of admiralty and maritime jurisdiction". Thus admiralty may be a field of law uniquely committed to the "judicial power". And the Court never announced in so many words that it was nullifying or abrogating concededly constitutional statutory provisions. The technique which it developed and which reached its highest point in Harlan's *Moragne* opin-

10. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 6-38 to 6-46 (2d ed. 1975).

11. Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251-65. See A. MILLUS & J. MANES, *THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND ITS EXTENSIONS* (1978).

12. 119 U.S. 199 (1886).

13. 398 U.S. 375 (1970). The "anomalies," referred to in the preceding sentence of the text, are set out in 398 U.S. at 395.

ion was, by broadening the base of recovery under "general maritime law", to engulf or submerge the offending statute. There are of course a great many statutes which were originally enacted to circumvent some preexisting common law prohibition. The *Moragne* technique suggests interesting possibilities to any court confronted with such a statute if the court decides that it would like to return to the common law tradition freed of the statutory restrictions.

In 1872 the California legislature enacted a Civil Code which was a slightly revised version of the so-called Field Code drafted in the late 1850's for enactment in New York. The Code failed in New York but, by an unlikely turn of events, turned out to be just what was needed in California as a device for replacing Spanish law with Anglo-American law when the Golden State was detached from Mexico and re-attached to the United States. Shortly after the Code's enactment John Norton Pomeroy, later the author of a justly celebrated treatise on Equity, wrote a series of articles in which he realistically proposed that the courts should construe the Code as having imported the common law into California subject to the same possibilities of future growth that existed in any other common law jurisdiction. What came to be known as the Pomeroy rule was enthusiastically supported by all concerned. For the next hundred years the law in California developed in much the same way that it developed in the rest of the country without benefit of codification.¹⁴

In *Li v. Yellow Cab Co. of California*,¹⁵ the Supreme Court of California moved as close to the brink of outright statutory nullification as any court has yet ventured. *Li* was an automobile accident case in which both plaintiff and defendant were found to have been negligent. The trial court, sitting without a jury, ruled for the defendant on the ground that plaintiff's contributory negligence barred any recovery. When the case came on appeal to the supreme court, a majority of the justices of that court (perhaps all of them) evidently favored scrapping the common law contributory negligence

14. See the California references in Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247, 249 n.8 (1979).

15. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

rule and replacing it with a comparative negligence rule under which damages would be apportioned according to fault. The trouble was that § 1714 of the Civil Code of 1872 had, in a long and uniform course of judicial decision, been construed as an adoption of the common law rule ("mitigated" by the last clear chance doctrine). To make matters even worse, the attempt to adopt a comparative negligence rule by amendment of § 1714 had been made in each regular session of the California legislature since 1971 and had failed each time. Nevertheless, the majority of the Court determined to press forward.

There was, as a matter of fact, a relatively easy, if somewhat undignified, way out of the Court's impasse. Not only § 1714 but the accompanying 1872 Commissioners' Code Note, read with care, were extraordinarily ambiguous. The Court could perfectly well have announced, as it was urged to do by *amici curiae*, that § 1714 had been intended to adopt a comparative negligence rule in the first place and had simply been misconstrued by the California courts. That would have required the overruling of all the earlier cases but would have left intact the concept of statutory integrity. The majority justices, however, decided to do it the hard way.

Justice Sullivan, after a painstaking examination of the historical evidence, first concluded that the traditional California interpretation of § 1714 was correct. He then offered a somewhat sanitized version of the circumstances of the Code's enactment in 1872 and the general acceptance of the Pomeroy rule of interpretation. David Dudley Field had grouped a series of general provisions as a sort of introduction to the Code. These provisions, which were taken over without change in the California version, included statements that the Code was to be regarded as a "continuation" of the common law and that the maxim that statutes in derogation of the common law are to be strictly construed had no application to it. Justice Sullivan placed emphasis on those statements as indications that the Code had never been meant to preclude growth and change in the law (although it is hard to see what Field's repudiation of the derogation maxim had to do with the argument). In the light of all these considerations, the majority justices felt that § 1714 did not stand in the way of the court's announcing that California would from now on (as well as in the *Li* case itself) follow the comparative negligence rule. (In this part of his opinion Justice Sullivan did not

deal with the repeated and unsuccessful attempts to amend § 1714 since 1971, although he had made a footnote reference to the legislative campaign in his introductory statement of the case.) The opinion then adds several pages of instructions to the lower courts on the sort of comparative negligence rule the court had decided to adopt and concluded with a statement on the extent to which *Li* was to be applied retroactively. Two justices dissented. The majority decision, the dissenters said with considerable heat, went beyond the limits of judicial competence. Furthermore, they added, the complexities of comparative negligence theory made the problem one which could be much more satisfactorily dealt with by the legislature than by the courts even if § 1714 had not been present.¹⁶

The majority opinion in *Li* is of course highly ambiguous. The theory which Justice Sullivan articulated for his colleagues stressed the peculiar nature of the Civil Code of 1872 which for a hundred years had been treated as something less than a real statute, as something not much more than a Restatement. But if that was the simple truth of the matter, what was the need for so elaborate an opinion? Judges, like ladies, can protest too much. It should be added that the majority justices in *Li* seem to have read the political barometer accurately. The California legislature, which has in the recent past rebuked the court for going too far,¹⁷ has not, since 1975, concerned itself with contributory negligence, comparative negligence or the integrity of the Civil Code of 1872.

We may now return to Senator Davies and the Nonprimacy of Statutes Act. I started by stressing the originality of the proposal

16. For a current statutory formulation of the "complexities of comparative negligence theory," see the Uniform Comparative Fault Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1977. The act is set out in V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 21.4 (Supp. 1978).

17. In *Connor v. Great Western Savings and Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), the Court held the Savings and Loan Association liable for damages to the buyers of defectively constructed houses in a residential development; the Savings and Loan Association had financed the developer. The legislature promptly immunized financing institutions from liability under the doctrine of the *Connor* case; see CAL. CIV. CODE § 3434 (West 1970). On *Connor* and the subsequent statute, see Rohner, *Holder in Due Course in Consumer Transactions: Requiem, Revival, or Reformation?*, 60 CORNELL L. REV. 503, 563-66 (1975). Justice Sullivan in his *Li* opinion cites *Connor* approvingly without mentioning its repudiation by the legislature. 13 Cal. 3d at 822, 829, 532 P.2d at 1239, 1244, 119 Cal. Rptr. at 871, 876.

and then went on to suggest that, despite its originality, it was, nevertheless, firmly rooted (as all viable ideas about law must be rooted) in the events of our recent history. It is a response to the legal problems which, as the result of our past excesses, we face in the United States in the 1970's.

The great merit of the proposal is that the courts, given statutory authority to carry out the necessary demolition work, will be able to do directly and openly what will otherwise have to be done indirectly and in secret. The courts will be largely freed from the temptation to resort to the self-defeating techniques of misconstruction and constitutionalization. The elaborate ambiguities of *Moragne* and *Li* will no longer be necessary. The end result of a generation of common law life under the Nonprimacy of Statutes Act should be a measurable gain in the clarity and simplicity of our legal system. I do not in the least mean to suggest that everything will be sweetness and light once the Act has been adopted and has survived the predictable constitutional challenge. Lawyers are lawyers and, as an English scholar has put it, "the life of the common law has been in the unceasing abuse of its elementary ideas."¹⁸ We can confidently expect that the Nonprimacy of Statutes Act will be abused, which will not serve to differentiate it from any other statute or any common law principle.

The success of the Nonprimacy of Statutes Act, if it gets its day in the sun, will lie in how quickly, in its own turn, it will become obsolete. The urgent problem in the 1970's is how to get out of the statutory box. Once that has been done, we may have the wit, benefiting from our experience of the past half century, to avoid falling into the same trap again. The next generation of lawyers may be able to see more clearly than our own generation has done the virtue of leaving problems to a common law development instead of rushing in with a ready-made statutory solution. And, if statutes are unavoidable, the next generation of draftsmen may be able to avoid the horrors of overdrafting which have plagued us since the 1930's.

If Senator Davies is right, as I believe he is, his statute will have become obsolete long before the year 2020.

18. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* xi (1969).

