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SAINT JOHN, NEW BRUNSWICK

COURSES LEADING TO A B.C.L.

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UNIVERSITY OF NEW BRUNSWICK LAW SCHOOL JOURNAL

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VOL. IV No.1 DECEMBER, 1950

—CONTENTS—

CONTENTS Cont.

Editorials

THE PROGRESS OF U. N. B.

Some of us are old enough to remember the pre-war days. We recall that the University of New Brunswick suffered from neglect. This neglect took the form of insufficient funds, a chronic shortage of teaching staff, inadequate libraries and so on. The Law School in Saint John shared in this neglect.

But now, a new day has dawned. The old neglect has gone, we hope, forever. Today, under the wise leadership and progressive guidance of Beaverbrook, Trueman and Harrison, the University and its Law School is marching forward to assume its rightful place among the best universities in this country. This year's graduating class in the Law School has witnessed remarkable progress. The academic standards at the school have been raised considerably. We now have two class rooms instead of one. A large common room has been placed at the disposal of the students. The library is to be tremendously improved, due to the magnificent and generous gift of our beloved Chancellor, Lord Beaverbrook. A system of tutorial seminars is in operation. The intellectual and extra-curricular activities of the students in the field of self-government, debating and moot courts have never been better. We even dare to hope that this Journal is a credit to the students. Last year an alumni association was founded to unite the law school graduates of 1950. It is hoped that Mr. Justice Rand's address to the students last year will be followed by other juristic lectures. Last, but not least, in the catalogue of achievements of the law school is the appointment to the faculty of two brilliant young New Brunswick men, namely Professors McAllister and Ryan. These reforms can and should be continued. Let us continue the building process so that theU.N.B. Law School may, in time, be numbered among the best law schools in Canada and the first in the Maritimes.

J. C. H.

THE CHANCELLOR'S GIFT TO THE LIBRARY

The Faculty of Law—for the first time in its fifty-eight years of existence—will possess through the generosity of the Chancellor, The Right Honourable Lord Beaverbrook, the nucleus of an adequate library. So significant is the gift to Faculty that facts more acaccurately than words speak its nature: in 1949 Faculty possessed only one-tenth of the volumes deemed necessary for a proper law school by the Association of American Law Schools; it possessed less than one per cent of the active volumes in use in the eleven Canadian law schools, eight of which enjoyed, in addition to their own, the facilities of Law Societies. Lord Beaverbrook has provided facilities not available in the Saint John Law Library and lessened to some extent dependence on facilities available in that library.

Lord Beaverbrook's interest in the Faculty library could not have been evinced at a more appropriate or necessary moment. For the student course load, consistent with the Canadian standard, has, by an increase in hours and by the addition of new courses, been substantially increased to fifteen hours a week in the second year with present plans envisaging fifteen hours a week in each year beginning next year; consistent with the trend recognized by the Canadian Bar Association and by the Association of American Law Schools, new emphasis is being given to public law subjects, each of which requires a wide collection of materials in sharp contrast with a narrow collection adequate for most private law subjects; consistent with the declared purposes of Faculty, which are to afford a thorough professional training ing and to develop in the student powers of analysis, discrimination and judgment each student in each year is required to write an essay on a topic designed to stimulate independent research and analysis, and to participate once as a solicitor and once as a counsel in a Moot Court involving, independently of Faculty assistance preparation of a factum and oral argument before a member of the profession or the Judiciary. Such a program can be undertaken successfully only when the tools for the job are available

Legal publications of every description are represented in Lord Beaverbrook's collection: law reports, textbooks, works of reference, legal periodicals, leisure reading. Faculty will be provided with an additional set each of the Dominion Law Reports and of the All England Law Reports: with a wide range of textbooks principally in subjects of the third year; with a number of standard works of reference including Williston's classic on Contracts, the extremely useful Canadian Abridgment and the very new American Jurisprudence: and with complete sets of several of the leading Anglo-American legal periodicals, including the Law Quarterly Review, the Harvard Law Review, the Columbia Law Review, the Michigan Law Review, and the Minnesota Law Review. In sum the collection, carefully selected and integrated with library development undertaken this year by Faculty, involves an accession to the library of well over one thousand volumes.

Future generations of law students will remember that in the hours of the Battle of Britain the name Beaverbrook was then inseparably linked with the names of great champions and defenders of law; they will know his contribution to legal development in New Brunswick and to their education; they will with pride recall that he was a student—and in their own Faculty.

—Contributed

WILLIAM FRANCIS RYAN

PROFILE BY A FRIEND

William Francis Ryan, B. A., B. C. L., L L. M., newly appointed Associate Professor of Law in the University of New Brunswick Law School, is a native of Saint John, an alumnus of four great universities, and, not least,a former practitioner at the New Brunswick Bar. A son of the late William M. Ryan, K.C., M.P., and Mrs. Ryan, he was born in 1920 and obtained his early education in the schools of Saint John. Upon graduation from St. Vincent's High School, he took Grade XII at Saint John High School and entered the university of New Brunswick in the fall of 1938.

The career of "Bill" Ryan at the University in Fredericton was a notable one. In addition to being Business Manager of the weekly student paper "The Brunswickan," he was in his Senior year President of the Student's Representative Council. Nor did his extra-curricular activities affect adversely his academic work; graduating with First Class Honors in History and Political Science, he was awarded the Governor-General's Gold Medal for highest standing in Arts. He thereupon spent a year doing special studies in History at the University of Toronto.

War had come and, unable to enter the Services, Bill forsook the campus for the Research and Statistics Branch of the Department of Labour in Ottawa. In 1944 he entered the U.N.B. Law School. When he left in 1946 he had won the Law Faculty prize for highest standing in the Third Year, and in the meantime he had worked for a summer with the late great Dr. Lon Richter at the Institute of Public Affairs in Dalhousie University.

Following admission to the Bar, Bill practiced for a year with a local law firm and then proceeded to Columbia University where he obtained the degree of Master of Laws. After a further year of practice, during which period he lectured part time at the U.N.B. Law School, he became holder of a Beaverbrook Scholarship at London University. He returned from Great Britain in September last to assume his new post.

It seems superfluous at this point to say that Bill Ryan is a keen and thorough student. Those who have heard him lecture know that his ability to express himself, while perhaps partially inherited, is acquired also, through continuous and intensive study. There is no substitute for the information so gained, and Bill Ryan does not try to find one.

PROFESSOR G. A. McALLISTER

PROFILE BY A FRIEND

Professor George A. McAllister, B.A., M.A., B.C.L., L.L.M., was born in West Saint John in 1919 and from his earliest years showed a marked propensity for academic life, particularly in the sphere of law and politics. As both a friend and a neighbor of the late Chief Justice J. B. M. Baxter it is not inconceivable that his interest in these matters was attributable, at least, in some measure to this association.

After completing his High School training with commendable success George McAllister attended the University of New Brunswick where he established himself as an assiduous worker and an able scholar. Under Professor Burton Keirstead he took first class honours in Economics and Politics and later received the Master of Arts degree in Economics. Also, during this period, those persons who became his friends and associates were not long in discovering his capacity to assume responsibility with competence in respect of extra-curricular activities.

Returning to Saint John George McAllister pursued what proved to be his main interest, the Law, and as a consequence of hard work and ability he received the B.C.L. degree with high distinction from the University of New Brunswick Law School. He then worked for several years with the Institute of Public Affairs, Dalhousie University, specializing on matters pertaining to Industrial Relations.

In 1945 he was awarded a very valuable scholarship and proceeded to Columbia University where he received the L.L.M. degree for his thesis on "The Constitutional Aspects of Canadian Labour Legislation."

The following year, George McAllister and Miss Barbara Anderson of Sackville, New Brunswick were married. Mrs. McAllister went with her husband to the University of British Columbia upon his appointment to the law faculty of thatUniversity.

The University of British Columbia temporarily lost the valuable services of Professor McAllister when at the end of two years there he was honoured by his old alma mater with a Beaverbrook Scholarship. This munificient scholarship made it possible for Professor McAllister

to attend the University of London where once again he steeped himself in the study of the law, but not to such an extent that he and his wife failed to take full and proper advantage of the facilities afforded by the scholarship to see England and learn of it's ways and customs.

On completion of his course at the University of London, Professor and Mrs. McAllister returned to Vancouver where they remained for a year. In 1950 the University of New Brunswick Law School recognized the advantages that would accrue to the school by obtaining the services of one of its outstanding former students. And so today, George McAllister and his wife are living in Saint John where he has the enviable distinction of being Professor of Law at the school in which he received his first legal training.

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THE MOOT COURT

This year the Moot Court has become the major outside activity of the school. Already four moots have been held – twice as many as were held all last year. Altogether fourteen are planned with every student of the school participating as counsel.

The first four moots dealt with cases on torts, contracts, constitutional law, and insurance law. All of the cases ran off smoothly and realistically.

The Court is divided into three divisions – First Year, Second Year, and Third Year, with counsel corresponding to the division of their year. The Third Year Division is presided over by a single judge who is a practicing barrister. Solicitors for the division are allotted from the second year.

The Second Year Division is presided over by a Chief Justice who is a practicing barrister and four associate-judges who are third year students. Solicitors for the division are allotted from the first year.

The First Year Division is presided over by a Chief Justice from the practicing profession with four associate-judges from the second year.

The Registrar is appointed for each case from the first year. His duties are clearly defined and include such tasks as preparing the Court room, introducing Counsel to Judges, and delivering the factums to the Judges. Factums are filed with the Librarian who carries out the regular duties of a Registrar in this regard, as he is the one permanent member of the court.

The problem of finding suitable cases for argument has been successfully solved in the Second and Third Year Divisions by basing the

argument on appeals from already decided cases. To date, this method has proven most successful since it has largely eliminated the inevitable omission of necessary material facts. The First Year Division cases are prepared from stated facts drafted by the presiding Associate Judges.

In order to obtain a proximinity to reality and also to have the sittings proceed without unnecessary postponements and misunderstandings, a strict procedure is laid down with time limits. For example the preliminary procedure for the hearing of a Third Year Division case is as follows:

(17). Counsel and Solicitors are designated at least two weeks before the scheduled hearing.

(2). At least ten days before the hearing the case is assigned.

(3). At least five days before the hearing of the case the Counsel files five copies of the factum with the Librarian.

(4). Counsel obtains from the Librarian, copies of the factums.

In order to obtain a proximity to reality, gowns are worn by counsel. Grading cards are provided for the use of the Judges. These cards give a basis for analysis of ability, including such factors as presentation, logical structure of case, and pertinence of authorities cited. Such grades are confidential.

The foregoing is, of course, only a sketchy picture of the Court, but is an indication of its added emphasis. Moots of necessity have many limitations, but it is the hope of all concerned that many fundamentals will be learned and many mistakes will be made in the Moots instead of in the court room after admission to the bar.

—Edward O. Fanjoy,
Chairman,
Moot Court Committee.

* * *

THE RIGHT OF APPEAL

If a judge has heard a case, and given a decision, and delivered a written verdict, and if afterwards his case be disproved, and that judge be convicted as the cause of the misjudgement; then shall he pay twelve times the penalty awarded in that case. In public assembly he shall be thrown from the seat of judgement; he shall not return; and he shall not sit with the judges upon a case.

(Code of Hammurabi, Section 5)

THE INTOXICATING LIQUOR ACT and the BURDEN OF PROOF

The introduction into New Brunswick of The Intoxicating Liquor Act, being Chapter 28, R.S.N.B., 1927, has given rise, as in other Provinces with similar legislation, to numerous prosecutions for violations of the provisions thereof. Consequently we have many interpretations of this legislation. In particular is this so with respect to the "burden of proof" sections, viz. ss. 103 to 110 inclusive.

By virtue of s. 108 (1), once prima facie proof is given that a person charged with selling or keeping for sale or giving, keeping, having, purchasing or receiving liquor had such liquor, in respect of which he is being prosecuted, in his possession, charge or control, he may be convicted of such offence unless he proves that he did not commit the offence with which he is charged. The burden of proving the right to have, keep, sell, etc. is, by s. 109 (1) on the accused. These sections were considered in the case of R. vs. Jones (1933) 6 M.P.R. 599. The facts were that a bottle of alcohol was found in the unoccupied taxi of the accused, Jones. The liquor was not purchased from the New Brunswick Liquor Commission in violation of s. 56 (2) and consequently a charge was preferred against him. The prosecution relied simply upon the statutory onus placed on the accused by virtue of ss. 108 (1) and 109 (1) and did not attempt to answer the defendant's defence. Hazen, C. J., delivering the judgment of the Court of Appeal, Grimmer and Baxter, J. J. concurring, cited with approval the principle laid down by Lord Wright in his judgment in the case of Winnipeg Electric Company vs. Geel (1932) A.C. 690. In this case s. 62 of the Manitoba Motor Vehicle Act was under consideration. s. 62 provided as follows:

> "When any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle and that the same had not been operated at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of the highway or place where the accident happened or so as to endanger or likely to endanger the life or limb of any person or the safety of any property, shall be upon the owner or driver of the car."

Lord Wright enunciated this principle thus:

> "The onus which it (the section) places on the defendant is not in law a shifting or transitory onus. It cannot be displaced by the defendant giving some evidence that he was not negligent if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent. The burden of proof remains on the defendant until the very end

> of the case when the question must be determined whether or not the defendant has sufficiently shown that he did not cause the accident by his negligence. If on the whole of the evidence.....the issue is left in doubt or the evidence is balanced and even, the defendent will be held liable in virtue of the statutory onus."

See also R. vs. Reardon (1935) 10 M.P.R. 191; and R. vs. Richard (1940) 14 M.P.R. 561.

The provisions of ss. 108 (1) and 109 (1) do not arise, however, when liquor is found in the residence of the accused. s. 32 provides that liquor legally purchased may be kept in the purchaser's residence. In R. vs. Mullin 3 C.R. 70 a quantity of liquor legally purchased was found at the residence of the accused, Mullin, and a charge of unlawfully keeping liquor for sale contrary to s. 56 (1) was laid against him. The prosecution merely gave evidence of the finding of the liquor and the magistrate relying on s. 108 (1) held that a prima facie case had been established. No defence was offered and the accused was convicted and sentenced to the minimum sentence of two months and a fine of $200.00 with costs. On appeal the decision of the magistrate was reversed on the ground that s. 108 (1) does not come into operation until a prima facie case is established. Liquor lawfully purchased and kept in the residence of the purchaser is prima facie lawful by virtue of s. 32. Harrison J. distinguishes R v Jones because in that case the liquor was found in the accused's taxi-cab and was unlawfully purchased. The Manitoba court of Appeal comes to the same conclusion in considering a corresponding section to our s.108 (1).

In R. v Kozub 9 C.R. 390, liquor lawfully purchased was found in the residence of the accused A charge and conviction of keeping liquor for sale followed and the conviction upheld by the Court of Appeal, two of the learned justices dissenting. Evidence was given that within approximately four and one-half months the accused purchased liquor to the value of $577.05, although during such period he was receiving Unemployment Insurance. Analagous sections in the Manitoba Act to our s. 103 and 107 were applied. s. 103 provides that in certain prosecutions (including keeping for sale) that as soon as it appears to the magistrate that the circumstances in evidence sufficiently establish the offence complained of he shall put the defendent on his defence and in default of his rebuttal of such evidence to the satisfactoin of the magistrate shall convict him accordingly. s. 107 provides for the drawing of inferences of facts. Thus Harrison J. in the Mullin case states:

> "I do not however exclude the possibility of the magistrate drawing inferences of fact from the kind and quantity of liquor found, coupled with evidence as to the occupation and income of the accused. Such facts might establish

> a prima facie case of keeping liquor for sale. And when a prima facie case has been proved the accused would have to answer and discharge the burden of proof which then rests on him."

Bearing in mind the sections considered, the question frequently arises, has the accused the benefit of relying upon the doctrine of reasonable doubt? In R. v Peleshaty 9 C.R. 97 the Manitoba Court of Appeal held that the doctrine of reasonable doubt applies as did the British Columbia Court of Appeal in R. v. Haughan. Adamson J. A. in the Peleshaty case makes reference to R. v Jones as follows:

> "In the eyes of the law a person is not guilty if there is a reasonable doubt. If an accused raises a reasonable doubt that he "committed the offence" it must be found that he has proved "that he did not commit the offence." The doctrine of reasonable doubt is the very cornerstone of our criminal jurisprudence and is not to be whittled away, cut down or modified except by explicit words. The Legislature did not mean that a person may be convicted when there is a reasonable doubt. The principle of the Winnipeg Electric Co. v Geel (1923) 3 W.W.R. 49, (1932) A.C. 690, 101 L.J.P.C. 187, 40 C.R.C. 1, (1932) 4 D.L.R. 51, 28 Can.Abr. 321, with respect does not apply in Rex vs. Jones 6 M.P.R. 399 61 C.C.C. 346 (1934) 2 D.L.R. 499, 24 Can. Abr. 512.

It is apparent that the Manitoba legislation does not contain a section similiar to our s. 110 which provides that it is not necessary to prove the commission of the offence beyond a reasonable doubt as in a criminal matter, and that the duty is satisfied by a preponderence of evidence according to the rule prevailing in the trial of civil causes. A recnt New Brunswick case, Walsh v The King 25 M.P.R. 255, deals with this section. Walsh was charged with unlawfully selling liquor. Briefly the facts were that two police officers observed the accused drive his taxi-cab into the driveway of his residence. Two passengers were in the cab at the time. Shortly after the passengers emerged from the driveway and liquor was found on them as a result of a search by the officers. Both gave evidence at the trial that they purchased the liquor from the accused. The defence was a complete denial with one witness for the defence swearing that he had sold the liquor to both passengers. At the close of the Crown's case the magistrate held that a prima facie case had been established. However,after hearing two defence witnesses and at the close of the case the magistrate dismissed the charge on the basis of a reasonable doubt. The Crown appealed to the County Court Judge who reversed the decision of the magistrate. The accused then appealed to the Court of Appeal and the appeal was dismissed. Hughes J. states:

> "On the record, therefore, there was ample evidence for either a verdict of guilty or not guilty. It was only a question

> of deciding which side was telling the truth. The police magistrate was unable to decide this. He thought the case had to be proved beyond a reasonable doubt; but that advantage to the defendant has been taken away by s. 110 of the Intoxicating Liquor Act. Therefore the magistrate was wrong in the reason given for his decision."

The law in this province with regard to the burden of proof is now well settled. Bearing in mind these sections and the interpretations that have been placed upon them the magistrate must apply them to the facts before him and accordingly either convict or acquit the accused.

Henry E. Ryan,
Saint John, N. B.

CROWN PROCEEDINGS

In the year 1949 a resolution was adopted by the Council of the New Brunswick wick Barrister's Society requesting the Attorney General of New Brunswick to enact legislation similar to the Crown Proceedings Act 1947 of the Parliament of the United Kingdom. As a result the matter was referred to the Commission on Uniformity of Legislation for the drafting of a uniform statute, and a report and a draft of the uniform statute have been made. It is anticipated that legislation will be introduced in the Legislature of this Province in 1951.

The reason for the proposed change is that, apart from special statutory authority, an action can be commenced against the Crown by a subject, only in the following cases:

1. Where land or goods or money has found its way into the possession of the Crown and the object is to obtain restitution or if restitution cannot be given, compensation in money.

2. When a claim arises out of contract, as for goods supplied to the Crown or to public services.

3. Where the claim is for statutory compensation as when a statute imposes a liability on the Crown to pay for the use and occupation of property.

Since the reign of Edward the First the procedure for relief against the Crown has been by Petition of Right. In the absence of special statutory provision a Petition of Right does not lie against the Crown for a claim arising in tort.

Under the Petition of Right Act R.S.C. 1927, c. 158 a Petition of Right may be left with the Secretary of State of Canada for submission to the Governor in Council. If a fiat is granted the Petition is filed in the Exchequer Court and proceedings are carried on in that court which has exclusive original jurisdiction.

Under the Exchequer Court Act R.S.C. 1927, c.34 the Exchequer Court is given exclusive original jurisdiction in all actions against the Crown. These are enumerated in sections 18 to 20 of the Act. However, the litigant as against the Crown, does not have the benefit of all the defences which he would have if the action had been one between subject and subject.

There can be no such proceedings against the Crown in the right of the Province of New Brunswick.

The Crown Proceedings Act 1947 made revolutionary changes in the rights of the subjects to take legal proceedings against the Crown in the courts of the United Kingdom.

Part 1 of the Crown Proceedings Act enables a person, who before the Act could only proceed by Petition of Right or against a Minister, to take proceedings against the Crown as of Right and without a fiat.

Section 2 imposes on the Crown liability in respect of tort in three classes of wrongs, (1) torts committed by servants or agents, (2) breaches of the duties which a private employer owes to his servants or agents by common law by reason of being their employer, and (3) breaches of the duties attached at common law law to the ownership, occupation, possession or control of property. It is also provided that the Crown shall be liable for breaches of a statutory duty to the same extent as it would be if it were a private person.

The Act also gives the Crown the benefit of any statute which negatives or limits the liability of any government department or officer of the Crown in respect of any tort and gives the Crown the same protection as is commonly given to servants of the Crown. The Crown is not liable in respect to anything done or left undone by a person discharging duties of a judicial nature or in connection with the execution of judicial process. The basis of this being that the Crown has not or should not have the right to control the performance of such duties.

Likewise the Crown is made liable for the infringement by any servant of the Crown of any patent, copyright or registered trade mark committed with the authority of the Crown.

Section 4 of the Act gives a right of indemnity to the Crown against its servants who involve the Crown in liability in tort. It also applies the law relating to contribution by joint tortfeasors and the Contributory Negligence Act..

With regard to shipping, sections 5 to 7 place the Crown in the same position as a private shipowner respecting liability for collision at sea.

Under section 8 the Crown becomes liable to pay salvage respecting services rendered to ships and other property of the Crown.

Section 9 protects the Crown and its servants from liability respecting the carrying of mails and the transmission of telegrams and telephone messages.

Section 10 relates to the armed forces . It exempts from liability both the Crown and any member of the armed forces for liability arising out of the death of or personal injury suffered by any member of the armed forces when he is on duty or when the act causing such injury happens on military premises or on a ship, aircraft or vehicle used for military purposes.

Part 2 of the Act deals with jurisdiction and procedure. Briefly, it provides that all civil proceedings for and against the Crown shall be instituted and proceeded with in accordance with the rules of court. Most of such actions can be sued in the name of a government department, otherwise they must be brought by or against the Attorney General. However, no injunction or order for specific performance can be obtained against the Crown but the Court may make any declaration of the rights of the parties.

Part 3 deals with judgements and executions. When a certificate of the amount due against the Crown is given an obligation is imposed on the appropriate government department to pay such sum.

Under Part 4 provision is made for discovery of documents in the possession of the Crown. Heretofor the Crown could not be compelled to give discovery or to answer interrogatories. Courts have held that the Crown may refuse to produce documents if the Minister is of the opinion that the production would prejudice the public interest. This Right has been altered by the Act so that the Court may now order discovery against the Crown.

Crown ships, aircraft carriers and other property are excluded from proceedings for their arrest, detention or sale.

Such legislation, if adopted in the Province of New Brunswick, would enable our courts to adjudicate upon claims arising from the many activities in which the Provincial Government is engaged. The more the state operates public utilities and industry, the greater is the need for reform. The maxim "The King can do no wrong" had little justification when it crept into our Jurisprudence centuries ago. It has none today. Lawyers and Law Students may now look forward to the time when these reforms will be achieved in this Province.

—by A. B. Gilbert,
U.N.B. Law School
Saint John

THE WASHINGTON BAR CONFERENCE

EDITOR'S NOTE:—The Editor regrets that due to lack of space, the following article by Mr. B. R. Guss had to be reduced. We apologize both to Mr. Guss and to our readers.

As one must be expected in dealing with events that took place at Washington—one must turn first to Arthur N. Carter, K. C., the immediate past-president of the Canadian Bar Association. He delivered upward of twelve speeches, introductions and addresses and all were framed in fine taste and delivered with fine feeling. He proved to be wise and effective. Mrs. Carter, on her part, was charming and dignified.

Another New Brunswicker who distinguished himself was Horace Porter, K.C.,who was elected president of the Conference of Commissioners on the Uniformity of Legislation. This group deals with the elimination of many differences both in Substantive and Procedural Law existing between Provinces and as its name suggests attempts to have uniform Statutes in every Province. Recently dealt with were the following Acts: The Vital Statistics Act, the Interstate Succession Act, Assignment of Book Debts Act, Bulk Sales Act, Commorientes Act and the Defamation Act.

M. Gerald Teed, K.C., as Vice-Chairman of the Taxation Section now its new Chairman, presided over the Taxation Section with great ability; subjects studied and discussed were: Husband and wife under the new Income Tax Act relating particularly to Partnerships, Community Property and Gifts; Definition of the term "Income"; Appeal procedure under the Income Tax Act; The new 15% tax on Distribution of corporate surpluses.

The section on the Administration of Civil Justice gives consideration to the effect upon the Public of certain Statutes which no longer have the support of public opinion; for instance The Lord's Day Act, The Canada Temperance Act and the Criminal Code sections relating to lotteries and gaming. Very keen discussions take place on these subjects and the principal of Repeal or Amendment of Legislation in keeping with changing Public Opinion has been adopted.

Consideration was also given to appointment of Judges only after consulting with the Bench and the Bar. Of vital importance too was the resolution, originating in this Section which resulted earlier, in the allowance of expenses incurred by lawyers attending Bar Meetings, as a deduction in the calculation of taxable income. The most important resolution of this Section "Strongly urged the Federal and Provincial Governments to enact legislation permitting actions against the Crown without necessity of a fiat." At the Commercial Section it was decided to investigate the role of Commercial Arbitration in Canada. Consideration was given to the revision of fees under the Bills of Exchange Act and to the difference in Provincial Practice on

Agency Allowances in Commercial Matters. This Section is considering a uniform code of Commercial Law for the American Hemisphere—thus aiding in the breaking down of barriers in International Trade on the Continent.

The Conference of Government Bodies consists of representatives officially chosen by each of the ten Provincial Law Societies it is like a Federation of Law Societies and this group concerns itself with such as: The Uniform Standards of admission to Law Societies and an Incorporated Council of Law Reports.

The Section on Industrial Relatons gives consideration to Collective bargaining, conciliation boards and other means of creating an atmosphere condusive to Industrial Peace in Canada.

The Insurance Section gives thought and consideration to the revision of Insurance Law throughout the provinces of Canada. It is hoped some day to have simple language to indicate to simple people the nature of the contract into which people enter. It has been recommended that a special course be prepared on Insurance Law and that it be taught in all Law Schools.

The Section on Legal Education and Training is confronted with the perennial problem of whether students should be taught the practical things or theory. In talking to lawyers about this, the prevailing feeling seems to be that the young lawyers should be taught to do the things which a client expects done when he engages a lawyer.

The Junior Bar Section was ably presided over by Stanley Biggs and listened to a brilliant lecture by Dr. Paul Gerin-Lajoie on "Amendments to the Canadian Constitution," and to H. Courtney Kingstone of the Legal Branch of the Secretary-General of the United States who spoke on the position and role of the United Nations Lawyer. W. C. Morris, Jr., Chairman of American Junior Bar Conference spoke most interestingly on a very important subject: Public Relations.

The writer as head of a special committee on the Junior Bar, appointed by A. N. Carter, K. C., proposed an extension of the age limit from 5 years practice to 7 years practice, for Junior Bar members. This was acceptable to the Junior Bar and was adopted by the Association.

Hugh O'Donnel, K.C., delivered an address on "The Board of Transport Commissioners in Canada and Corporate Fiscal requirements as a basis for Rate-making in Transportation and Communication Utilities."

The Section on the International Organization for maintance of Peace considered a Declaration on Human Right, and the fundamental freedoms.

D. Gordon Gowling, K.C., the new President of the Canadian Bar Association delivered an address on The Making of Law and The Part that Lawyers Play in this Process.

Roger Letourneau, K.C., Chairman of Section on Comparative Law had an interesting joint breakfast meeting with The Comparative Law Division of The American Section on International and Comparative Law. The Honourable Hume Wrong, Canadian Ambassador to Washington spoke at a joint luncheon with the Junior Bar Conference.

The Section on the Administration of Criminal Justice gave considerable thought to the problem of Drunken Driving, Motor Manslaughter, and the dangers of minimum penalties. The section recommends that the question of blood tests and other scientific tests to discover the state of intoxication of a driver should be investigated by scientific agencies. Evidence of such tests should be admissable without the necessity of proof that the accused had agreed to have the test taken. J. Paul Barry is a member of this section.

H. E. Swift, K.C. of Winnepeg, spoke on Public Relations with particular attention to the Legal Aid; and also on the reimbursement of funds to clients who had lost them through defaulting lawyers.

R. M. Chitty, K.C. reported progress for the Public Relations Committee. The question of suitable publicity to disseminate information on the work of The Canadian Bar Association is a pressing need.

The Honourable Stuart F. Garson, Canadian Minister of Justice addressing a joint meeting spoke of the part played by the Commonwealth in International Affairs. At this function the Honourable J. Howard McGrath, Attorney-General of The United States referred to the great Role that lawyers play in safe-guarding Civil Liberties. He spoke strongly against Communist Propaganda: Our best answer is this kind of actual demonstration that Democracy works, that Democracy provides for its people security, equality and freedom.

Among the distinguished guests from other Bars were: Sir Norman Birkett a great favorite of the Canadian and American Bars who was the living embodiment of all that is highest and best in forensic skill. He proved his points with his own address. Sir Geoffrey Russell Vick, another great favorite from England who also extended greetings from The English Bar.

Maitre Andre Toulouse of the French Bar, who delivered an address of great interest and stated that the foundations of peace were liberty and justice; and liberty and justice were available through The Law: that is where lawyers must play their part.

At the same session a former New Brunswicker was also an able guest speaker: Senator J. W. deB. Farris who spoke of the opportunities and responsibilities that face lawyers today. He referred to the Courts as the foundation of our Judicial System and urged that we do all in our power to preserve them. He suggested that our system of justice be extended to The International Level.

The problem of setting up Medico-Legal Societies was treated by Edson L. Haines, K.C., who stated that the first group has been organized in Toronto. Of interest to lawyers was a discussion on the problems of obtaining medical evidence in malpractice suits. It is hoped that this problem will be solved through the organization of Medico-Legal Societies across Canada.

At a Joint tax session, M. Gerald Teed, K.C., delivered an address on: "A Canadian Lawyer looks at the Internal Revenue Code."

At a joint luncheon of the Food and Drug Sections, the Honourable Paul Martin, K.C., M.P., delivered an impressive address of which all Canadians present were rightly proud. The Honourable Mr. Martin pointed out that Canada as the third greatest International Trader, is greatly concerned that there should be no needless legislative barriers to the flow of food and drugs from country to country.

Other Canadians participating in the joint sections with the Americans were the Honourable Mr. Justice Walter F. Schroeder of the Ontario Supreme Court, who spoke on: "The Courts and Comparative Negligence." Gordon N. Shaver K. C., who spoke on : Pitfalls in Insurance Policies." D. Parke Jamieson,M. B. E. K. C., who spoke on: "Apprenticeship Training in Canadian Provinces." W. S. Owen, K.C., "Preferred Methods of Dealing with Canadian Business of United States Corporations." The Honourable James C. McRuer, Chief Justice of the High Court of Ontario: "The Trial of Criminal Causes, Involving Security."

An address of importance at this time in the world's history was that of the Honourable Louis A. Johnson, United States Secretary of Defence. He spoke of Korea and challenged the free nations to be prepared to sacrifice in order to remain free. General J. A. Clark, K.C., made known in apt phrases the bestowal of an honorary membership in the Association. At the same meeting Leonard W. Brockington, K.C., the Demosthenes of our day, added new laurels to his illustrious record.

Progress was reported by John T. Hackett, K.C. and the Honourable C. P. MacTague, K.C. on the Legal Survey, which has been conducted across Canada. This survey is of vast importance to the Legal Profession, as has been proven in other countries where similar surveys have taken place. Much is hoped of benefit to the profession when the report is finally presented and implemented.

The standard of excellence of the Canadian Bar Review remains a matter for pride and the Editor, George V. V. Nichols, B.A., B.C.L., presented a fine and philosophical report on the principals which have guided him in this publication. The Bar is indeed fortunate in its choice of Editor.

One of the greatest forward steps taken by the Canadian Bar Association was the establishment of a Committee on LEGAL AID. Your writer has assumed the Chairmanship of the National Committee.

It may be seen from the number of subjects studied and considered that The Canadian Bar Association has something of value and interest for every lawyer. About half the lawyers in New Brunswick are members of the Canadian Bar Association. Is there hope that the other half could be encouraged to join?

When lawyers foregather they talk about the infinite matters which affect all citizens in their daily lives and therefore a meeting of The Canadian Bar Association ia an important event in the history of our Country. When both Bars meet there is a co-mingling of the best minds for the benefit of the entire North American Continent.

by B. R. Guss,
Saint John, N. B.

THE ST. ANDREWS ANNUAL MEETING

The annual meeting of the Barrister's Society of New Brunswick held at the Algonquin Hotel last June amply justifies the decision by the Council a few years ago to hold annual meetings at St. Andrews and couple them with a programme of entertainment for barristers and their wives.

The meeting opened on Sunday, June 18, with the Society's annual golf match on the hotel's links. To round out a full day of entertainment, the Moncton Barristers' Society entertained at an evening cocktail party. As is usual with cocktail parties, this enabled the members present to become better acquainted with their brother barristers, and to realize that the man on the other end of the telpehone or one on the other side of the Court room is not such a bad fellow after all.

The business sessions held during the next two days were interesting and lively and a large volume of rather important business was transacted.

An important decision made was to increase the requirements for admission as students-at-law. The proposal to require a student-at-law to have completed a B.A. or B.Sc. course was hotly debated at the previous year's meeting and referred to a committee for the drafting of specific amendments to the regulations of the Society. Much constructive discussion followed upon the presentation of the report. A number of material alterations were made to the proposed amendments before they were approved in final form. The effect of the amendments is that students-at-law being admitted subsequent to September, 1951 are required to have a B.A., a B.Sc. or other approved degree. The regulation under which a person may be admitted as a student-at-law without attending Law School was repealed. It was also decided that a student must put in at least six months actual service in an office before admission as a barrister.

A highlight of the business session was an interesting and informative discussion led by Hon. Charles P. McTague, K.C. on the Survey of the Legal Profession now being conducted by the Canadian Bar Association. Mr. Mc Tague explained, and enlivened the members' interest in a subject with which comparatively few were acquainted.

The principal guest speaker at the dinner on Monday evening was Mr. Justice Vincent McDonald of the Supreme Court of Nova Scotia who delivered a brilliant, learned and humourous address. A. N. Carter, K.C., the then President of the Canadian Bar Association spoke briefly at a luncheon held on Monday and brought home to the members the widespread ill-feeling among the public against members of the legal profession. It was largely due to Mr. Carter's address that a committee was set up to investigate ways and means of professional advertising on behalf of the Society.

It is the unanimous feeling of those who have attended these annual meetings at St. Andrews that they are among the most enjoyable events of the year. Apart from the many friends made, such a meeting is of the utmost value in welding together the legal profession by ties of friendship and by open discussion of the Society's business affairs. It is of primary importance for efficient administration of justice that the province have an integrated and well organized bar. The role of the annual meeting at St. Andrews ranks high in establishing and maintaining a high standard of professional efficiency. It is to be regretted that a comparatively small number of the members of the Society take advantage of the opportunity to attend this meeting, but it is hoped that future years will see an increasingly large enrolment.

—by E. Neil McKelvey,
Saint John, N. B.

THE WARTIME CROWN COMPANIES OF CANADA

In 1776, Adam Smith issued his famous dictum that the state should only concern itself with three duties which he conceived of as being the defence of the country, the administration of justice and the maintenance of certain public works. Since that time the state has largely altered and increased its functions. In the western world, the "laissez-faire" state has become the administrative or welfare state. In Canada, for instance, governments have taken over from private enterprise in many fields. Today, governments of various kinds and shades produce and distribute electric power, operate railroads and air transportation facilities and telephones, own and control radio broadcasting facilities as well as many other public enterprises. The underlying tendency to increase government functions and activities has increased since 1900 under, needless to say, both Liberal and Conservative regimes. The establishment and the operation of the Crown companies during the second world war was nothing more than a variation on this theme.

When the danger of war was at its greatest the Government of Canada, by the Department of Munitions and Supply Act, (1) created a governmental department to replace the War Supply Board, which had functioned since November 1939, as a purchasing agent for the Department of National Defence. The new statute, which was proclaimed on April 9, 1940, empowered the Minister of Munitions as follows: (2)

> "The Minister shall examine into, organize, mobilize and conserve the resources of Canada contributory to, and the sources of supply of, munitions of war and supplies and the agencies and facilities available for the supply of the same and for the construction and carrying out of defence projects and shall explore, estimate and provide for the fulfilments of needs, present and prospective, of the Government and the community in respect thereto and generally shall take steps to mobilize, conserve and co-ordinate all economic and industrial facilities in respect of munitions of war and supplies and defence projects and the supply thereof."

Thus, the Department of Munitions and Supply became the "General Staff of the second front line charged with marshalling and directing Canada's productive effort." (3)

In pursuit of the goal of waging total war, the Government authorized the Minister of Munitions and Supply to incorporate certain government-owned companies. The authorization to establish crown companies was given to the Minister in the following terms:— (4).

> "(a) The Minister may, if he considers that the carrying out of any of the purposes or provisions of this Act is likely to be facilitated thereby, procure the incorporation of any one or more companies or corporations under the provisions of The Companies Act, 1934, or under the provisions of any Act of any province of Canada relating to the incorporation of companies, for the purpose of exercising and performing in Canada or elsewhere any of the powers conferred or the duties imposed on the Minister by this Act or by the Governor in Council and may delegate to any such company or corporation any of the powers and duties conferred or imposed upon the Minister under this Act or any Order in Council.
>
> (b) For the purposes of this section, the Secretary of State may, if the Minister so requests, by letters patent under his seal of office, grant a charter constituting such persons as are named by the Minister and

1. *Statutes of Canada, 1940, C. 31.*
2. *Statutes of Canada, 1940, C. 31, S. 3.*
3. *The Canadian Congress Journal, January, 1940. The words were used by Hon. C. D. Howe, Minister of Munitions and Supply in a C.B.C. broadcast.*
4. *Statutes of 1940, C. 31, s. 3; as amended by Statutes of 1943, C. 8, s. 2.*

any others who may thereafter be appointed by the Minister in their stead or in addition thereto, a body corporate and politic without share capital, for the purpose of exercising and performing in Canada or elsewhere, without pecuniary gain to such corporation, such of the powers and duties conferred or imposed upon the Minister under this Act or any Order in Council as the Minister desires to delegate to such corporation. The charter and by-laws of any such corporation shall be in such terms as may be approved by the Minister and by the Secretary of State. The Minister may remove any members, directors or officers of any such corporation at any time and appoint others in their stead. The provisions of Part II of *The Companies Act, 1934*, shall apply to every such corporation, except in so far as they may be declared inapplicable, varied or added to by its charter or by the Governor in Council.

(c) The accounts of any such company or corporation shall be audited by the Auditor General of Canada."

This, then, was the legal authorization for the establishment or creation by the Minister of Munitions and Supply, of approximately thirty crown companies.

These crown companies were to be utilized for buying and selling certain commodities, for the supervising, controlling and planing a sector of the economy and for managing the operation of certain war plants. Between 1940 and 1945 three separate kinds of crown companies with distinct functions were established, namely: "commodity companies" for buying, selling and stockpiling certain goods and materials; "supervisory and control companies" for co-ordinating and planning the production of certain war materials; and "productive companies" for the production of certain equipment. Amongst the commodity group, Melbourne Merchandising Limited purchased and sold wool while War Assets Corporation Limited disposed of or utilized war assets. Allied War Supplies Corporation was one of the most important supervisory and control companies. It was charged with the administration and integration of a vast group of industries in the chemicals and explosives field. Also among this group, Park Steamships Company Limited was charged with the important duty of controlling the operation of tankers and cargo vessels which were built in Canada under the supervision of another crown company, Wartime Merchant Shipbuilding Limited. Among the productive crown companies there was Research Enterprises Limited, which produced optical glass, fire control devices and radiolocators, and Small Arms Limited which produced service and automatic rifles. In the Montreal plant of National Railway Munitions Limited guns and gun carriages were manufactured. The Polymer Corporation Limited built and operated a synthetic rubber plant. Other crown companies were given the responsibility of working mines, building houses and logging. Obviousy, the establishment of these emanations of the Crown greatly increased the range of activities and the direct powers of the Dominion Government.

In form, the crown companies was an adaption of the joint stock company to public enterprise; the creation of crown companies was a utilization for war purposes of the corporate device. Statutory corporate bodies have long been used by governments, but the crown companies marked a further development in the use of the corporate device because their powers were not regulated by a special act of Parliament; (5) the powers of the crown companies which operated under the supervision of the Minister of Munitions and Supply stemmed from the enactment of the Department of Munitions and Supply Act by the Canadian Parliament. (6) This Act was a Canadian version of a similar British Statute.

All of the crown companies, with one exception (7) were incorporated, with share capital, under Part I of the Dominion Companies Act, 1934. In the case of the companies incorporated under Part I, the only shares issued, other than in the

5. *Cf. Sellar, Watson: Crown Munitions Companies.* (*Canadian Chartered Accountant, June 1943*).
6. *Ibid.*
7. *Allied War Supplies Corporation, which was incorporated under Part II, as a company without share capital.*

name of the Minister of Munitions and Supply in trust for His Majesty the King in right of Canada, were directors' qualifying shares. Thus, the directors were only nominal owners of the shares which they held. Moreover, every director of a crown company was compelled, before he could act, to file with the Department of Munitions and Supply the following documents, namely, a tender of resignation to take effect upon acceptance by the board of directors; an assignment, in blank, of his qualifying share; and an irrevocable request that any distribution of income or capital, in respect of the share registered in his name, be made directly to His Majesty the King in Right of Canada. (8) Thus, as far as voting rights in the various crown company directorate were concerned, the Minister of Munitions and Supply, as the shareholder for the Crown could outvote all the other directors. Moreover, the Minister could dispense with any director or any board of directors. In short, his veto was absolute. Also, the Minister's control over the operations of the crown companies was enhanced by virtue of contractural agreements which were made between the Minister and the corporations. These agreements contained the following or a similar clause:— (9).

> "It is understood and agreed that the Minister shall at all times have the right to exercise such control over the affairs and operations of the Company as he may in his absolute discretion think fit, and that the Company shall do or refrain from doing, as the case may be, all such things as the Minister may from time to time direct, and that all obligations of His Majesty under this agreement are conditional upon the Company acting accordingly."

Besides these controls, which could be termed contractual, there were financial controls. All of the funds, used by the crown companies either in the way of capital expenditures or operating expenditures, were obtained from the Dominion Treasury. (10) Moreover, each crown company was subject to an annual audit by the Auditor General, who reported to the Minister of Munitions and Supply, and as well, to Parliament.

The crown companies, while responsible to the Minister of Munitions and Supply and subject to the close scrutiny of Parliament, had considerable freedom of action in running their own affairs. One particular crown company was described as having all "the freedom of action of a private company plus the prestige and authority of an agency operating as a unit of the Dominion Government." (11) In practice, if not in theory, this statement would seem to have applied to the operations of all crown companies, because, within the general framework of the policy of the Department of Munitions and Supply, the companies were allowed a considerable degree of self-government; the directors were allowed to operate the companies without much interference, but they were required to remember that they were "trustees" of the "Public investment." (12)

In essence, the crown company was a new mechanism of democratic government born of the needs and conditions of war. One reason for the establishment of the companies was that theGovernment did not want to become directly involved in the economy in bargaining and contracting and in open-market buying and selling operations; the crown companies served as buffers or cushions between the cabinet and entrepreneurs.

When Mr. Howe, the Minister of Munitions and Supply, spoke in the House of Commons during the first reading of the enabling Act of 1940, he advanced another reason for the use of the crown company organization: (13)

8. Dominion of Canada; Report of the Auditor General for the year ended March 31, 1941. (King's Printer, Ottawa, 1941), *page 460.*
9. Report of the Auditor General for the year ended March 31, 1942.
10. Sellar, Watson; loc. cit.
11 Polymer Corporation Limited.
12. Rt. Hon. C. D. Howe, Minister of Munitions and Supply, in House of Commons Debates (unrevised) November 20, 1940, page 287.
13. Debates of House of Commons, Canada, June 14, 1942, vol. I, p. 783.

> "It has been found utterly impossible to assemble in Ottawa a sufficient staff to handle all the multiplicity of undertakings that the Department has in hand at the present time. The Act provides that certain government owned and controlled companies shall be established and headed by business men chosen by the government who will be able to carry on operations as companies rather than as part of the Departmental staff."

Thus, the complex technological problems involved in beginning and maintaining the production of munitions of war, the need for a spirit of boldness and enterprise in the managerial personnel of the crown companies, the desire to escape from the excessive caution and circumspection which day to day responsibility to parliament necessitates and the recognition that the operation of these utilities required a flexible type of organization adapted to the outlook of the persons who were to operate them were the underlying reasons for the formation of crown companies. The Government of Canada desired to enlist certain industrialists in the war effort and because it was discovered that these persons would not conform to civil service conditions or, perhaps, because some industrialists, loyal to one political party refused to serve under a minister loyal to another, public enterprise was found feasible and practicable. (14) The crown companies were not born of any particular doctrine or ideology; they were not the product of socialist control of government; they were sired of the needs of war.

These crown companies could be distinguished from all forms of governmental agencies by their form of organization, by their freedom from most of the usual ministerial controls, by the secrecy which surrounded the operation of some of them and by the purely business character of their personnel. The wartime crown companies were closly allied with the traditional form of the "public corporation." (15)

The main difference in form between the wartime crown companies and the pre-1949 public corporation was that the crown companies were operated under a general act of parliament which was vaguer in delimiting the statutory powers of the controlling minister than the various public acts which established public corporations where the powers of the minister in charge were usually clearly defined and restricted. The distinguishing feature lies in the difference of degree of ministerial and parliamentary control of the operation of the enterprise. The two types of public enterprise are similar in structure in that they are government-owned corporations, the operations of which are divorced from the ordinary fabric of government, so that the day to day control has been delegated to virtually autonomous directors or trustees. (16) Thus, public corporations like the Canadian National Railways, the Ontario Hydro-Electric Power Commission, the Canadian Broadcasting Corporation and the British National Coal Board and the Tennessee Valley Authority are similar in organization to the wartime crown companies. Public corporations the operations of which are divorced from the ordinary fabric of both operated under the same general conditions within the national economy. These conditions are : first, both are free from full and continuous responsibility to

14. From a conversation with Watson Sellar, Auditor General of Canada.

15. The term "public corporation" was first used by the Right Honourable Herbert Morrison, Minister of Transport in the first Labour Government of Great Britain to describe semi-autonomous commercial organizations, regulating their own personnel and, in the main, their financial arrangements but forbidden to extract profits for their services and governed by boards appointed for stated terms by Ministers of the Crown. See Gordon, L., The Public Corporation in Great Britain. (New York, 1938). The public corporation has been otherwise defined as a "corporate body created by public authority with defined powers and functions, and financially independent. It is administered by a board appointed by public authority to which it is answerable." See Davies, Ernest: National Enterprise; The development of the Public Corporation. (London, 1946.)

16. Cf. Encyclopaedia of Social Sciences, Volume VII, page 106.

a minister of the crown and through him, to Parliament, as is a government department; second, that there are, apart from the community itself, no proprietors to whom the governing body of the corporation or company owes a duty to make profits, that is, the capital is provided either from public funds or by private investors who have the status of creditors not of shareholders; third, both are financially autonomous in the sense that the corporation's or company's finances are self-contained and it has no taxing power. (17) These, then, are the common characteristics of the two forms of public enterprise.

The crown company — so it was believed by many — was only a wartime expedient. In this respect, the crown corporations can be distinguished from the average public corporation, which operates in both peace and war. But even this criterion of distinguishing the two has broken down so that the Auditor General of Canada could say in 1946: (18)

> "The war is over, the efficiency of the corporate device has been proven and it is not unreasonable to anticipate its continued use, especially in commercial ventures."

J. Carlisle Hanson

17. (See articles in The Times, London, January 20-24, 1947.)
18. Sellar, Watson; Government Corporations; in 24 C.B.R. 392.

THE POLICE AND THE LAW

The protection of life and property is the basic function of all police forces. It is general knowledge among all men engaged in police work, in Saint John at least, that such duties have materially increased since the freeholders of the City were empowered by the Charter of the City of Saint John on March 7th, 1812, to elect one constable for each of the six wards annually. The work of these men, who were employed mostly at night, was to follow the ancient custom of crying the hours and the state of the weather. Today, the duties as originally outlined have been increased by innumerable statutes, regulations and by-laws. A police constable is called upon to perform the following duties, to name only a few: protection of life and property; the caring of the injured, ill, poor and distressed; of children, persons of unsound mind, missing persons, etc., everything that is concerned with the maintenance of public order and security; licensing and certification in various forms; acting as a helpmate in any emergency; traffic duties; reporting conditions of streets, supervision of school patrols, etc.

Most policemen want to see their job recognized as a profession. Many are handicapped, however, in that they do not have the advantage of having attended a specialized school for a long period of formal training and study. A policeman usually embarks upon his chosen career after a short period of training which, at best, can only provide him with some of the basic fundamentals of police work. A man joining the force is usually placed with an older man during his probationary period, given lectures and examinations from time to time. These in themselves are fairly good, but if he wishes to acquire proficiency in the skills of a policeman, he must learn by experience and by attending the police school, when the school is held. In a small department such as ours, it is not possible to conduct a permanent police school. For one thing, we have not the full facilities, and the strength of the Force will not allow it. So that he must obtain his police "education" through the school which is held of necessity during the winter months. This, along with experience gained by working with senior members of the department is one of the major ways he can acquire more knowledge of his work. From time to time it is possible to send other members of the department to advanced training schools conducted by the Royal Canadian Mounted Police, which are of great assistance. The effect of these courses will be seen in years to come.

Much harm often results from the non-observance of courtesy by a policeman. He must at all times, without exception, exercise sympathy, understanding and discretion, and, at the proper time, firmness. A police force does not make laws; policemen only enforce them. They are mainly concerned with bringing violators before the Courts and producing evidence in support of the action taken. Whether the person is convicted or not should be no concern of the policeman. His responsibility has ended when the accused is before the Court and he has given his evidence.

The system of British justice is such that the "burden of proof" rests entirely on the Crown. True, the burden shifts in some cases, but under our system full use may be made of legal argument. A policeman, no matter how long he has served, is more than likely to be faced with the best legal talent defending the accused; consequently knowledge, truthfulness, and correct deportment are necessary when a policeman takes the witness stand. Clarity of speech and firmness are also requisites.

Too often a young police constable, eager and full of the facts of the case, has elaborated on certain phases only to find from this eagerness that Counsel for the Defence has very cleverly turned part of the evidence, at least in favor of his client, or through adroit questioning nullified some very important Crown evidence.

A policeman is at all times in contact with the legal profession. In major cases the Crown attorney depends on the maximum helpfulness of the police investigator. He is the connecting link between the case and the Crown attorney. Clearly, the police, who are usually the first responsible officials to learn of a crime, can be of the greatest assistance to Crown Counsel.

On the other hand, although every endeavour should be made to obtain a conviction in a case, every opportunity should be afforded Defence Counsel to obtain all information relevant to the case in order that he can prepare a proper defence for his client.

Defence Counsel will usually take advantage of every opportunity afforded by cross examination of Crown witnesses, particularly policemen, but it has been found with very few exceptions, that the average policeman has nothing to fear, provided he gives his evidence in a clear-cut manner. The witness stand provides a peculiar challenge to policemen, some meet it adequately, others fail in some respects.

I often think of a definition of what it takes to be a cop, given by an American Chief of Police of other days. Here it is:

"HERE'S WHAT IT TAKES TO BE A COP"

"If you have the wisdom of Solomon, courage of Daniel, strength of Sampson and patience of Job; the leadership of Moses, kindness of the Samaritan, the strategy of Alexander, faith of David, diplomacy of Lincoln, tolerance of Confucius and a complete knowledge of criminal law and procedure, you are a police officer."

by J. J. Oakes,
Director of Police,
City of Saint John.

BREACHES OF THE N. B. MOTOR VEHICLE ACT AS GROUNDS FOR ACTIONS OF NEGLIGENCE.

Introduction

The statutory requirements of the Motor Vehicle Act do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends. (1) Although it has been said that the Act is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the non-observance of the requirements of the statute, (2) it is submitted that this statement should be qualified somewhat.

The driver or rider of a vehicle on the road may have observed the Motor Vehicle Act and all statutory regulations and still be guilty of negligence. Again, although it is not quite clear, regarding the provisions relating to pedestrians, (3) it cannot be supposed that the Act intended to make so important a change as to alter the common law, and make non-observance of these evidence of negligence. Further it should not be necessary to show that failure to hold a license is not grounds for an action of negligence. (4)

The law relating to motor vehicles is largely an application of the common law principles of negligence to conditions created by the motor vehicle. There is no doubt that a motor vehicle is essentially a machine that requires care in its operation if the rights of others are not to be invaded. The primary duty of every user is therefore to exercise reasonable care. Reasonable care in this connection means the care which an ordinary skillful driver or rider would have exercised under the circumstances. "The law does not require a supernatural poise or self control on the part of the driver of a motor vehicle; and if some unforseen emergency occurs which would naturally overpower the judgement of an ordinary careful driver, so that he fails to adopt the best course possible, he may not be negligent." (5)

No rule is more frequently overlooked than the rule that the conduct of the person whose conduct is in question must be measured with regard to the circumstances as they existed at the time. "No case is to be treated as if the person whose conduct is under consideration were a Judge or juror sitting safely and comfortably in Court calmly exercising his mind with the inquiry.....how the accident might have been avoided; the difficulties of the situation in all respects must have due consideration. (6)

(1) *See Sec. 48 of the New Brunswick Motor Vehicle Act, c. 20 of 24 Geo. V, 1934.*
(2) *Stewart v. Steel 6 D.L.R. 1*
(3) *See Sec. 40A and 40B, ibid.*
(4) *Such provisions are regulated by penalties.*
(5) *per Masten J., in Foster v. Zavitz, 24 O.W.N. 127 at 128.*
(6) *per Meredith, C.J.C.P. in Blair v. G.T.R. 1924, 1 D.L.R. 353 at 354.*

Where a situation of danger arises the person in charge of a vehicle is called upon to (a) realize the danger, (b) determine upon a course of action, and, (c) act. Since the law does not require supernatural poise or self-control, it is obvious that the length of time between the apprehension of danger and the physical action taken to avert injury is a very important element in the inquiry, was due care exercised? (7) It is stated that the time reaction of the average driver is 2/5 second. When it is realized that a car travelling at 35 m.p.h. covers about 20.5 feet in that time, it follows that the failure to avoid a danger which first appears at that distance ahead cannot be attributed to negligence. The Court of Appeal has placed the interval of time reaction at 1 to 2 seconds. This time element often plays an important part as evidence to prove breaches of the Motor Vehicle Act.

Breach of Statutory Duties

The cases of liability arising out of a breach of statutory duty were classified by Willes, J. (8) as follows: "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute merely gives the right to sue, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

There is no doubt that the Motor Vehicle Act creates a duty. The duty of a person who drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. Reasonable care in this connection means the care which an ordinarily skilful driver or rider would have exercised under the circumstances. The steps to be taken to perform this duty of taking reasonable care have been laid down in a more detailed form in several sets of circumstances which are of constant occurrence.

The violation of or non-compliance with the provisions of the Motor Vehicle Act are deemed an offence and penalties are provided. (9) If the Act was to provide these penalties and these alone, it might be that this would be the only remedy under the third class of liability stated by Willes J. But by Section 48 of the New Brunswick Act, common law rights are not affected.

(7) *See Claxton v. H.G. & B. Elec. Ry.*, 32 O.W.N. 256 at 257.

(8) *Wolverhampton New Waterworks Co. v. Hawkesford* 1859, 6 C.B. (n.s.) 336, 356

(9) *See Sec. 65-75, Motor Vehicle Act of N.B.*

> "Sec. 48. Nothing in this act shall be construed to affect the common law right of any person to prosecute or defend a civil action for damages by reason of injuries to person or property resulting from the negligent use of a public highway by any person operating a motor vehicle.

This seems to answer that pertinent question, is the person bringing the action one whom the statute desired to protect? The statute may have been designed to protect a particular class of persons, but this is not essential in order to give a right of action. "The question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot. The right of action does not depend on whether a statutory commandment or prohibition is pronounced for the benefit of a class." (10) Section 48 provides that the common law right applies to any person notwithstanding a penalty for violation of the provisions, as provided by sections 65 to 75 of the New Brunswick Motor Vehicle Act.

The Extent of Statutory Duty Under Motor Vehicle Act

Salmond on Torts (11) says with regard to the breach of statutory duties, that the breach of a duty created by a statute, if it results in damage to an individual, is prima facie a tort for which an action for damages will lie, but the question in every case is one as to the intention of the Legislature in creating the duty. Prima facie, persons for whose benefit an Act is passed, have a right of action for damages for its breach causing them injury, but on the true construction the Act may not intend a remedy to the individual or it may provide a special remedy, the nature of which indicates that no right to the individual was intended. And then the learned author said that it also is a question of construction whether liability is absolute or depends on wrongful intent or negligence, and he quotes Brett L.J. as follows: (12)

> "Where the language used is inconsistent with either view, it ought not to be so construed as to inflict a liability unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the per formance of the duty imposed.,,

(10) *per Atkin L.J., in Phillips v. Britannic Hygenic Laundry Co., 1923, 2 K.B. 832*
(11) *7th edit. at p. 635.*
(12) *Hammond v. Vestry of St. Pancras, 1874 L.R. 9 C.P. 316.*

Other authors have said that the breach of a statutory regulation is usually prima facie evidence of negligence. (13) Shearman and Redfield on Negligence (6th edition), referring to American decisions stated:

> "It seems to us that the true rule is, in all such cases, that the violation of such a statute or ordinance should always be deemed presumptive evidence of negligence which if not excused by other evidence including all the surrounding circumstances should be deemed conclusive."

Charlesworth in his book on Negligence (14) refers to what Greer L. J. said about the English Road Traffic Act, 1930: "The code is not binding as a statutory regulation; it is only something which may be regarded as information and advice to drivers. It does not follow that, if they fail to carry out that which is provided for by the code, they are necessarily negligent. It only provides that they may be found negligent if they do not carry out the provisions of the code. Nor is it sufficient excuse for them to say, in answer to a claim for negligence: "We did everything that is provided for in the code."

McCardie J. delivering a judgment in the case of Phillips v. Britainia Hygienic Laundry Company Limited (15) stated:

> "I agree, however, that the breach of a statutory regulation will usually afford prima facie evidence of negligence. The view I am now expressing seems to accord with the opinion of the Divisional Court and the Court of Appeal in Wintle v. Bristol Tramways and Carriage Co. (16) namely that the Motor Car Acts and Regulations do not in themselves set the standard of care required for the purpose of civil actions. If we were to approve the plaintiff's submission here that the defendant's duty is absolute, a stranger would possess a greater right to care than is possessed by a passenger for reward against a person driving him.....It must be remembered that the common law gives a person injured an ample measure of protection by virtue of the legal rules as to negligence and nuisance. A high degree of care is required from those who drive motor cars. I respectfully agree with the view expressed by the late Mr. Beven in his well-known work on Negligence. (17) He there says (after referring to the Motor Car Acts and Regulations): "'These alterations in the law, while they permit the use of motor cars and regulate their uses, are directed to the public and police aspects of the case, and do not affect individual rights or remedies.".....In every case, I be-

(13) *Pollock, Gibbs.*
(14) *At page 68, 1938.*
(15) *1933, 1 K.B. 539.*
(16) *1916, 166 L.T. 125; 1917, 117 L.T. 238*
(17) *3rd edit. vol. 1, p. 110.*

> lieve the allegation has been that of negligence, and the breach of a statutory regulation has been alleged not as a cause of action in itself, but as evidence of a breach of the common law duty to take due care. . . . If the legislature desires to cast an absolute duty on motor car owners the purpose should be affected by plain words in an Act of Parliament, and not by a somewhat obscure regulation of a police character."

We should not lose touch with the New Brunswick Motor Vehicle Act. The latest decision on the subject (18) makes it clear that a breach of the statutory regulations is only prima facie evidence of negligence and "unless such negligence was an effective cause of the damage., it would not create liability on the part of the defendant." (19) The learned judge said that the rule governing the case is clearly stated by Viscount Hailsham in the Swadling v. Cooper, (20) where he says:

> My Lords, the law in these collision cases has long been settled. In order to succeed the plaintiff must establish the defendant was negligent and that that negligence caused the collision of which he complains. If it is established from his own evidence, or by evidence adduced on behalf of the defendent that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own negligence in failing to take reasonable care."

Then quoting from Gibbs, (21) the learned judge goes on to say that although by statute, road users may be enjoined or forbidden to do certain acts, it does not follow that they will be civilly liable for a collision resulting from a breach of such statutory duty.

At this point then, we have arrived at the crux of the matter. As the trial judge remarked in the case of Chapman v. Wilson (22) referring to the provisions of a Motor Vehicle Act: "A breach of a by-law of a statutory provision does not of itself constitute negligence. It is evidence of negligence – it is only evidence of negligence –and it is prima facie evidence of negligence which casts upon the person who has been shown to have violated the by-law, the onus of satisfying you that notwithstanding that the conditions were such that the non-observance of the by-law or of the statute was not in point of fact negligence." Again in Webster v. Gelinas, (23) Hogg J. quoting from Mr. Justice Davis in his decision in Falsetto v. Brown, (24) where he said:

(18) *Leblanc v. S.M.T. 23 M.P.R. 145.*
(19) *per Harrison J. at p. 155.*
(20) *1931 A.C. 1 at p. 8.*
(21) *Collisions on Land, 5th edit. p. 6.*
(22) *1930 1 M.P.R. at p.*
(23) *1941 4D.L.R. 495 at 496 - 7*

> "The plaintiff, then, in an action such as the present where there is no statutory onus upon the owner or driver, must allege and prove negligence in the operation of the motor vehicle that caused the loss or damage sustained, and it is not sufficient merely to set up and rely upon a breach of a statutory duty.....it was not the intention of the Legislature that everyone injured through a breach of any statutory requirement should have a right of civil action against the owner for damages."

Hogg J. goes on to say that "the Act establishes very many rules of the road to be observed by the drivers of motor vehicles. But a breach of the Act must be a proximate cause of the injury complained of to render a person liable for damages." In other words the defendant may be responsible in damages because of a violation of a section of the statute, if there is negligence, and the violation causes or partially causes the accident.

Thus where A occasions damages to B in a motor vehicle collision. The plaintiff B in his action for damages for negligence must (a) prove the facts, (b) showing a breach of the statute (25) and (c) damages resulting as proximate cause of such breach. Then the onus of explanation is cast on the defendant A, who in the absence of explanation shall be held negligent.

Following two Canadian cases, (26) it was held that such onus of explanation is merely to give an explanation which is consistent either with negligence or with no negligence, and if he gives such an explanation, the onus is on those who assert that he was negligent to establish the fact. However the defendent must give an explanation, for prima facie evidence, if there is no evidence to meet it, becomes conclusive evidence and justifies a finding of guilt or a verdict for the plaintiff, when the accused or defendant offers no evidence to meet it.

Causa Causans

Negligence, to give rise to a cause of action, must be the real or proximate cause of the damage complained of.

A car carrying a quantity of liquor came into contact with a motor truck driven by an unlicensed driver. "The illegality of the conduct of both parties was not the cause of the accident," but as both were driving negligently, neither could recover. (27) "The cardinal principle in the law must be causa causans of the loss or damage suffered by the claimant. The mere fact of negligence of a person does not

(24) *1933, 3 D.L.R. 547.*

(25) *A breach of this duty occasioning damage will establish a prima facie case of negligence.*

(26) *Gauthier & Co. v. The King, 1915 S.C.R. 113; Motorways Ltd. v. Simpson, 1948 O.R. 360.*

(27) *Honor v. Bangle 19 O.W.N. 380.*

necessarily result in liability in law on the part of that person." (28) Thus, if the negligence of the defendant did not cause or contribute to the cause of the plaintiff's damage, but such damage was in fact caused solely by the plaintiff, there would be no liability in law on the part of the defendant for such damages. Conversely, if the negligence of the defendant was the sole cause of the plaintiff's damage, the fact that there was some negligent act or omission on the part of the plaintiff is not sufficient in law to impose on the plaintiff any part of the responsibility or liability for the accident or damages resulting therefrom. (29)

The recent case of Fuller v. Nickle (30) illustrates the principle of causa causans. In this case, there was a collision at night between the appellants' truck and a car driven by the respondent. The whole left side of the car was practically ripped off by contact with the overhanging box of the truck. The truck was not equipped with the clearance lights required by the law and was 3½ inches wider than the legal width. The trial judge found that the respondent had not discharged the onus of showing that the infraction of the law contributed to the accident or that the appellant was otherwise guilty of negligence which was the causa causans. The Court of Appeal reversed this judgment and found that the probable cause of the accident was the absence of clearance lights, coupled with the illegal width of the truck. In the Supreme Court of Canada, the decision of the trial judge was restored. "The appellants' infractions of the Vehicles and Highways Traffic Act, both in failing to display clearance lights and having upon his truck 3½ inches extra width, may justify the imposition of penalties, but in fixing the responsibility for a collision in an action between parties they are important only if they constitute a direct cause of that action." (31)

There are many cases on this point of law which show that a violation of a specific provision of the Motor Vehicle Act does not necessarily constitute an act of negligence. It would be absurd to hold that the breach by a motorist of a statutory duty to have a red light in the rear of his motor vehicle would be a ground for an action for damages by a person who collided with the front of the car. In the case of Godfrey v. Cooper, (32) the plaintiffs were passengers in a jitney driven by F and injured in a collision with the defendant's motor car, negligently. F had no license to drive his car, although he was required to have one by the Act. The defendants claimed F was illegally on the highway, and the plaintiffs had no cause of action. Held that F's failure to procure the license was not shown to have caused the accident, and the plaintiffs were entitled to succeed. In

(28) *Smith Transport Ltd. v. Shurtleff, 1948 O.W.N. 412.*
(29) *See Andreas v. C.P.R. Ry. 1905, 37 S.C.R. 450.*
(30) *1949, S.C.R. 450.*
(31) *per Estey J. See also City of Vancouver v. Burchill, 1932 S.C.R. 620. Forbes v. Coca Cola Co. of Can. & Guiteau 1941 3 W.W.R. 909.*
(32) *51 D.L.R. 455.*

another case, (33) failure to sound the horn in breach of the Act was not the cause of the accident, when the plaintiff driving a team saw the motor car approaching, and the horn, if sounded could have done no more than warn plaintiff of the approach. If it is the proximate cause however, as where the plaintiff's car was not equipped with an adequate mirror, and that absence of the mirror was not only contributing, but a proximate cause of the collision, judgement must be for the defendant. (34)

In all actions of this type, it is the proper question for the jury whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to his misfortune by his own want of ordinary care that but for such want of care the misfortune would not have happened. It must be remembered that as in the case of negligence, a cause which is merely a sine qua non does not establish contributory negligence. (35)

Contributory negligence does not apply where there is ultimate negligence. This conclusion is supported by very high authority in an Admiralty case, where it is said per Viscount Birkenhead, L. C. Admiralty Commissioners v. S. S. Volute (1922) 1 A.C. 129 at p. 136: "A is suing for damage....He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B (the defendant) had not been subsequently and severably negligent. A recovers in full."

It is at this point then that we must deal with the question of ultimate negligence. Where both are negligent, the vital question is, whose negligence is last in point of time. In the case of Hanley v. Hayes, (36) where two vehicles were coming to an intersection, it was pointed out by Masten J. A. (37):- "If he had exercised reasonable precaution as to speed and observation, he could have checked his car, or have swung to the left, in time to have averted the accident. Instead.....he veered to the right. He was, therefore.....guilty of ultimate negligence."

When an emergency arises by reason of the negligence of one party, a new duty is cast upon the other to do his best to avoid the consequences of the initial negligence. If there is a breach of that duty, and disaster results, it is attributed solely to his failure His ultimate negligence is the sole cause of the disaster, and he must assume the whole responsibility. But it is only where a clear line can be

(34) *Forbes v. Coca-Cola Co., 1941, 3 W.W.R. 909; also Martin v. Ralph, 57 D.L.R. 588. These cases are authority for the principle that a defendent cannot rely upon a breach of the provisions of the Vehicles Act on the part of the plaintiff unless the breach can be shown to be the proximate cause of the accident.*

(35) *McLaughlin v. Long, 1927, 2 D.L.R. 186; see also the various Contributory Negligence Acts for the appotionment of loss according to degree of fault.*

(36) *1925, 3 D.L.R. 782.*

(37) *Ibid p. 785.*

(38) *Engel v. T.T.C. 1926 1 D.L.R. 986.*

drawn that the subsequent negligence depends upon the fact that one party had a chance (the last clear chance) to avoid the injurious consequences, and failed to make use of it, either due to further negligence at the moment, or to the operation of an act of negligence already committed, but the effect of which was continuing.

However, no matter what it is called, "efficient" or "effective cause," "real cause," "proximate cause," "decisive cause," "immediate cause," "causa causans,".....the object of the inquiry of the accident is a search to find the responsible agent. (39) Very often it is more convenient to begin at the accident, and work back along the line of events which led up to it in order to fix upon some wrong doer the responsibility for the wrongful act which has caused the damage.

It is submitted that the statutory requirements of the Motor Vehicle Acts do not limit or interfere with the common law remedy for negligence. Also that the Motor Vehicle Acts simply regulate the standard of care at any given time. Thus the Acts impose a duty on the driver of a motor vehicle to comply with the regulations laid down, but this still leaves upon every driver a common law duty of taking appropriate action outside the Motor Vehicle Act in circumstances where it becomes essential in the interest of safety. In such circumstances where it may be reasonable to depart from the ordinary rule of the road, it will throw the burden of proving such circumstances upon him, the driver who has departed from the ordinary rule. For example, where vehicles A and B approach each other from opposite directions on the same side of the road, A on its proper side and B on the wrong side, and when collision is imminent, A swerves to its wrong side, B at the same time swerving to its right side causing a collision, B is liable to A. (40)

If the driver of a motor vehicle fails to observe the provisions of the Motor Vehicle Act relating to the standard of care in driving, (41) or equipment requirements, (42) and is involved in an accident while such violation of the Act is continuing, can it be said that the breach or breaches of the Act is ground for an action of negligence? We have found that such breach is prima facie evidence of negligence. Prima facie evidence is sufficient to establish a fact, or to raise a presumption of fact until rebutted. It must be remembered however that three things are necessary in order that the plaintiff should recover, and it is necessary for the judge or jury to decide: (1) Whether the defendant has failed to observe the duty imposed on him by the statute. (2) Whether such failure was the direct cause of the injury of which the plaintiff complains. (3) The damages resulting from such injury suffered by the plaintiff.

(39) *B.C. Electric Ry. C. Ltd. v. Loach (1916) 1 A.C. 719 P.C. per. cur. 725–6–7*
(40) *Wallace v. Bergins 1915 S.C. 205.*
(41) *Sections 37, 38, 39, 42 of N.B. Motor Vehicles Act c. 20 of 24 Geo. V.*
(43) *McPhee v. Lalonde 1946 O.W.N. 373 per LeBel J.*

It is reasonable to believe that a breach of the Motor Vehicle Act in no way related to a collision will not be grounds for an action of negligence. For if there is no causal connection between the negligence and the damage there is no evidence of negligence to go to the jury. Here it should be noted that when there is a violation of the Motor Vehicle Act in the "agony of collision, the motorist is not liable even though there is a causal connection in the breach of the Act and the damage. "The plaintiff has no right to complain if in agony of the collision the defendant fails to take some step which might have prevented a collision unless the step is one which a reasonably careful man would fairly be expected to take in the circumstances. (43) This is also true in the case of pure accidents, where for example, a car driver suddenly becomes unconscious and falls down on the floor of the car, and the car, left without any guidance runs over the sidewalk and injures a pedestrian. (44) Except for these two cases, it may be said that if the driver of a motor vehicle violates the provisions of the Motor Vehicle Act relating to the rules of the road and equipment requirements, and such breach of duty is the direct cause of the damages to the plaintiff, then the plaintiff has a good ground or basis of action for damages in negligence. If there is no causal connection between the breach of the Motor Vehicle Act and the damage there is no evidence of negligence to go to the jury.

It would seem therefore, that the law has worked out definite rules which must be complied with, and these rules represent the legal standard of care. These rules vary from time time as social conditions and habits of life vary. (45)

The reasonable man who drives a motor vehicle has the skill of a competent driver, has complete knowledge of the Motor Vehicle Act and the various statutory regulations dealing with the driving of motor cars, and complies with them. He knows that such rules are for his own benefit and the benefit of the general public. If the motorist violates them he will be penalized by the State, and if his violation causes injury to another person or person's property, he will be liable unless he can explain the prima facie evidence of negligence. Any such negligence will be determined by an action in torts for damages, with the standard of care laid down by the Motor Vehicle Acts.

—by C. T. Gilbert,
Ottawa

(44) *Goolson v. R. 1947 Ex. C.R. 513. See also Buckley and Toronto Transport Comm. v. Smith Transport 1946 Q.R. 798.*

(45) *Although breaches of the Motor Vehicle Act do not in themselves create grounds for an action of negligence, yet those provisions of the Act which deal with rules of the road, and vary from time to time, may create liability where none existed at common law. That is to say they enlarge the field of reasonable care.*

ELECTION PROCEDURE AND THE ELECTIONS ACT

Editorial Note:- The views expressed in the following article do not necessarially represent the opinions of the U.N.B. Law Students' Society or of the Law School Journal but are the opinions of the author Mr. Gordon Fairweather.

I have been asked to contribute a few words concerning suggested amendments to the New Brunswick Elections Act, but I have decided to incorporate with my suggestions some comments on the new English Act.

"The Elections Act" being Chapter 8 of the Acts of New Brunswick, 1944 sets out the method, mechanics and machinery for the electing of candidates to the Legislature of New Brunswick and because the Act does all this it should be a model in its own way of progressive and democratic thinking; it should be designed so as to safeguard the rights of our people and to ensure that each and every voter has complete freedom to vote for the candidates of his choice.

This is not possible in New Brunswick under the system of balloting provided for in S. 55 of the Act. This section permits of the use by the contending parties of a form on which are printed the names of the candidates who represent a particular party. Any of you who have had an opportunity to either work at or near a poll on Election Day will be aware of the abuses this method permits. At times the Poll resembles a midway at a fair or exhibition with workers for each side trying to thrust the prepared ballot into unsuspecting hands like a hawker trying to attract customers into a sideshow. The best conquests are, by the very nature of the methods used, those of our people who are old, who do not see too well or perhaps are unable even to read.

S. 55 should be repealed forthwith and the voters of this Province given an opportunity to vote by marking an "X" beside the name of the candidate of their choice, the entire list of whom should be listed on one ballot. Only in this way can we be sure that our people are able to vote according to their wishes.

Another section which requires amendment is S. 34, which is the section dealing with qualification and disqualification of electors. By sub-section (d) Indians residing on an Indian Reservation are not entitled to vote. I cannot understand why all Indians, no matter whether they live in reservations or not, should not be given the right of franchise. These people are, after all, truly our first citizens.

Sub section (g) of Section 34 disqualifies inmates from poor houses from voting. This sub-section too should be repealed.

Perhaps these few suggested reforms to the Elections Act of New Brunswick will be considered by some to be too trite even to bother commenting on. However, I shall allow my case for reform of the ballot to stand on the evidence of any Poll worker on Election Day.

Any discussions of elections procedure would be incomplete without reference to a recent Act of the United Kingdom Parliament, the Representation of the People Act, 1949. This great reform legislation is too extensive and the bulk of it too remote from our local set-up to warrant any extensive comment in an article such as this; however, the provisions of the Act respecting election expenses, corrupt and illegal practices and methods of counting ballots do deserve at least a cursory examination.

S. 64 of the Act strictly limits the election expenses of any candidate. Permissable expenses depend on whether the candidate is from a County or a borough constituency. In each case a candidate is allowed a flat amount of £450. and, in the case of a County constituency an additional two pence for every voter on the roll; and in a borough constituency an additional one and a half penny for every voter on the roll.

If this provision were in effect in Canada it would mean in a country constituency where there are, say, 30,000 voters an allowance of slightly under $2000. Slightly less than this again would be allowed for a City riding. It is obvious what a tremendous difference this would make (and I submit for the better) in any election campaign in this Country.

Perhaps some will remember reading an article written by the Hon. Charles G. Power in McLean's Magazine a year or so ago where he made a carefully reasoned plea for limiting campaign expenses in this Country.

The Hon. Mr. Power has, if I remember correctly, suggested the same thing in the House of Commons on a number of occasions and usually with little audible support. I wonder, however, if the truth were known if this scheme would not have many more supporters who would only show their colors if they thought everyone else agreed with them.

The English Act also limits the use of cars to bring voters to the polls. In my opinion distances are too great in some of our rural ridings to make this a desirable or practicable reform in Canada.

Sections 99, 100 and 101 set out strict provisions against bribery, treating or the use of undue influence in an attempt to gain votes. Bribery of course speaks for itself and is provided for in the equivalent Canadian Statute. However, S. 100, dealing with "Treating" is interesting because of the widespread practice in country constituencies in Canada of parties providing one meal and in some cases two meals to entire families! I know of one particular poll where the enlightened chairmen of each party got together and agreed on a scheme of joint catering. It is best that I say nothing about "treating by providing drink."

One further reform brought into effect by the English Act concerns the counting of ballots. In England this is done at a central place in

each constituency. All ballot boxes are taken to this central place and emptied into one common pile. The votes are then counted and it is impossible to learn the number of votes a particular candidate got in any particular poll. This might be rather difficult in this Country because of distances, however, it is worthy of consideration. In some small polls in Canada the division of votes can all too readily indicate how a particular person voted. This should not be possible.

To summarize, I make my plea for (a) the immediate abolition of the ballot in use in New Brunswick which has on it the names of candidates representing a particular party; (b) an enlargement of the franchise to include: Indians no matter whether they live in reservations or not; and persons living in poor houses; (c) a curtailment of election expenses allowed each candidate: (d) strict control over such malpractices as bribery, treating and undue influence.

I shall end with the thought that at least we in Canada do not suffer under laws similar to those in the United States where election dates are established by statute. In Canada, of course, election dates are (except insofar as statutory limits as to the length of time a Government can hold office) set by the Government. This provides contending parties with the elements of a guessing game, confines genuine electioneering to the few weeks before the contest, keeps the airwaves relatively clear until the last frantic weeks and the faces of would-be men of destiny are not hanging from billboards and telegraph polls for too long.

—by Gordon Fairweather,

* * *

LAW STUDENT'S LAMENT

My chest is as tight as a Writ of Mandamus,
Blackstone's bursting my fuddled head
I am (ipso facto) an ignoramus
From studying torts 'till my eyes are red.
I'm steeping my soul in Leake (on Contracts)
My brain's in a tizzy, from Cox (C.C.)
Gone are my erstwhile social contacts
From spending my evenings in "Chancery"
In youth, I considered Steve Leacock Witty
Now "Corpus Juris" provides my cheer
I'm so daft that I chuckle when I read Chitty
I am "nulla bona", and dad blames beer!

Herman Lordly

RESTRICTIVE COVENANTS

Bernard Connors vs. Connors Bros., Ltd. and Lewis Connors and Sons, Ltd. (1941 I.D.L.R. 81)

The Privy Council judgment in 1940 in the case of Connors vs. Connors Bros. and Lewis Connors and Sons came up for decision in a recent Moot Court. Some points unconsidered by Lord Maugham merit a further discussion of the case.

The plaintiff had been a substantial stockholder in Lewis Connors and Sons Ltd. He had sold his shares to Connors Bros., Ltd. and thereupon had entered into a restrictive covenant not to "either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada." Various transactions which are not material ensued Ten years later the plaintiff contemplating his re-entry into the sardine business commenced proceedings for an interpretation of the covenant.

Baxter, C. J. held that the plaintiff was bound by the covenant on the grounds that it was not too wide in the circumstances and was, therefore, reasonable between the parties. In addition, he held that it was in no way injurious to the public interest. The Appeal Division of the N. B. Supreme Court upheld the trial judge. On appeal to the Supreme Court of Canada, the judgement was reversed by a majority of the Court. On further appeal to the Privy Council the judgement of Baxter C. J. was restored.

A brief review of the law respecting covenants in restraint of trade might be appropriate at this point. The law has changed considerably since Elizabethen bays due to the changing nature of trade and commerce. **The Nordenfelt** case (1) before the House of Lords in1894 provides the best illustration of the modern law. This was summed up by Lord Birkenhead in the **McElliston** case in 1919: (2).

'An agreement in restraint of trade is **prima facie** void and cannot be enforced unless, (a) it is reasonable as between the parties, and (b) it is consistent with the interests of the public."

The question of reasonableness of the covenant seems to be the decisive factor since there are no decided cases where a covenant has been declared reasonable and yet void as being inconsistent with the interests of the public. However Lord Birkenhead in the **McEllistrom** case commented that it would not be difficult to imagine such a case.

The question of onus creates some difficulty as well. It seems quite certain that the onus of reasonableness lies on the covenantee. However once reasonableness is established, the onus of proving inconsistency with the public interest appears to fall on the covenantor. Lord Maugham indicated in the **Connors** case that the problem of onus will come up for futher elucidation in the future, though he didn't feel called upon to consider the point.

(1) *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co. 1894 A.C., 535*
(2) *McEllistrom vs. Ballymacelligott Co-Operative Agriculture and Dairy Society 1919 A.C. 548.*

In the **Connors** case Lord Maugham considered that the restriction covering the whole of the Dominion of Canada was reasonable between the parties, since the business protected by the covenant did in fact extend over Canada generally. This is in conformity with the modern law. However it is submitted that this particular covenant amounted to a restriction world-wide in area. It applied not only to the sale of sardines but also prohibited processing. The covenantor is **in fact** denied the right to process sardines in Canada **for sale** anywhere **in the world**...Thus the covenantee is receiving world-wide protection in fact whereas only protection in Canada is required for reasonable protection. It is submitted that this covenant is unreasonable as between the parties and therefore invalid.

Lord Maugham dismissed the contention that the covenant was inconsistent with the public interest, stating that to be so the covenant must create a "pernicious monopoly" calculated to enhance prices to an unreasonable extent.

It is submitted that such a view is not in conformity with Canadian combine legislation, though it is quite valid in England. It is extremely doubtful whether the covenant would fall within the prohibition of S498 of the **Criminal Code.** Under this section the agreement is illegal only if its purpose is to restrain trade.

On the other hand the covenant might well be within the range of the **Combines Investigation Act** being "likely" to operate to the detriment of the public. Furthermore it is quite certain that the covenant would not of necessity have to result in the enhancement of prices. It is sufficient if the covenant limits the activities of business. It is submitted therefore that Lord Maugham was in error on this point also and that the covenant was against the public interest as viewed by Canadian combines legislation.

Rex V. Dunham

N. B. Supreme Court, Appeal Division, Nov. 8, 1949.

Accused coming to the aid of a person resisting arrest and being choked by a constable – use of force against constable – reasonable and probable grounds for believing the constable would cause serious injuries – misdirection as to use of reasonable force.

Officer Donner, a constable of the R.C.M.P. at Havelock, Kings, County, N. B., was serving a summons in the restaurant of the accused under the Intoxicating Liquor Act. He also possessed a search warrant to search the premises. In the course of the search the constable was hampered by one Cussack, who apparently intoxicated, resisted arrest. A violent struggle ensued, in which Dunham, the accused, fearing for Cussack's life, struck Donner on the head with a pop bottle. The arrest of Cussack and Dunham followed.

Dunham was charged on three counts: (1) that he unlawfully and intentionally did assault Harry Donner, R.C.M.P., occasioning him bodily harm; (2) that he unlawfully and intentionally did assault a police officer engaged in the execution of his duty; (3) that he unlawfully assaulted Donner with intent to resist the lawful apprehension of himself by said Donner.

The trial judge acquitted the accused, when the jury affirmed his question "If the accused had reasonable apprehension that Constable Donner was going to kill Cussack, he would be justified in trying to prevent the killing." The crown appealed the case under section 1013(4) of the Criminal Code, claiming the jury was misdirected. As the amount of force used by the accused had not been indicated, the Crown felt this would have greatly influenced the jury's verdict. The Appeal Court held that there was a misdirection which warranted a new trial on counts (1) and (2) and with respect to (3) the appeal should be dismissed.

Among the interesting questions this case develops is the right a person has to interfere with an officer carrying out his duty. Interference with an officer should be permissable, as in this case, the person reasonably believed that without interference the officer would have killed the other party. As to the reasonableness or the force employed, that is a question for the jury to decide. A pop bottle might seem like too much force. Seeing a man being choked to death by a police officer would motivate the ordinary reasonable man into trying to prevent a possible death.

It is quite possible the officer's excessive force was due to malice created by the victim's forceful attempt to resist arrest. The police officer suffered no after-affects from the blow of the pop-bottle, therefore there is a prima facie case that the force used was not excessive.

Salmond respecting defence of other persons, points out that old books placed a distinction between defence of persons with whom one is closely connected (a wife, child, or master; Leeward v. Blasely (1695) 1 Ld. Raym. 62) and the defence of a mere stranger. Today this distinction is obsolete and every person has the right of defending any person by reasonable force against unlawful force. (Salmond on Torts 10th Edition, P. 334).

Prosser seems to have the same view as Salmond. He believes that an honest defence of a third party should enable the person to receive the same consideration by the court as the third party who was attacked. (Morris v. McClellan, 1908, 154 Ala. 639).

—by Donald J. O'Brien,
U.N.B. Law School

BOOK REVIEWS

PALMER'S PRIVATE COMPANIES; by J. CHARLESWORTH.
STEVENS & SONS LTD., LONDON, 1949, 41st EDITION
PP. VII, 98, INDEX 3 SHILLINGS.

This is another of those admirable little phamplets in "This is The Law" Series. It deals summarily with the formation and advantages of English private companies. It considers briefly the mode of converting a business into a private company and it covers a wide range of problems which must necessarily be faced by lawyers who are called upon to nurse companies through the full gamut of their existence, from the cradle of incorporation to the grave of winding-up

A "private company" is defined as a company which raises its capital and makes its other financial arrangements privately, without inviting the public to finance it in any way. The principal attributes of such a company are that the right to transfer shares is restricted, the number of members in the company is limited and invitations to the public to subscribe for shares or debentures are prohibited.

The author deals *seriatim* with the great advantages which a company has over a partnership. In one notable passage, sparkling with literary excellence, the author points out that the Companies Acts, by setting a limit to the liability imposed on a person who ventures risk-capital in an enterprise, have, in effect, struck off the fetters imposed by the common law on freedom of contract and have emancipated the community at large from the tyranny of unlimited liability.

The booklet abounds in general principles and in the broad interpretations of statutory law. Only a mere handful of cases are cited and the author avoids detail. In organizing and in writing his work in this manner, the author has made it very interesting and readable. It is unfortunate that much of the information relates exclusively to English company law and has, therefore, little relevance to the existing New Brunswick and federal company law.

J. Carlisle Hanson

GILES, F. T.; THE MAGISTRATES COURTS
PENGUIN BOOKS, HARMONDSWORTH, MIDDLESEX 1949.
218 PP. INDEX. 35 CENTS

F. T. Giles, the author of this book, is a layman, but he has the advantage afforded few other laymen of sitting out half of his waking hours in the Magistrates Courts of England. During this time he has acquired an amazing knowledge of law, both substantial and procedural. The charm of the volume lies not so much in the legal knowledge expressed, as in the plain ordinary language with which it is written.

Mr. Giles has kept away from latin phrases and hackneyed legal expressions. He has presented, in the language of the man on the street, an excellent treatise on the practice, jurisdiction, aims, and shortcomings of the summary courts in England. The work is admirably suited for law students for that reason.

Canadian courts are guided in matters of procedure by the criminal code of Canada. In this code is hidden a surprising amount of law. I use the term "hidden" not by accident, but with a purpose. I believe the Canadian Criminal code to be one of the most incomprehensible statutes in existence. It has been amended and re-amended to such an extent that it takes far more than mere legal genius to elict certain meaning from its hodge-podge pages of mis-placed provisions.

To any genuinely suffering student of criminal law I would readily recommend "The Magistrates Courts." It will at least give you an inkling of the general scope of cases which are usually tried in the inferior courts. Even more than that, it will afford some assistance in deciding whether it is advisable to have any given case tried by a magistrate when you are faced with a choice.

The book can be obtained in pocket-book form from Riverside Books Limited 47 Green Street, St. Lambert, P.Q. at the price of thirty-five cents. Much more money has been spent before now on much less book. Try it.

—John T. Gray

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CONTENTS

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LAW SCHOOL

SAINT JOHN, NEW BRUNSWICK

COURSES LEADING TO A B.C.L.

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HON. W. HENRY HARRISON, D.S.O., B.A., (U.N.B.); LL.B. (HARV.) LL.D. (U.N.B.); D. CAN. L. (KINGS COLLEGE UNIV.)
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PROPERTY (1st year); COMMERCIAL LAW; AGENCY AND PARTNERSHIPS, WILLS AND INTESTACY; CONFLICT OF LAWS; JURISPRUDENCE

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A. N. CARTER, M.A., B.C.L., (OXON); K.C.

T. LOUIS McGLOAN, B.C.L. (KINGS COLLEGE UNIV. AND U.N.B.); K.C.
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CONTRACTS

D. GORDON WILLET, B.A., M.A., (U.N.B.); B.C.L., (KINGS COLLEGE UNIV. AND U.N.B.); K.C.
EVIDENCE

L. G. HOAR, B.A., B.C.L. (U.N.B.)
JUDICIAL REMEDIES AND ELEMENTS OF ENGLISH LAW

J. PAUL BARRY, B.C.L. (U.N.B.)
CRIMINAL LAW AND PROCEDURE

M. GERALD TEED, B.A. (OXON); K.C.
TAXATION

Lecturer Resident in Fredericton, N. B.

J. W. SEARS, B.A., (U.N.B.); (OXON); B.C.L., (OXON); LL.D. (U.N.B.)

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Dr. JOSEPH W. SEARS—Resident Lecturer in Fredericton,—B. A. (UNB) '21; Rhodes Scholar at Oxford for three years; B. A. (Oxon) '24; B. C. L. (Oxon) '25; admitted N. B. Bar '25; practised in Fredericton for two years; appointed in '30 to post of Registrar, Treasurer and Secretary to the Senate of UNB; from '33 on lectured in torts, contracts, crimes and real property; appointed Bursar and Secretary to Senate in '45; Dean of Administration in '46; LL. D. (UNB) '48; Professor of Law '51. Dr. Sears has devoted his full time to the University and at all times has assisted where his help has been needed most. Since '30 he has been Treasurer of the U. N. B. Associated Alumni and from '30 to '46 was Secretary of the organization. Many former students remember Dr. Sears as having instilled that desire to seek out the law. Dr. Sears is congratulated for a job well done with the knowledge that future years will see him actively engaged in lecturing and organization.

Editorial

NEW HORIZONS FOR THE LAW STUDENT

"For the rational study of the law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

—Oliver Wendell Holmes

At its annual convention during the past summer, the New Brunswick Barristers' Society instituted some far reaching reforms in legal education. As from 1951, no person will be admitted to the provincial bar unless he or she has attended the regular course of instruction at a recognized law school. Moreover, and perhaps more important, no student will be admitted to the U.N.B. Law School unless he or she has obtained or is about to obtain a bachelor's degree in arts or science.

These changes have been brought about by the changed role of the lawyer in society. Time was when a successful lawyer needed to be little more than a mere technician, a word merchant or a practiser of legal quackery. It is now recognized that the mere technician is not enough to meet the needs of modern society. Now, legal education is to be built upon a more solid foundation, namely, upon the broad base for living provided by a study of the arts and sciences.

Any discussion of legal education inevitably brings up another point: namely, what is the purpose of legal education? Naturally the prime purpose of our law schools is to train lawyers for the task of pleading, administering the law and so on. But this is not the only purpose. As Mr. Justice Rand has said, lawyers are part of the administrative structure of the state. The performance of this role entails a knowledge of economics, political science and philosophy. Even a nodding acquaintance with these subjects will cause a lawyer to recognize his functions in and his duties towards his society. University training is the most appropriate method of bringing home to prospective lawyers the responsibilities which they have in our modern world.

In short, then, the function of university training in arts and law is to provide purposeful education for persons who desire to pursue the study and practice of law. By long training and wide scholarship any fully matured lawyer must come to glimpse the social purpose of lawyers. The social purpose of our profession is the honourable task of making law become the handmaiden of justice. Individually and collectively, this is the high purpose to which the practice of our profession calls us.

We owe it to ourselves and to the honour of our calling to reject any aim or goal which would debase the profession. Thus, to those who believe that law is nothing more than the handmaiden of Business, we would say this:- The logical application of this philosophy would mean that lawyers would become nothing more that parasites doomed to the servile and destructive occupation of nibbling at the fringes of enterprise. If law is nothing more than the handmiaden of Business, or Government, then the rule of law becomes little more than the tool of the powerful. Surely our legal system should exist for the benefit of the many.

Our legal system, so far as legal training is concerned, should strive to give expression to these ideals. Our Law School is the means; the excellence of our profession is the end. Law students and lawyers might with credit, adopt the ancient dictum of that great philosopher-lawyer, Francis Bacon, which is the motto of the British Institute of Actuaries: "I hold every man a debtor unto his profession, from the which as men of course do seek to obtain countenance and profit, so ought they endeavour by way of amends to be a help and ornament thereto."

J. C. H.

• • • • •

COURT MARTIAL APPEALS

It it with interest that members of the legal profession, especially those with a military background, learn of the establishment of an Appeal Board for Courts Martial. This is an overdue step in the right direction. Little has been published in connection with the matter and it is to be presumed that the Board will come under the jurisdiction of the Judge Advocate General's Branch, and will be comprised of officers with legal training.

The practice in Canada has been to have an Assistant Judge Advocate General in attendance at Courts Martial, but, this has not always been possible. Due to the exigencies of the service and operational commitments, Assistant Judge Advocates General often are not available to attend the various Courts Martial held in scattered parts of the large military commands. This results, in many cases, in Courts Martial being held with no proper legal guidance.

Before the institution of the Appeal Board, Area Commanders had the power to mitigate sentences handed down from the courts in their area. This, however, was not in the nature of an appeal. It was solely the opinion of the Area Commander on perusing the record of the Court. This practice will no doubt continue, but with the added assurance to the accused that his case will be heard by a board of officers trained in law.

It is an integral part of every officer's training to study the military law as contained in the regulations. Legal officers have the advantage of their training in distinguishing points of law and rules of evidence which arise during a hearing.

With the tremendous expansion of the services during war time it is natural that Courts Martial increase in number. Officers who sit as members are very often reservists who have been called up or younger officers commissioned in peace time. Many of these have no knowledge whatsoever of Courts Martial procedure with the result that the accused could suffer some measure of injustice. It is true that the Judge Advocate General's Branch review these Courts Martial; but review will not thwart a miscarriage of justice.

It will be argued by some that these officers should know their military law, or that they should not be detailed for Courts Martial; but with an expansion, as in the last war, of from six thousand to over half a million personnel in the armed forces, it is impossible to find the qualified personnel available as needed. Field units and units in isolated districts have little hope of finding legally trained personnel for Courts Martial work.

During the last war permanent Courts Martial boards were set up in various districts. These usually included officers with legal training and operated successfully. However, they could not be compared with a court of first instance, and their decisions were final, subject to approval of the Area Commander. In no way did they resemble a Court of Appeal.

It is not known at this time what, if any, regulations will govern appeal from a District, Field or General Court Martial to this new Board. It is to be hoped that the rules of procedure will not govern the appeal too stringently.

Anon.

* * * * *

During the spring term five evening seminars were held. They were designed to stimulate student interest and to be of practical use. All seminars were well attended. Speakers and topics were: Hon. Dr. A. P. Paterson (Constitutional Relationship between Dominion and Provinces); B. R. Gass (Office Administration); Judge Comeau (The Lawyer's Relation with Juvenile Problems); G. Earle Logan (Divorce Practise); E. N. Huestis (Probate and Administration Practice).

CRIME AND THE SOCIAL SCIENCES (1)

Crime is both universal and variable. Viewed as behaviour, crime may be said to exist in all human societies; as content, however, all human societies devise their own definitions of what constitutes criminal behaviour. What passes for crime in one society may well be regarded as normal behaviour in another. The frame of reference for the definition of crime in a given society may be said to be the prevailing system of norms, the prescription which spells out what that society regards as acceptable behaviour on the part of the individual.

In recent years a great deal has been written about the effect of society upon the individual. His behaviour has been said to be the result of conditioning, of training to the system of norms of his society. In some quarters, there has been a disproportionate emphasis upon this "deterministic" point-of-view: the human being has been considered almost entirely as a mechanistic organism, responding to the socially inherited modes of behaviour. While this conception is vital to the social sciences, the fact that certain elements (and the criminal group is such an element) of a population in a given society participate in the type of behaviour which does not conform to the "normal" must be taken into account for more complete understanding of social life.

Crime then may be defined as consisting of behaviour which society feels does not conform to what society defines as desirable. From this, it follows that, in order to be placed in the category of crime, behaviour must be of the type that is felt to threaten the welfare of the group, the socially recognized "rights of individuals or groups of individuals in society. As a safeguard against such "dangerous" behaviour, societies devise systems of social control for the allocation of authority in order to ensure that the behaviour of the individual will conform to the "collective will": by providing threats of retribution to the would-be offender and by formulating appropriate punishment for the individual who has been found guilty of anti-social behaviour.

Two outstanding types of social control have been recognized by the social scientists: the "internal" control arising from isolated, informal homogeneous social life characteristic of the small primitive group and, to a lesser extent, of contemporary informal groups; and the more formal "exterior" application of sanctions upon the individual so prevalent in modern life. Sutherland offers a brief functional description of these two types:

> "During all previous history society was organized on the basis of primary, face-to-face groups. Each group was largely self-sufficient and isolated from other groups. All members of a group had the same traditions and were confronted by the same problems. In that situation control was spontaneous and easy.....The control of.....secondary relations has not yet been developed. We do not have sufficient uniformity of interests or sufficient uniformity of attitudes regarding our interests to have a spontaneous control. Each individual or small group attempts to get the desired objects, with little regard for society as a whole....At the same time, the present is an age of diversity of opinions, standards, and codes.....We do not like the variant activities of other groups and we attempt to stop them by laws. We attempt to compel uniformity in the beliefs and activities we regard proper." (2)

1. For a more elaborate treatment of the ideas expressed in this paper consult: BARNES, H. E. and TEETERS, N. K., *New Horizons in Criminology*, New York, Prentice Hall, Inc., 1945 and HOUSE, F. N.,*The Range of Social Theory*, New Yory, Henry Holt and Company, 1929.
2. SUTHERLAND, E. H., *Criminology*, Philadelphia, 1924, p. 21.

Man's conception of crime and criminal behaviour has changed radically with the changing times. In early primitive days — and among the few remaining primitive groups — the criminal was regarded as an individual infested with evil spirits. The metaphysical temper of a superstitious people interpreted criminal behaviour as the work of evil spirits, and punishment was designed to rid the group of the evil spirits in one way or another. It is interesting to note that retribution was directed not specifically toward the individual, but toward the evil spirits which were believed to possess him.

The pagan spirit gave way to the Christian interpretation of crime. Early Christianity regarded the pagan "evil spirits" as the "Devil." The criminal was a man possessed of the Devil; this was the contrast conception of Christ. The Christian religion, according to this early view, offered sanctions and meaning to the socially accepted behaviour patterns, while the Devil and his cohorts struggled to conquer man's soul. Criminal behaviour, therefore, was an index of the fact that the Devil had gained full possession.

Another contribution to the theory of crime, and one that persists to the present day, was that provided by the prolific Greek philosophers in their doctrine of "free will." According to this doctrine, the criminal is a perverse free moral agent; he is a criminal by choice, and not because of circumstances or conditions. In the same way, of course, the law-abiding person has also chosen his own "way of life." This notion of "free will" as an explanation of criminal behaviour, according to Barnes and Teeters, "still provides the foundation for nearly every existing criminal code and constitutes the intellectual frame of reference for our court procedures and our administration of criminal institutions." (3)

These three approaches to the understanding of crime have fallen or been replaced, however, by the trend toward a more rational, scientific understanding of human society and human behaviour. The emerging prominence of the social sciences toward the close of the 19th century was marked by the discarding of these previous notions, and crime began to be regarded as a social phenomenon. In their attempt to achieve a rational understanding of human behaviour, social scientists found it necessary to study man within the context of his social life. Out of this attempt there arose the formula that criminality results from the social conditions in which the criminal lives, or from the personality which emerges out of his social and psychological background. Devine's statement is a graphic illustration of this changed thinking:

> "The question which I raise is whether the wretched poor, the poor who suffer in their poverty, are poor because they are shiftless, because they are undisciplined, because they drink, because they steal, because they have superfluous children, because of personal depravity, personal inclination, and natural preference; or whether they are shiftless, and undisciplined and drink and steal and are unable to care for their too numerous children because our social institutions and economic arrangements are at fault . . . . I hold that personal depravity is as foreign to any sound theory of the hardships of the modern poor as witchcraft or demoniacal possession; that these hardships are economic, social, transitional, measurable, manageable. Misery, as we say of tuberculosis, is communicable, curable, and preventable." (4)

Most of the social sciences have contributed to this changed thinking. Psychology, for example, has directed our attention to the possible relationships between abnormal mental make-up and abnormal behaviour. Psychologists have devised tests which attempt to discover the relationship - if any - between feeble-mindedness and criminal behaviour. This does not mean that all feeble-minded individuals are potential criminals, but it must be recognized that the suggestibility of the feeble-minded make them particularly prone to criminal behaviour when the proper social conditions are present.

3. *op. cit.* p. 3
4. DEVINE, E. T., *Misery and its Causes*, New York, 1909, Chap. 1.

More recently, psychiatry has been preoccupied with the study of mental diseases, which has provided some clues to the mental causes of crime. Moreover, the method of psychiatry, individual treatment of mental illness, illustrates the importance of studying the individual in order to get at the factors which make the person criminal in his behaviour.

The contribution of economics was that of emphasizing the economic aspects of crime. This point of view, in its extreme form, regards poverty as the prime cause of crime. More extreme economists have seen fit to employ Marxian ideas in their theories of crime, and one Dutch economic criminologist has defined crime as a term applying to acts harmful to the interests of some groups of persons who have at their command the power necessary to enforce their will. (5) Economic causation, especially that relating to poverty, is not rigidly true, however. In our own contemporary society, the phenomenon of "white-collar crime" can hardly be explained by this theory. Rather, it has been pointed out, the "economic causes of crime are not due to want alone. Greed as well as need encourage crime. Indeed in our day, greed and economic ambition produce far more serious crimes than any that result from misery and poverty. (6)
Sociology and Social Psychology have stressed the social factors inherent in crime. "Any society has the criminals it deserves," runs an aphorism devised by French sociologists and criminologists. One of the early French sociologists who suggested interpreting crime as a social phenomenon put forward the theory that "imitation" is the main force causing and governing crime. (7) Later Durkheim, another French socioilogist believed that crime stood in direct proportion to the degree of integration and solidarity of the social group to which the individual belongs. (8)

More contemporary studies by sociologists have recognized the importance of other social aspects of crime. Research has shown that there is a tendency for crime to occur in urban areas, and attempts have been made to study the relationship between the cultural background of the areas to the type and frequency of crime; slums and semi-slums have been pin-pointed as "delinquency areas." Sociology has shown the necessity for taking into account such facts as cultural conflict and the mobility of modern life.

These contributions, among others, have resulted in the development of a science of crime. The phenomenon of crime is viewed as a function of individual and social factors which cannot be rationalized in terms of a general single-cause theory. Treatment of the criminal must be governed by this view of crime. We have already witnessed a startling transformation in the treatment of juvenile delinquents, but the new techniques have not spread to all branches.

Too often, in the study of criminal law, the student must make a full-time pursuit of becoming familiar with rules and regulations, precedents and judgments, their implications and relationships. There is, perhaps, very little time in which to ponder the social implications of crime. Enlightened treatment of the criminal and, perhaps, a lessening in the occurence of criminal behaviour can only result from an understanding of crime in all its social implications. It is far too idealistic and unrealistic to hope that crime itself can be abolished; the weakness and fallibility of human nature is too universal to make this applicable.. But crime *can* be diminished.

by Professor Albert Tunis,
Department of Psychology and Sociology
University of New Brunswick

5. BOGNER, A. *Criminality and Economic Conditions*, tr. by H. P. Norton, Modern Criminal Science Series, Boston, 1916, p. 379.
6. BARNES, H. E. and TEETERS, N. K., *op. cit.*, p. 6.
7. See discussion on TARDE, G., in HOUSE, F. N., *op. cit.*, p. 323.
8. See discussion on DURKHEIM, EMILE, in BARNES, H. E. and TEETERS, N. K., *op. cit.*, p. 6.

THE LIABILITY OF THE SOLICITOR – TRUSTEE

1. INTRODUCTION.

The subject matter of this essay has not been directly considered by judicial authority, and the cases that we shall examine deal mostly with such problems as indemnity, gifts, costs, undertakings, and remuneration, in transactions between solicitor and client. From these cases we must attempt to find out whether there is any rule of stricter liability for the solicitor, who is acting as solicitor and trustee of the one estate, than for the lay trustee.

We are here concerned only with express trusts created either inter vivos or by will, and for convenience, we shall refer only to the trust created by will, although the propositions we shall attempt to formulate, will apply equally to trusts created inter vivos and by will.

Equity has not always adopted a fixed and definite standard to determine the liability of a trustee for breach of trust. During its history, equity has swung from a high standard to a higher and almost intolerable one. Statute law has relieved trustees from this responsibility in certain cases, and even courts of equity themselves have realized that the high standard they had set may defeat its own purpose by making the trust unpopular; nevertheless the precedent for the higher standard remains and may be revived in case of need; it will be the subject of this essay to suggest that the court would revive this higher standard in the case of the solicitor trustee.

The term "Breach of Trust" is an elastic one, what may be a breach of trust for one set of facts, may not be so for another. The confines of "Breach of Trust" are never closed. (1)

When a solicitor is acting only as a trustee and not also as solicitor of the trust estate, his liability will be the same as any other professional or business man, who suddenly finds himself appointed a trustee. The special case we are considering is that of the solicitor, who is acting as the solicitor of, and trustee to, the same trust, and who is advising his beneficiaries, and co-trustees of their rights, duties and responsibilities under the trust.

The relation between a solicitor and his client is confidential and fiduciary; so also is the relation between a trustee and his beneficiary. The position of a solicitor-trustee, must merit special consideration by courts of equity. Very often the solicitor will have drawn up the Will or other instrument creating the trust; thus a confidential and fiduciary relation will have preceded, and very often will have been responsible for the appointment of the solicitor as a solicitor trustee. This itself would be sufficient to demand the closer scrunity of the courts.

(1) *Hanbury – Modern Equity 3rd ed. p. 261*

A host of duties may be mentioned which, by their nature, must be fulfilled alike by lay and solicitor trustees. For example: the duty to render an account, to observe the rule in Howe v. Lord Dartmouth (2). No one can be compelled to assume the duties of a trustee but the courts will not permit anyone who has assumed these duties to say that he lacked business or professional experience. Stupidity or ignorance, as well as wilful default, may be a ground for liability. There are many such cases in the reports. The duties of a trustee are enfoced without regard to the personality or qualifications of the person acting.

The liability of the ordinary trustee may be both civil and criminal. The solicitor, being an officer of the court, is subject to a penal liability outside the scope of criminal law and unknown in other professions. A study of both the penal and the civil side of liability may reveal some general principle that will answer the enquiry of this essay.

II ARGUMENT

As a rule trustees are all equally responsible to the beneficiaries for any breach of trust. No trustee can set up as a defence that may amount to a breach of trust, and it has been laid down that a trustee is not entitled to any indemnity against loss brought about by following the advice of his co-trustee who happens to be a solicitor (3). The latter is protected in the same way as any other person who is carrying out an onerous duty. But when a trustee has relied innocently without negligence on the advice of his solicitor-co-trustee, the position may be different. There is no authority directly in point, but Hammond v. Walker (3) is authority when the solicitor is acting only as trustee and not as solicitor-trustee. The rule here suggested is that there may be a right to indemnity in the co-trustee where the solicitor trustee is acting qua solicitor in the trust administration.

There is some support for the proposition that a lay trustee may be entitled to indemnity from his co-trustee who is a solicitor-trustee. Reilly v. Lockhart (4) is an example. Here, a solicitor-trustee who had been entrusted with the management of the trust, was held liable to indemnify his co-trustee for the costs and expenses of proceedings arising out of his negligence. In a later case (5) this right of indemnity was extended to cover all loss arising by the solicitor- trustee's negligence. We must be cautious in our acceptance of this case as an authority for the broader liability. Cotton, L. J. felt that such a rule did exist but the authorities that he cited cannot be said to go as far as his Lordship contended. In the same case, Fry, L. J. emphatically and unequivocally refused to recognize any such rule even in the case of a solicitor-trustee. Bowen, L. J. diffidently agreed with Cotton, L. J.

(2) *(1802) 7 Ves 137*
(3) *Hammond v. Walker (1854) 3 Jur. N.S. 686*
(4) *(1856) 25 L.J. Ch. 697. See also in re. Linsley (1904) L.J. Ch. 841. and in re. Turner (1897) 66 L.J. Ch. 282.*
(5) *Bahin v. Hughes (1886) 55 L.J. Ch. p. 472.*

A distinction was drawn in Head v. Gould (6). A trustee who had participated with his solicitor-trustee in the trust management was held to have no right of indemnity whatever. As a general rule, equity will not recognize a passive trustee in an active trust. Where a solicitor is appointed trustee either by the court or the instrument and is entrusted with the management of the estate, the court will consider his co-trustee in the capacity of a passive trustee. This is borne out by the policy of indemnity. Since a distinction is made between an active and passive trustee in this case, we may say with some force that the court's policy is in favor of some indemnity for the passive but innocent trustee, otherwise it would be needless to draw any line at all. The authority of Bahin v. Hughes (5) must rest upon its age rather than its merits. Since it has never been overruled, we may take our stand that it represents the law. At any rate, it is a pointer, indicating the policy of the court, when the liability of the solicitor-trustee arises.

The strong language of Lord Haldane's speech in Nocton v Ashburton (7) cannot be overlooked. The ratio must necessarily be limited to the case of solicitor dealing with the client's own personal business. But the great authority of Lord Haldane, as an equity jurist, compels us to respect his wide dicta which may be said to cover all cases of solicitor and client even where both are trustees of the same estate. The result of all these cases is that a solicitor may be held liable qua solicitor to indemnify his client against loss in certain circumstances and, therefore, that a solicitor-trustee must indemnify his client trustee, where the solicitor is negligent, and the co-trustee is innocent. The co-trustee may be considered constructively the client of the solicitor because of the natural confidence which the former will place in the latter. The standard which is expected of the solicitor in all the foregoing cases is that of the prudent solicitor. When acting as trustee he must act as a prudent business man would act but he must also apply the prudent standard of the solicitor if he works professionally in the trust administration. Trustees empowered, for instance, to invest in the mortgage of real estate may consult and rely on their solicitor-trustee as did Lord Ashburton in his own personal business. Thus the rule in Nocton v. Ashburton (7) lends its support to the other. The solicitor's responsibility is clear and it can surely be no defence to the negligent solicitor that his co-trustee is under a fiduciary relation to another. Thus Nocton v. Ashburton (7) would support the proposition that a fiduciary relation will exist in a solicitor whose client is his co-trustee.

Were all this authority, we might justly hesitate to accept the principle of indemnity to which we have referred. There is, however, another line of cases covering a slightly different matter which throws some light on the attitude of the court to the dealings of a solicitor. These cases deal with the enforcement of what is called the "solicitor's undertaking". The climax of this series is Re. Hilliard (8) where it was

(6) *(1899) 2 Ch. 250.*
(7) *(1914) 83 L.J. Ch.784.*

held that a solicitor may be liable upon his undertaking, notwithstanding that such undertaking would not be enforceable as a contract or impose liability as an estoppel. In the course of his judgment, Coleridge J. said–"The court does so (i.e. enforces the undertaking) with a view of securing honesty in the conduct of its officers, in all matters which they undertake." Halsbury (9) dealing with the same matter, comments as follows – "The Jurisdiction (of the court to enforce undertakings) is based upon the right of the court to require its officers to a high standard of conduct." In United Mining & Finance Corp., Ltd. v. Becher (10) the trial judge held that the court would enforce these undertakings regardless of the lack of imputations of dishonesty. The process of the court may be used against a completely honest solicitor and in favor of a stranger who may not be his client and in cases where the solicitor has acted gratuitously. The solicitor must act in the capacity of a solicitor in relation to the undertaking.

All the authorities (11) are agreed on the high standard of professional conduct which the court requires. The rule is of universal application and is not limited to any particular class of business provided that the undertaking be made in the course of duty as a solicitor. There can, therefore, be no objection to its application between solicitor-trustee on the one hand and co-trustee, cestui que trust or strangers to the trust on the other, to render a solicitor liable where he has not been negligent.

These cases illustrate the general policy of the court in reviewing the conduct of solicitors: a policy suggestive of and consistent with a practice of strict scrutiny. There can be no room for doubt that the lay trustee is outside the application of this and equally no room for doubt that here exists a potential of increased liability to the solicitor-trustee.

It is a general principle of equity that a trustee cannot make a profit out of the estate. This is a corollary of another rule approved by Fullerton, J. A. in McLellan v. Newton (12) that "it is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect.....So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the transaction; for it is enough that the parties object."

(8) (1845) L.J. Q.B. 225.
(9) Laws of England Vol. XXXI P. 1008.
(10) (1910 79 J.J. K.B. 1006 and at P. 1008
(11) See also Res a solicitor exp. Hales (1907) 76 L.J. K.B. 931 where it was held that lapse of time is no bar. These undertakings are enforced summarily in England under R.S.C. O.52 r. 25.
(12) (1928) I.D.L.R. 189 (C.A. at P. 191.

There can be no doubt of the soundness of such a rule nor of the urgency of its strict application. Its importance here must be tested by its application to solicitor-trustee.

The rule is so wide and emphatic that it might be expected to apply to lay and solicitor trustees alike. Thus it would appear that equity made no distinction. There is some authority that in the case of the solicitor-trustee the foregoing result is obtained by another line of reasoning showing the particular disfavour of the court towards the solicitor trustee. In New v Jones (13) the court held that it was an incapacity in a solicitor-trustee to receive costs and that this incapacity was passed on to his firm. Where an instrument entitles the solicitor to his costs and charges, it will be strictly construed (14). Any claim under a testamentary instrument will be construed as a legacy and the solicitor will be entitled to nothing if the estate is insolvent (15). The claim will be subject to legacy duty (15). Thus lay trustees may receive remuneration under the trust instrument without the imputation of a gift. If the settlor or testator has seen fit to reimburse them in this way, the court will take no objection. The solicitor-trustee takes such a benefit grudgingly granted by the court as a mere gift of the privilege to charge for his fees and costs.

It may be well to interrupt the argument at this point with a few words on the court's policy towards a gift inter vivos from a client to his solicitor. Kindersley, V. C. reviewed the authorities in Tomson v. Judge (17)where he laid down the firm rule that a gift by a client to his solicitor cannot be sustained while the fiduciary relation continues to exist. It does not cease to exist simply because the solicitor is acting gratuitously or because the client is no longer consulting the solicitor in legal business but continues as long as the confidence naturally arising from the old relation continues (18). The onus of proving the discontinuance is always upon the solicitor. What is the difference between a gift inter vivos and a gift by will? It is submitted that the legal position of both when they are accepted by a solicitor is the same. In the case of a will, there may be a period between its making and the death where no fiduciary relation will exist. This is the solicitor's burden to prove and until this is done the gift should be construed as invalid. Although there is no authority for this proposition it has the merit of being consistent with principle.

It is therefore possible to elicit a completely different reasoning in dealing with the costs of the solicitor-trustee. It springs from the complete incapacity in the solicitor to accept payment; an incapacity that is relaxed only occasionally.

(13) *(1833) 41 E.R. 1429.*
(14) *Harbin v. Darby (1860) 28 Beau. 325.*
(15) *White, re Pennell v. Franklin (1898) 67 L.J. Ch. 502.*
(17) *(1850) 19 L.J. Ch. 107.*
(18) *Demerara Bauxite Co. v. Hubbard (1923) AC 673.*

This argument is not altogether without support. Vice-Chancellor Turner in Lincoln v. Windsor (19) laid it down that a solicitor-trustee is entitled only to out-of-pocket expenses whether he is a sole trustee or is acting with others. The reason given is that these costs (in non-contentious matters) are not automatically subject to the scrunity of the court and would be so subject only if the beneficiaries should object to them. In Craddock v. Piper (20), Lord Cottenham remarked that a solicitor-trustee is very likely to be entrusted with the exclusive management of suits concerning trust property and with a large discretion. This case dealt with the allowance of costs in contentious matters and His Lordship decided after reviewing the authorities that a solicitor was, in such a case, entitled to costs only when acting for himself alone or for himself and co-trustees. They are allowed if they are not increased by the action of the solicitor. The reason that costs such as the above are permitted is that they must be taxed and are therefore strictly supervised by the Court. Our interest in this case is not so much a concern with the allowance of costs as with the fact that it should have been so long unsettled that such costs would be allowed. It is almost as though the accepted principle of practice had been that a solicitor-trustee was not entitled to any costs at all. The very strict and parsimonious allowance to solicitor-trustees in such a case even where court supervision is automatic leads to the general principle that the position of a solicitor-trustee involves the very highest standard – one that will ensure by every means that no conflict of interest and duty will arise.

Under the Trustee Act (21) a trustee whether appointed by deed, settlement or will is permitted such an allowance for his care, pain and trouble as may be granted by the court. This section includes solicitor- trustees as well as others. Under a Nova Scotia Statute (22) it is enacted that a solicitor will be entitled to charge for his professional services as a trustee, provided no charges shall be made for any service which an executor or trustee must render without the intervention of a solicitor. There is no similar provision in New Brunswick, but in Nova Scotia there is a section similar to our Sect.49. The inference we must draw from this is that Sect.49 does not give the right to a solicitor to charge for his professional services (23). In a Manitoba case Turriff v. McDonald (24), it is laid down that where a statute gives a solicitor a right to remuneration for his care, pains and trouble, he should be made such allowance only as the court thinks fair. He is not entitled as of right to be remunerated as a solicitor.

(19) (1851) 20 L.J. Ch. 531 See also Stanes v. Parker (1866) 50 E.R. 392.

(20) (1850) 19 L.J. Ch. 107.

(21) Section 49 Ch. 175 R.S.N.B.

(22) Ch. 212 Section 56 R.S.N.B. 1923.

(23) See Huggard v. Prudential Ins. Co. 1924 IWWR 642, Which was a case dealing with R.S.M. 200, and a solicitor director in circumstances similar to a solicitor-trustee.

(24) (1901) 13MAN R 577

There are many cases in the reports where the court has declined to appoint a solicitor as trustee. In re. Kemp's Settled Estates (25) Cotton, L. J. condemned the appointment of the tenant for life, or his solicitor. The ratio decidendi is simply that the court will not appoint as a trustee anyone, who is interested in the trust, or his agent. Doubtless the learned judge was applying the rule mentioned above (26) as to conflict of duty and interest, and nothing more. It does not appear from the judgment that he was laying down any principle on the appointment of solicitors. Although the court may have wide power of appointing new trustees it will never make any appointment which it considers undesirable. Since he will usually be associated professionally with some of the parties to the trust, the solicitor will, therefore, be an objectionable appointment. The guiding principle of the court is the interest of all the beneficiaries, and the efficient management of the trust. (27)

Although the English courts have not completely avoided solicitors when appointing trustees, they have adopted a practice which illustrates their caution, and it may be said, their disfavour. An undertaking by the solicitor appointed is inserted in the order to the effect that he will immediately seek the appointment of a new and independent trustee, should he himself become sole trustee (28). This is the only suggestion we are given as to the policy of the courts. It is submitted that, once the appointment has been made, the court will exercise its vigilance more strongly against the solicitor-trustee, in accordance with the general principle which is being formulated here.

The Supreme Court has an inherent jurisdiction to review the conduct of its officers. This conduct must be in keeping with the public office which a barrister or solicitor is called upon to fulfil. The Corpus Juris gives a brief outline of the important duties which these legal functionaries are required to carry out. Under the Barristers' Society Act, Sect. 19 (29), the council of the Barristers' Society may, of its own motion and shall on the application of any person, enquire into complaints. There are several grounds set out in the Act on which a complaint may be made, but the most important one for our purpose is the simple ground that the barrister or solicitor has been guilty of conduct unbecoming a solicitor. These words do not necessarily impute any dishonesty to a solicitor. It has ever been held that a

(25) *(1883 24 Ch. D. 485 and see generally Annual Practice (1941) P. 1168*

(26) *Vide note (12) Supra.*

(27) *Re Tempest (1886) I.R 1 Ch. 485.*

(28) *See Annual Practice (1941) p. 1168; also re Cotton, Jennings v. Nye (1915) 1 Ch. 307 and other case to which Annual Practice refers.*

(29) *Ch. 50 Acts of the Legislature (1931) and see the Corpus Juris vol. 6 p. 568 "Nature of the Office."*

solicitor becomes subject to the council's enquiry if he has not fulfilled an undertaking given in the course of his professional duty. Accepting as we must the general high standard required of solicitors by the court, we may assume that a very large sphere of activity which would be quite innocent in a layman, will be subject to censure by both the court and the council established under the Act.

Recent legislation in England is of some interest to show the concern with which the British legislature regards the position of solicitor trustees. This act (30) provides, inter alia, strict provisions for the solicitor to keep separate accounts of all trust funds which come into his hands, as solicitor-trustee. The council under the act is empowered to ensure compliance, and may require a solicitor to produce his accounts. Furthermore, a solicitor must pay over all money received (with some practical exceptions) into separate bank accounts. The rules further require that he shall obtain the authority of the council set up by the Act, before any sums are withdrawn. In some cases, mainly concerned with routine amounts, the money may be withdrawn without this authority.

This legislation came as an aftermath of a series of frauds which had been committed by solicitors who were both express and constructive trustees. These criminal practices had, in many cases, left the clients and beneficiaries in pecuniary difficulties, a state of affairs for which the bench vigorously demanded suitable and adequate remedies. In the criminal proceedings which resulted, the courts did not hesitate to mete out to the offender the severest penalties of the law.

The record of the legal profession in this Province is unblemished in comparison with the pre-war defalcations in England, and although we do not have the same disciplinary machinery, we have a valuable protection to the public in the Barristers' Society Act (31). Provisions of Sect. 30 are wide enough to ensure that any conduct falling short of that of a gentleman in the exercise of his profession will render a solicitor liable to account for himself and perhaps to suffer the ignominy of being struck off the rolls, when he has failed to meet the standard. What will amount to professional conduct unbecoming a solicitor in order to found an application to strike off the rolls? Darling J. in the case of in re - A Solicitor,ex parte Law Society (30) approved a definition, which was again approved in a later case (33), that any conduct disgraceful in the eyes of his fellow solicitors would be sufficient

(30) *Solicitor's Act (1941) In particular Sect. 18 and the regulations made thereunder, namely: Solicitors Trust Accounts Rules — 1945.*
(31) *Act of Legislature N.B. C50 — 1931.*
(32) *(1912) 81 L.J. K.B. 245 and*
see definition given in Allison v. General Council of Medical Education and Registration (1894) 631 L.J.Q.B. 534 at 540.
(33) *Re A Solicitor (No. 2) (1924) 93 L.J. K.B. 461.*

to warrant the action of the council in striking him off the rolls. The court may, of its own motion, order that a solicitor be struck off. Thompson v. Flinch (34) is an example. Here the solicitor-trustee wrongly invested trust money. No fraud was alleged, and the Law Society had taken no action. Nevertheless, the court ordered, ex mero motu, that such action be taken.

The criminal liability of the solicitor exists quite independently of any disciplinary action by the court or the Barristers' Society.

* * * * *

III CONCLUSION

A solicitor-trustee, as he is understood here, must fulfill a double function. He is trustee and solicitor in the administration of the one trust. Thus, he must fulfill the duties of both at once. It may be, however, that the sphere of duty of both, coincide, so that the ordinary relation of solicitor and client involves the same responsibility as trustee and cestui que trust. Should this be the case, then there would be no increased liability when the solicitor becomes a trustee. Such an argument is clearly a non-sequitur for even if the duties do coincide, it does not follow that the court will not distinguish classes of trustees. On the other hand, the duties of the two functions may merely overlap. The situation then will be that certain duties will be peculiar to the solicitor qua solicitor. That this is so is obvious from the unique liability flowing from the solicitor's undertaking.

Apart from authority, it seems logical to expect that the solicitor trustee would be under a greater liability than a lay trustee. The office of trustee is an onerous one for which the courts have from time to time relaxed their severity. However, this leniency is reserved for particular cases and is the exception, not the rule. Although the excepted cases may be more numerous than instances of the rule itself, we should not lose sight of the very high standard formerly required. A standard which seems to be taken for granted by most text book writers for they cite no authority for it.

We have considered liability in a general way, now we must refer to particular parties, namely: co-trustees, beneficiaries and strangers to the trust. The enforcement by the summary jurisdiction of the Supreme Court of the undertaking of the solicitor is not only unique to the legal profession but it pervades every aspect of its activities. The undertaking must be made while the solicitor is acting professionally (36). It must be clear in its terms so that the damages are capable of measurement (37).

(34) (1856) 25 *L.J. Ch. 681.*
(36) *United Mining and Finance Corp. Ltd. v. Becher* (1910), 79 *L.J. K.B. 1006. See also Re. Phillips* (1880) 6 *Man. LR 108.*
(37) *Thompson v. Gordon* (1846) 15 *L.J. Ex. 311.*

Take the case of the trustee in Low v. Bouverie (38) where Lindley, L. J. gave the opinion which was approved by Lord Haldane in Nocton v. Ashburton (39) ,that a trustee may become liable if what he has said would amount to a cause of action. In this case, a trustee had given information about charges and encumbrances on the trust fund but he did not mention all of them. Insofar as a solicitor's undertaking is more in the nature of a cause of action, it is submitted that a solicitor-trustee would be liable, where a lay trustee would not. The enforcement of an undertaking defeats such defences as the Statute of Frauds and nudum pactum which would be open to the lay trustee against a stranger. This is one example of a fertile source of liability, and cases could be multiplied. It would be difficult indeed for a solicitor-trustee to show that his undertaking was not given in a professional capacity. In most cases in which a solicitor would be consulted about the trust fund, his undertakings would involve the legal part of his office of solicitor-trustee. Thus, the liability to third parties may be greater than in the case of the lay trustee.

The court is given a discretion under Sect.49 of the Trustee Act (40) to relieve a trustee who has committed a breach of trust, provided he has acted honestly and reasonably. In National Trustee Co. of Australia v. General Finance etc. Co. (41) the Privy Council held that honesty and reasonableness were matters that the court must consider before granting relief. Other circumstances must also be taken into account and special matters affecting the relationship between the beneficiaries and the trustees are most important. In this case, the trustee was a Trust Corporation and was accepting a fee. The court held that remuneration was such a matter affecting the relation of trustee and cestui-que trust and refused to grant relief.

This was an Australian case but the legislative provisions under review were the same as our own (42). The ratio of the case seems to be that when some special situation exists between the fund, the beneficiary and the trustee of which remuneration is an example, the court will not exercise its discretion. When a solicitor is appointed trustee, it is usually because of natural confidence which the parties repose in him. This is a circumstance which the court would be entitled to notice before granting relief. We have seen how cautiously the court supervises the charges and costs allowed to a solicitor-trustee and we have analyzed the principle involved in the enforcement of undertakings. These rules converge to require of the members of the legal profession a standard of conduct which must be unassailable and which will make it difficult to excuse a breach of trust under any circumstances. It would be illogical to set up such a high moral and legal standard on the one hand and to relieve the solicitor-trustee on the other hand simply

(38) *(1891) 60 L.J. Ch. 594 at P. 596.*
(39) *(1914) 83 L.J. Ch. 784.*
(40) *R.S.N.B. (1927) C 175.*
(41) *(1905) 74 L.J. P. 73.*
(42) *R.S.N.B. C 175 See 49.*

because he is honest. It is true that he may satisfy the court of his honesty but reasonableness is relative to the standard by which it is judged. From this point of view, also, a solicitor-trustee would find it difficult, if not impossible, to justify himself. Section 49 of the Trustee Act contemplates relief from the liability for breach of trust and it would render nugatory the undoubted principles referred to above if we found that a solicitor-trustee could exonerate himself by pleading this section.

Following the maxim "Equality is Equity," the courts will usually permit contribution between co-trustees who are "in pari delicto." This is not the case with indemnity because equity does not recognize a passive trustee. All trustees must be active in an active trust. However, there is authority to show that when a solicitor is one of the trustees,the others may be able to claim an indemnity (44). It would be a case of circular argument to suggest that because an indemnity is so awarded, a solicitor's co-trustees must be looked upon as passive and that since they are passive trustees then they should be awarded an indemnity. It is submitted that the court has applied, in these cases, the rule laid down in Nocton v. Ashburton (45) and has thus set up and confirmed its separate and special treatment of solicitor-trustees.

There is one matter in which the solicitor-trustee would seem to fare equally with the lay trustee. In re. McM. Trust (46) where a solicitor trustee had delegated the receipt of rents to his clerk who subsequently absconded with a considerable portion of the trust income, the solicitor was held not liable for breach of trust. This case purported to apply the rule in Speight v. Gaunt (47)., the leading authority on delegation by trustees. While we may admit the principle permitting even solicitor-trustees to delegate certain functions, it would be illogical to regard the standard of care required of the lay trustee in the matter of delegation as the standard of his legal confreres. Here too the solicitor-trustee must be taken on the same footing as he is in other transactions.

The court is the final arbiter of liability and this article has attempted to point out the high standard of the legal profession enforced by sanctions of a special nature.

We may conclude with a quotation from Hanbury in which he adopts a statement in Maitland's famous work (48) that sums up and confirms our conclusions — "Equity is hard upon a trustee and it is hard on a solicitor; in a case where the two functions are combined, it will be very hard indeed."

—by William A. Gibbon,
Barrister,
Saint John, N. B.

(44) *Vide supra* P. 6 *et seq.*
(45) (1914) 83 L.J. Ch. 781.
(46) 28 C.L.J. 502.
(47) (1883) 11 Q.B.D.
(48) Hanbury [illegible] p. 333 [illegible]

THE EVOLUTION OF MUNICIPAL GOVERNMENT IN NEW BRUNSWICK

The people of New Brunswick have concerned themselves in the past more with the substance than with the form of government. The following comment written with reference to New Brunswick's part in the struggle for responsible government is revealing:—

> "One cannot but be struck with the difference in the aims which the people of New Brunswick set before themselves, as compared with those sought in the other provinces. While they were struggling to widen the sphere of self-government, New Brunswick confined itself to strictly practical objectives. The people accepted instinctively Pope's dictum, 'for forms of government let fools contest', and were quite satisfied with a government which administered their affairs as they wished, let its form be what it might." (1).

While this opinion relates primarily to responsible government on the provincial level, it must be taken to reflect the popular view of local self-government as well. The young lawyer in his early practice may expect to encounter a wide and undiscriminating diversity of laws regulating local self-government in this province.

Inevitably, demands will be made on his time, early in practice, requiring some participation in local public affairs. The young practitioner with his recently acquired knowledge of The Counties' Act, (2) The Towns Act, (3) The Villages' Act, (4) and the Local Improvement Districts Act (5) is expected as a matter of course to devote some time and energy to municipal government. He may secure recognition and reward by appointment as a solicitor to a municipality. He may contribute his knowledge and services as a representative. Undoubtedly he will be called upon from time to time to concern himself with litigation arising out of complaints of breaches of by-laws. In any event, he will be required to devote some of his time to the practice of municipal law.

As experience ripens into further knowledge, the full panorama of municipal statute law begins to unfold. All municipal institutions are the creation, and are under the jurisdiction of the Provincial Legislature, in accordance with Section 92 of the British North America Act, 1867. A community may derive its authority from one of the four public acts referred to above or it may function under a special charter. In any event, its powers will be expanded by such public acts as the Early Closing Act (6) and many others of a like nature representing the government's views of the requirements of the municipalities. Again the community will undoubtedly have secured legislation on its own initiative representing its views of local requirements. The particular assistance of other acts may have been invoked by such passages as these:—

> "The provisions in this Act contained shall be held to apply to the Police Magistrate of the City of Fredericton, and to the Mayor, Aldermen and Commonalty of the said City, and any bye-law and ordinance of the said City, in the same manner and to the same extent in all respects as the same is made to apply to the City of Saint John." (7).

(1) William Smith; **Evolution of Government in Canada**, Confederation Memorial Volume, P. 244.
(2) C. 147, 14 Geo. VI, (1950)
(3) C. 169, 14 Geo. VI, (1950)
(4) C. 170, 14 Geo. VI, (1950)
(5) C. 48, 9 Geo. VI, (1945)
(6) C. 55, 3 Geo. VI, (1939)
(7) C. 22, 43 Victoria, (1880)

Occasionally statutes are incorporated by reference and sometimes by double reference. In early practice it is considered good mental exercise to follow the procedural pattern set by The City of Fredericton Civil Court Act, (8) which adopted the procedure in Justices Civil Courts, which in turn was modified by the provisions of The Inferior Courts Act. (9) Sometimes this is baffling. It bears a strong resemblance to Joseph's coat. One municipality may be governed by reference to over 100 separate pieces of legislation. This can be explained in part by reference to the many draftsmen who have fashioned the law over a period of time, by lack of close supervision on the part of the Municipalities' Committees of the Legislative Assembly, and by the strong individualistic opinions of the governing bodies of the municipalities themselves.

When knowledge of municipal law is complete in the young lawyer, he will begin to compare the legislative labyrinth of New Brunswick municipal law with the statutes of other provinces. The opinion is ventured that the municipal statute law of New Brunswick exceeds that of the larger province of Ontario by several feet of library shelf. One might ask with fairness the reason for this legislative harvest. The answer may be stated in its shortest form: that New Brunswick municipal law is the product of its own history. The purpose of this article will be to trace that history.

While an historical review of legislation of this nature must deal with structure and form, rather than with the functions of local government, the fundamental purposes of municipal institutions should be kept firmly in mind. local self-government is the essence of democracy. There is a maxim that "the best school of democracy, and the best guarantee for its success, is the practice of local self-government." (10)

Community problems are first in the attention of the electors. The dog by-law may transcend in the local consciousness changes in the fiscal system of the central government. Many parliamentary representatives receive their first training in municipal councils. Electors and elected alike first learn the principles of democracy in their own communities. The wisdom of earlier times is still modern. De Tocqueville in his *Democracy in America* has written:—

> "Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions, it cannot have the spirit of liberty."

The scope of this article must extend from the formation of the province in 1784 to its most recent legislative pronouncements in 1950. (11) As particular forms of government are related by experience, adoption and problems of draftsmanship, some light can be shed upon the various forms of local government which exist in this province by reference to and comparison with systems in use in other jurisdictions.

We are told (12) that the beginnings of popular government were in small areas, rural communities and tiny cities, each with a relatively small number of free inhabitants. These free inhabitants, or freemen, became accustomed to meet in the form of assemblies to discuss communal affairs, and while the heads of families exercised great influence, there is no doubt that the wishes of the freemen were voiced and considered. Such assemblies met without benefit of charter, constitution or by-laws as we know them today and developed in embryonic form the pattern of parliamentary institutions which were to follow. Well known examples are the Agora of Greece, the Comitia of Rome, the Folk Moot of the

(8) C. 55, 43 Cons. Stat., (1877)
(9) C. 124, R.S.N.B., (1927)
(10) Viscount Bryce: **Modern Democracies**, Vol. I, P. 133.
(11) The Counties Act and The Village Act **supra.**
(12) Cf. Viscount Bryce: **Modern Democracies**, Vol. I, P 129.

Anglo-Saxons in England, and the Thing of the Norsemen. Full proof of the utility of such assemblies may be observed in the survival of town meetings, such as ratepayers meetings to elect school trustees, or citizens indignation meetings called for the purpose of opposing pending action of local governmental bodies.

The early assemblies were concerned with all problems affecting themselves without restriction by higher authority, and more particularly with problems of joint defence against attack, settlement of internal disputes and the management of land. In the course of time, such communities became absorbed into larger political divisions and they lost most of their power of self-government to the central authority thus created. The central authority, however, as the complexity of government developed, learned to delegate local powers back to the communities. At this point may be seen the origin of local delegated self-government as we see it today. With few exceptions all municipal forms of government derive their authority today by delegation from central authority. This is the first important characteristic in local self-government.

The development of all local governments did not precede the organization of a central government. Canada furnishes an excellent example of the exception. In his excellent study of the development of local government in Ontario, Mr. Romaine K. Ross points out:—

> "While in England the central government was, for the most part, superimposed upon a local organization already in existence, in the provinces of Canada local administration grew out of a highly centralized system of government. The ultimate result, however, has in both cases been the same. The growth of a central government in England did not wholly extinguish local authorities, nor did the inroads of local administration in the Canadian provinces completely disintegrate the central government. Rather have the organs of government in these political territories where democratic principles of government prevail, found expression in a happy mdium wherein they can function, one with the other, in a manner calculated to do the greatest good to the greatest number." (13).

Prior to 1784, that part of Acadia under French rule, or Nova Scotia under British rule, which is now New Brunswick, was governed directly from Paris and later from London without representation. No representative form of local government existed. At the time of the separation of the province from Nova Scotia, the population was estimated at about 16,000. Of these, 12,000 were Loyalists who were recently arrived, 2,500 were pre-Loyalist, and 1,500 were French Acadians. The new province was divided by Letters Patent into territorial units consisting of counties, towns and parishes and a government consisting of a Governor, Council and Assembly was established. The province did not enjoy responsible government and the assembly was too much concerned in a contest with the council to attempt the reform of the municipal system which then existed.

All local government was non-representative. It could hardly be called a system. The county magistrates, appointed by the Governor-in-Council, holding a commission renewable yearly, assembled in quarter sessions, exercised a certain jurisdiction over taxation, roads, the poor, prisons, and other essential community matters. Their functions of local government were in addition to their duties as justices of the Inferior Courts, when they exercised both criminal and civil jurisdiction. Being men of prominence, it was not unusual to find a number of them in command of the local militia.

The first legislature met at Saint John in 1786, when important portions of substantive law were enacted. It is apparent, however, that the legislature was content with the programme of local government by magistrates, for by "An Act for the Appointment of Town and Parish Officers in the Several Counties of this

(13) **Local Government in Ontario**, P.P. 95-6.

Province." (14) the Justices of the General Sessions of the Peace were empowered to appoint a wide variety of parish officials. By "An Act for Assisting Collecting and Levying County Rates," (15) they were granted the important power to tax. Subsequent acts expanded the powers of the magistrates until they were clothed with all useful powers of local government. The power to assess and levy taxes, to expend money, and to appoint subordinate officials, gave them full control of the counties. We have it on good authority that "the system of county government was as bad as possible, because the magistrates were not responsible to any person. The condition of the county accounts was never made public and it was not until a comparatively late period—that the grand jury obtained legislative authority to inspect the county accounts." (16).

Such were the conditions which obtained generally in the counties until 1854. There was one important exception. On May 18, 1785, a few months prior to the first meeting of the Assembly at Saint John, a comprehensive charter was granted to the inhabitants of that city allowing them a full measure of local self-government. The preamble pointedly hints at the existence of evils and promises a prudent use of the liberties granted. Its text is as follows:—

> "Whereas our loving subjects the inhabitants of the Town or District of Parr, lying on the east side of the River Saint John, and of Carleton on the west side thereof, at the entrance of the River Saint John aforesaid, both which Districts are in our Province of New Brunswick, in America, have by their petition to our trusty and well beloved Thomas Carleton Esquire, our Governor and Commander in Chief in and over our said Province, represented that they have, by their exertions, conquered many of the difficulties attending the settlement of a new country; and that they are anxious to remove the remaining evils they at present labour under, part of which flow from the want of a regular Magistracy for the able and orderly government of the Districts they inhabit: And whereas they have also represented, that they humbly conceive one important step towards this desirable end, would be granting them a charter of Incorporation, under the sanction of which they might be enabled to ordain such bye-laws and regulations as their peculiar wants and rapid growth urgently call for: That the advantages to be derived from a charter empowering them to establish such ordinances as are requisite for the good government of a populous place are so obvious, they think it necessary only to hint at them; but that the speedy administration of justice both civil and criminal, will be so greatly aided by the erecting a Mayor's Court and Quarter Sessions, they humbly hope this consideration alone will be sufficient to induce a compliance with their request; and have confidently promised that their prudent use of the liberties so to be granted them will justify the favour. And whereas our said loving subjects, impelled by the foregoing reasons, have humbly petitioned the said Thomas Carleton, Esquire, our Governor aforesaid, for a charter comprehending the said districts on both sides of the river Saint John, erecting the whole into one City, to be called the City of Saint John, and conferring on the Corporation the several powers and privileges usually granted to mercantile towns for the encouragement of commerce, and found by experience conducive to the protection and support of the upright part of the community; as by the said petition, recourse being thereunto had, may more fully and at large appear."

This charter was well in advance of the times and its grant can be contrasted with conditions which prevailed in Upper Canada. No provision for municipal government had been made under the Quebec Act of 1774. The Imperial Parliament overcame this difficulty in 1791 by the passage of the Constitutional Act. The first session of the Upper Canada Legislature assembled under this act, introduced a bill authorizing town meetings and the election of certain municipal officers by the ratepayers.

(14) C. 28, 26 Geo. III. (1786)
(15) C. 42, 26 Geo. III. (1786)
(16) James Hannay: **History of New Brunswick**, Vol. II, P 136.

The bill failed to pass, but was reintroduced and enacted in 1793, thereby vesting in the ratepayers the right to elect their own officials and closing the door forever to the further ascendency of the magistrates over the people. The process of subtracting power from the magistrates continued for over a period of 50 years, hastened by the Durham Report of 1839 and the union of Upper and Lower Canada in 1840. A general municipal system was established in Upper Canada by the Baldwin Act of 1849. One is tempted to speculate by what expedient the ratepayers of Saint John managed to obtain local autonomy far in advance of say, Toronto, which obtained a full governing act in 1834, and influential Upper Canada which attained full autonomy in 1849. Perhaps the story is well known in Saint John. In any event, the presence in Saint John of so many "Loyalists" accustomed to the town meetings of Boston, presided over by the distinguished Samuel Adams, must be considered as a factor which could obtain for Saint John the distinction of being the first city in British North America to receive a self-governing charter. The air of suspician which appears to gather when Saint John appears before the Municipalities Committee of the Legislature in modern times indicates that its citizens are still alive to the great importance of local institutions. Recent litigation supports this opinion.

While Upper Canada was winning ground slowly in the municipal area, and the City of Saint John was developing its own local institutions, the Assembly of New Brunswick continued to ignore the demands for local autonomy. Its concern was in the larger field of responsible government for the province. The days of the magistrates' autocratic rule, however, were numbered. The struggle for responsible government which was at its height in all provinces, did focus attention on problems of community government, and the spirit of reform then abroad did assist the cause of local government. In 1848, the City of Fredericton received its first legislative charter and with it local home rule. The first revision of New Brunswick statutes followed and was enacted in 1854. These statutes contained a whole part devoted to principles of local autonomy. The adoption of local self-government in the counties was optional. Upon petition of 100 residents, either ratepayers or freeholders, the sheriff of the county was directed to hold a poll. If a majority of the electors favoured incorporation under the Act of 1854, the Governor-in-Council was so advised and a charter of incorporation issued. The legislation contained some limitations, the most notable of which required the submission of all by-laws to the Provincial Secretary-Treasurer, and allowing the Governor 60 days to disallow. Such by-laws also were to be in force for 3 years only, when they were required to be re-enacted and re-submitted. These matters indicate the remnant of suspicion of the abilities of the citizens to manage thei rown affairs. This suspicion was soon to disappear when the statutes were consolidated in 1877. Six counties took advantage of the Act of 1854 and embarked on their mission of educating people to govern themselves.

Again it is desirable at the end of a period to consider the sources of development. In England up to 1835 local government was in the hands of the magistrates, assembled in Quarter Sessions. They exercised jurisdiction over roads and prisons: the poor were cared for, if at all, by the Guardians; in the boroughs such necessary matters as paving and lighting or the supply of pure water, were all attended to by special commissioners. Local government lacked representation. In that year by the Municipal Corporations Act local government was granted and remained in the form of the original gift for over 100 years. This indicated the traditional English desire not to experiment with forms of government. This moderate development may have exerted some influence on the colonies, but such influnce would be distant. The more likely source of influence appears to come from the American nation newly established. The reports of the commissioners as a preface to the Acts of 1854 indicate that the source of material for such acts came from Massachusetts and New England. Here was the chief experimental ground of the municipal law of that day.

The development of local self-government in New Brunswick passed into its final stage in 1877 when the Public Statutes of the Province were consolidated. By Chapter 99 of the Consolidated Statutes 1877, it was provided that the counties not then incorporated be bodies corporate under the Chapter and the optional method provided under the Acts of 1854 was repealed. The feeling surrounding the granting of Confederation is credited with much of this advance in the development of municipal institutions. The advent of responsible government had a similar influence. The new Municipal Act delegated to the municipalities most of the local problems which were properly in the municipalities field.

From 1856 until the present, the form and structure of local self-government has been steadily improved. Between 1856 and 1896, seven towns were incorporated by special charter as follows:—

Woodstock	C. 32, 19 Victoria, 1856
St. Stephen	C. 20, 34 Victoria, 1871
Milltown	C.103, 36 Victoria, 1873
Marysville	C. 25, 49 Victoria, 1886
Campbellton	C. 81, 51 Victoria, 1888
Grand Falls	C. 73, 53 Victoria, 1890
Chatham	C. 46, 59 Victoria, 1896

Following the succession of private acts incorporating towns, the Towns Incorporation Act of 1896 was enacted providing a general act under which a community could seek incorporation as a town by application to the Lieutenant-Governor-in-Council. Twelve communities availed themselves of these privileges between 1899 and 1920, namely:

Newcastle	1899	Edmundston	1905
Sackville	1903	Dalhousie	1905
Shediac	1903	Bathurst	1912
St. Andrews	1903	Sunny Brae	1915
Sussex	1904	Hartland	1918
St. George	1904	St. Leonard	1920

The process was further continued by the Villages Incorporation Act of 1920 and four communities have since then been incorporated as villages:

Rothesay	1921	Dieppe	1946
Port Elgin	1922	Shippegan	1947

The City of Moncton was incorporated by Special Act in 1890.

A further general act of importance is the Local Improvement District Act, Chapter 48, 9 George VI, 1945. Under this Act, districts are permitted to incorporate for the purpose of providing services, the governing body of the district being the commission. Since that date, 37 districts have incorporated as local improvement districts.

The province has further improved the position of municipalities through general legislation dealing with particular aspects of municipal government such as the Early Closing Act and others which further increase the powers of the municipalities. The County Magistrates Act is an outstanding example. Most of these acts, like the early acts, are optional.

Up to 1934, the trend appeared to be toward a steady increase in the powers of municipalities. In that year, the Control of Municipalities Act provided for the establishment of a Department of Municipal Affairs headed by a Commissioner. This Department is clothed with considerable authority particularly in connection with financial affairs of municipalities. Thus far, the use of this power has been largely in the form of recommendation.

It has a counter-part in the Province of Ontario since 1935. The Ontario department has achieved a high degree of centralized supervision over local affairs

in that province through the Ontario Municipality Board which is vested with a large general jurisdiction. The Board's powers are made effective by order rather than by by-law and it actually supervises many municipal undertakings. The Ontario Act has delegated to the Board many judicial powers of extreme nature but proponents of the Board allege that it is functioning well and producing uniformity in municipal control.

New Brunswick has departed very largely from the traditional English system of government both in terminology and method. In England, the local authorities, as they are called, consist of the Counties and County Boroughs; next the Municipal Boroughs; then the Urban Districts and Rural Districts; and finally the oldest form of municipal government in England, the Parish Council or Parish Meeting. The duties and powers of these bodies are assigned to them direct by parliament, sometimes in general acts and sometimes by special legislation promoted by the authority itself. English municipal bodies of this nature work largely through Committees; such American institutions as Boards of Control, Town Managers and so forth are not used. There has been little experimentation in local government in England.

The United States, on the other hand, has been the testing ground of municipal institutions for over half-a-century It has been the chief experimental ground for local self-government in the world. It has produced such forms as government by Boards of Control, government by Commissioners, the strong-Mayor weak-Council form of government, the City Manager or Town Manager form of government. Such experimentation in the local field seems to one essential of local self-government. In a community, be it large or small, the personal equation is most important. A careful and logical development of a municipal structure can be defeated by an adverse personal element and all municipalities must in the final analysis depend on the good sense of their elected representatives. In the United States, there has been a considerable decline in the Council form of government with a corresponding increase in executive power. This has not been the case in New Brunswick. Two communities in New Brunswick, however, have adopted the equivalent of a Town Manager, namely Saint John and Woodstock, where a greater degree of executive authority is placed in the Manager, than under the traditional weak-Mayor strong-Council system.

One thing may be observed. New Brunswick municipal institutions have not reacted sharply to any particular form of government in use in other jurisdictions. In nomenclature we are independent. Our territorial units of local self-government are "counties", "towns" and "parishes"; in England they are "boroughs", "districts" and "parishes"; in the United States terminology is not uniform. In the common law prrovinces of Canada, we find 'districts" and "townships" but no "parishes." The designation of the parish as our smallest territorial unit, and as including a "city, town or incorporated village" (17) comes from Virginia and Maryland, the homes of some of our earliest settlers. In all British colonies the township system has been in frequent use and the word "parish" referred to an ecclesiastical division. In Virginia, the parish attained considerable importance as a political unit. Parishes were originally coterminous with the plantations and larger areas. It is only in New Brunswick that the term has become a permanent part of the civil organization of government.

In addition to our independence in names, we have shown no particular inclination to "centralize". The legislature has "delegated" local powers. It has not, however, "abdicated" these powers. It is only in financial matters that a tendency may be observed to withdraw local powers. (18) This is not so in other jurisdictions, when larger communities have suffered somewhat from local attention, thus creating the excuse for uniformity and centralization. The "pinch-penny" arguments of county councils have kept alive the spirit of interest in local public problems.

(17) C. 140, Geo. VI, (1950) S. 37 (34)
(18) Cf. County Unit Tax Systems for Schools.

Finally, in our counties at least, we are too small for the intricate machinery of larger American units and local business is still done largely by committee.

This article began with the intimation that the citizens of New Brunswick have shown more interest in the substance, rather than the form of local institutions. The gradual development of these institutions shows a tendency to follow the American pattern in preference to the English form. This development, however, has not been experimental. It has proceeded slowly and along individualistic lines, following no set theory and responsible to few rules of uniformity. While a Department of Municipal Affairs watches municipal progress, there is no indication of pressure on municipalities requiring them to conform to prevailing theories other than keeping standard accounts. This development contrasts strongly with other jurisdictions where greater uniformity is required, or more emphasis is placed on form.

Perhaps no formula for municipal structure can be presented that will guarantee good municipal government. The good character, honesty and reputation of the elected representative working within the framework of a simplified municipal machinery designed at home to reflect local opinions, produces good government on the part of those who govern and a lively interest on the part of those who elect. The personal equation is greater than the method.

Criticism of the narrowness and parsimoniousness of aldermen and councillors, and of those who elect them, is often heard. These defects are not serious. The narrow parsimonious spirit sometimes shown on the local level is often a manifestation of personal integrity and a deep interest in the whole of the community as opposed to its several parts. It is the true spirit of a trustee who is sworn to preserve the assets of an estate, not to prey upon them. Under these circumstances, civic speculation and personal gain are infrequent.

It is to be hoped that the independent spirit of New Brunswick municipalities will suffer few impairments and that regulation and centralization will not replace the spirit of improvisation and adaptation which is the natural genius of our people.

—By H. A. Hanson,
Fredericton, N. B.

THE LEGAL STATUS OF THE CANADIAN SOLDIER 1914-19

It is always an absorbing occupation to ruminate on the relations and implications of facts, however diverse in kind or separated in origin and time. So it may be interesting to reflect on the connection that exists between the 2nd Battalion, P.P.C.L.I., now fighting in Korea as part of the 29th Commonwealth Brigade, and a lengthy legal memorandum, spiked in a crumpled file cover, and bearing date 18 September, 1916. The Princess Pats are on active service in 1951 as part of a British Commonwealth Force resisting Communist aggression in Asia. The eighteen page memorandum, thirty-four years in the files, (1) played a part in this latest example of the impressive evolution and devolution of the British Commonwealth and Empire that beginning with Durham and Howe, was formulated by Laurier, Borden and Balfour, and hastened by the Great Wars of 1914-1919 and 1939-1945. This nearly ephemeral Empire, now shorn of political subordination, has retained a web of invisible community as light as gossamer. The 29th Brigade in Korea is testimony to its present strength; the long memorandum is evidence of its past development. This memorandum defined a concept previously uncertain, namely, the independent legal status of the Canadian Soldier serving abroad and is one of the little known steps on the Canadian climb to Dominion status.

The advance to Dominion Status which Canada made between 1914 and 1919 is illuminated by the contrast between the Declaration of War by Sir Edward Grey, effective throughout the Empire and the signature of the Peace Treaty by Sir Robert Borden, for Canada alone. Advance came swiftly and easily in those years. This celerity was due primarily to the respect won by the magnificent fighting ability of the Canadian Army Corps whose prestige made any serious resistance to Borden's claims for international recognition virtually impossible. Thus, the legal status of the men of the Corps was obviously important. The greater their independence the greater the amount of prestige Canada could extract from their victories. However it was not until after two years of war that this status was investigated, understood and defined. By the interesting inconsequence of British institutions, this understanding came about accidently because the Prime Minister of Canada wanted to replace one Cabinet Minister by two others.

In September, 1916, Sir Robert Borden, then Prime Minister of Canada, was nursing a painful problem. He was slowly, reluctantly, but perceptibly being pushed to a decision to re-organize the Department of Militia and Defence; a decision which, when taken, he was certain would humiliate the Militia Minister, Major-General the Hon. Sir Sam Hughes, Borden's most colorful, most loyal and most exasperating colleague. Considering Sir Sam's sensitivity this decision might lead to the Minister's resignation. But the Prime Minister had become convinced that the administration of the Canadian Army overseas was so chaotic that a drastic re-organization was imperative; and this re-organization Sir Sam seemed unable or unwilling to effect.

In 1914 the Militia Minister had performed prodigies of organization and improvisation. His energy had made possible the landing of the First Contingent on Plymouth Hoe, armed and equipped, seventy-one days after the declaration of war. It was a wonderful feat. However, by 1916, despite his positive qualities of energy, imagination and leadership, his continual indiscretions had made him a political liability to the Prime Minister. He was on bad terms with most of his colleagues. He was violently unpopular in Quebec, with those imperialists whom he had alienated by the Bruce Report, and in military circles, suspicious of political favouritism and aroused by the Ypres Letter incident. (2) "It had become essential", writes Sir Robert in his MEMOIRS, "to curtail the activities of Hughes and to place in the hands of a responsible Minister in London, the disposition of all

(1) P.A.C., E. L. Newcombe to Sir R. L. Borden, Confidential memo., 18 Sept. 1916 Overseas Ministry File (OMF) No. 8.

(2) VINCE, Capt. D. M. A. R.; "The Overseas Sub-Militia Council . . ."; in C.H.R., March, 1950.

such "matters affecting the welfare of the Canadian army as were properly the subject of the civil authority . . . finally I determined to appoint a Minister of Overseas Forces who would take over certain well defined duties and thus relieve the Government from the unfortunate results of Hughes' visits abroad." (3)

A lawyer, Sir Robert realized that before alterations were made in the method evolved for the control of the C.E.F., it was necessary to be absolutely certain the contemplated changes lay within the constitutional powers of the Dominion Government. Accordingly, either in preparation for action or to buttress decision, he consulted the Deputy Minister of Justice, Edmund Leslie Newcombe (later Mr. Justice Newcombe of the Supreme Court of Canada). Mr. Newcombe was requested directly and in confidence, to give an opinion on the nature of the legal relations existing between the Canadian Expeditionary Force and the Government. In Newcombe's long memorandum in reply those distinctions were first drawn which clearly established the status of the Canadians in the C.E.F. as "volunteer Militia on active service, employed in defending their country abroad." (4) Thus any Imperial legal ties on the Canadian forces were eliminated. Apparently this important and significant distinction was drawn only accidently as a necessary legal support for the main purpose of the memorandum—which purpose appeared in its last paragraph. This recommended: "the establishment of a Canadian Ministry of War in London, charged with the administration of the overseas forces." (5)

Like the Prime Minister, Newcombe was a Nova Scotian, a graduate of Dalhousie University, a Conservative, and a barrister. Born in Cornwallis, N.S. in 1857; he had been graduated from Dalhousie,—B.A., 1878; and was awarded a degree in law by Harvard in 1881. By 1893, the year in which he was appointed Deputy Minister of Justice by yet another Nova Scotian, Sir John Thompson, he was a well-known Halifax barrister, a Governor and Lecturer of his University. (6) He was a pleasant person—"Always ready and courteous, a gentleman to his finger tips" (7)—and it was a pleasure to do business with him. Fond of shooting, and regarded as a "mighty hunter" he was considered to be "deliberate in pleading and careful in counsel." (8) It was said of him that "so well does he invariably consider his points that he is never found spending one day in undoing what he did the day before." (9) He was worthy of the Prime Minister's confidence and capable of a clear, concrete opinion. This was desirable for, by 1916, the legal position of the Canadian soldier abroad was abstruse and complicated.

In the hectic August days of 1914 Sir Sam Hughes had discarded the prepared mobilization scheme in a single night-lettergram. In this he had sent the word "to every officer commanding a unit in any part of Canada to buckle on his harness and get busy." (10) One consequence was "that in a short time we had the boys on the way . . . Under that plan the contingent was practically on the way to Europe before it could have been mobilized under the ordinary plan." (11) Another result was that there was no time for careful thought about the status of the contingent. But while there was no long time for consideration:

> " . . . the status of the volunteers, and of the force as a whole, early attracted the attention of the authorities at Ottawa, because it was important that all should be legally subject to military law. There was no doubt

(3) BORDEN, Henry (ed) *Robert Laird Borden His Memoirs* (Toronto, 1938), II, 567.
(4) DUGUID, Col. A. F., *Official History of the Canadian Forces in the Great War* 1914 - 1918 (Ottawa, 1938), I, Appendix 8.
(5) Newcombe to Borden, 18 Sept., 1916, OMF, No. 8.
(6) V. MORGAN, H. J., *The Canadian Men and Women of the Time*, (Toronto, 1912), 849.
(7) *Loc. cit.*
(8) *Loc. cit.*
(9) *Loc. cit.*
(10) *Debates, House of Commons*, 26 Jan., 1916, I, 292.

that corps of the Active Militia placed on active service in Canada could be brought under military law by Order in Council as provided in the Militia Act, but there was doubt whether the overseas expeditionary force contemplated would fulfil the qualification of the said Act as to defence:—

> The Governor in Council may place the Militia, or any part thereof, on active service any where in Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency . . .

A request was therefore made on 5th August that the King should bring the volunteers under sections 175 and 176 of the Army Act, which was met when His Majesty on 9th August ordered the Governor General to raise the troops for service as an expeditionary force. Consequently every recruit for that force, when attested, was cautioned that he would be subject to the Army Act." (12).

"In the first call for volunteers . . . it had been declared "the force will be Imperial and have the status of British regular troops". (13) This declaration was natural enough. In the mobilization plan which the Minister had brushed aside there was no provision for administrative organization or political control once a force left Canadian shores. The Canadians who had formed British Regiments of Foot in 1812-1814 had become part of the Regular Army. So had the volunteers who had fought in the Crimea and through the Indian Mutiny and the men of the 100th Foot (Royal Canadians) on embodiment in 1858. Even the contingents sent to South Africa had been paid and administered by the Imperial authorities "after their arrival there, Canada merely making up the difference between the Imperial scale of pay and her own." (14)

That this notion of Imperial Service still lingered in 1914 is clear from the phrases in the night-lettergram of August 6; "force will be Imperial . . . status of British regular troops." (15) Not until 1916, when Newcombe wrote his memorandum, "was it realized that the C.E.F. was not, in fact, "'Imperial'—i.e. raised by His Majesty beyond the limits of the United Kingdom and of India to form part, for the time being, of the regular forces; and paid and maintained from an annual vote by the Parliament of the United Kingdom. It was, PER CONTRA, a force raised by order of the King in one of His Overseas Dominions, to form part, for the time being, of the Armies of the British Empire, and paid for and maintained with monies voted by the Parliament of Canada." (16).

Newcombe, to reach this understanding, naturally began his analysis by looking at "the statutory provisions under which (the Canadian Forces) . . . are raised, equipped and maintained." (17) These were soon found for they rested in the British North America Act, 1867, Section 15; the Militia Act, 1906, as supplemented by the Army Act and the War Measures Act, 1914; and the "provisions of the Appropriations Bills sanctioned by Parliament during the three sessions . . . since the war began." (18) Of necessity, his investigation also involved "examination of the various Orders-in-Council or regulations passed by the Governor General in Council in the execution of his delegated powers of legislation."

(11) *Loc. cit.*
(12) DUGUID, *op. cit.*, I, 22.
(13) *Ibid.*, I, 25.
(14) STACEY, *Col.* C. P., *The Military Problems of Canada* (Toronto, 1940), 68.
(15) DUGUID, *op. cit.*, I, 22.
(16) *Ibid.*, I, 25.
(17) Newcombe to Borden, 18 Sept., 1916, OMF. No. 8.
(18) *Ibid*

The British North America Act and the War Appropriations Acts Newcombe dealt with quickly. The B.N.A. Act, Section 15, made explicit for Canada the implicit principle of British law that the "prerogative of command of the colonial forces remains in His Majesty." But "the exercise of the command is delegated to the Governor General by his Commission, and must doubtless be exercised subject to the statutory provisions by which it is regulated, and upon the advise of the King's Privy Council for Canada." (19) Thus the B.N.A. Act was disposed of in a sentence.

Next the Appropriations Acts were dismissed in a paragraph:

> " . . . It may be observed here, so that the further consideration of the case may not be involved with any question of financial dispositions, that the . . . Acts . . . authorize . . . the payment . . . [of] the expenses which may be incurred by or under the authority of the Governor-in-Council during the respective fiscal years for the *Defence and security of Canada and the conduct of naval or military operations in or beyond Canada.*"

These two sets of statutes analysed, Newcombe investigated the Militia Act more thoroughly. After considering the relevant sections of the Act—2, 10, 16, 17, 22, 23, 25, 28, 69, 72, 74, 144-146—*Seriatim*, he summarized their contents: "It will be observed that there are special provisions for time of war; the Governor-in-Council is authorized to place the militia on active service beyond Canada for the defence thereof, and the command and period of service are specially regulated. The Act was intended to be adequate for the purpose of raising and despatching a force to defend the country abroad."

Continuing this investigation of the statutes, Newcombe then delved into the Army Act of the United Kingdom, made applicable to Canada by Section 74 of the Militia Act. The Army Act provided for two classes of colonial forces: " . . . There may be colonial forces raised by the Government of a colony, and forces raised in a colony by direct order of His Majesty *to serve as part of the regular forces.*" Since forces in the latter class were "paid and maintained by moneys voted annually by the Imperial Parliament," they were, in fact, "Imperial forces, although raised and serving in a colony." Hence this class could not encompass the troops of the C.E.F.

Up to this point Newcombe's argument had run clear and unhindered. Here, however, he was forced to consider the question of extra-territoriality since in 1916 it was generally held that the British North America Act did not confer powers of jurisdiction outside the territorial limits of Canada. He escaped this restriction by reference to Section 177 of the Army Act which included the words:

> " . . . Where any force of volunteers, or of Militia or any other force, is raised in India, or in a colony, any law of India or the colony may extend to the officers, non-commissioned officers and men belonging to such force, whether within or without the limits of India or the colony . . . "

Newcombe observed:

> "This section is important, not only as indicating the law which is to be applied to colonial forces, but as enacting constitutional provisions enlarging the powers of colonial legislatures. Under the ordinary constitutional powers such as are evidenced by the British North America Act, extra-territorial legislative authority is probably not conferred; but it will be observed that Section 177 of the Army Act declares in terms that where a force is raised in a colony any law of the colony may extend to the officers, non-commissioned officers and men of the force, whether within or *without the limits of the colony*, and I apprehend that this section has, upon the face of it, application only to military forces raised in a colony by *colonial authority;* and, moreover, that it does not apply to such forces as are raised by His Majesty's order at Imperial expense would seem to be

(19) *Ibid*

manifest by the provisions of Section 175 (4) and 176 (3) above quoted. " Section 177 therefore affords adequate sanction for any of the provisions of the Militia Act which might fail by reason of their extra-territorial application . . . . "

He concluded that: " . . . assuming the Canadian Expeditionary Force to have been aptly enrolled for the purpose, it stands subject to the Militia Act and the King's Regulations, in the same manner and to the same degree, whether during the period of training in Canada, in Great Britain or upon service at the Front in connection with His Majesty's regular forces, as if all these operations were being carried out within Canada." (20) This conclusion, Newcombe thought, "is not affected by any of the regulations or provisions which have been sanctioned by His Royal Highness under the War Measures Act."

He did think, though, that there "evidently was, at the beginning of the war, some misapprehension of the legal situation in respect of the project of affording military aid." After detailing the various cables which had passed between the Secretary of State for the Colonies and the Governor General, and the Orders-in-Council pertinent to the C.E.F., Newcombe:

> " . . . observed as an inference from this correspondence that His Majesty apparently acceded to the request of this Government to order the raising of the troops which were in contemplation at the time, and which were defined by Mr. Harcourt to consist of one division, in order to supply authority which it was suggested might be lacking in the absence of such an order. Obviously it was not intended that His Majesty's Government by reason of this order should assume the responsibility incident to the raising of a colonial force by order of His Majesty under Sections 175 and 176 of the Army Act, nor was it then contemplated that any force should be raised of the dimensions now authorized. It had been suggested that the provisions of the Militia Act might be defective, but that the Dominion desired to provide a force, and His Majesty's Government had replied by the advice that Canadian Ministers should take the necessary legislative and other steps. There was no room for reasonable doubt as to the application of Sections 175 and 176 of the Army Act, if the force were raised, because these sections make apt provision and operate of their own force without any order of His Majesty . . . It will be observed, moreover, that the order communicated by Mr. Harcourt's despatch of 9th. August was to the effect that the troops offered by Canada should be raised *by the Governor General of Canada for service as an expeditionary force*, and that more suggestions were made as to terms of attestation. The order was therefore intended to operate as a supposed necessary direction to set in motion the local provisions for the raising of a force on behalf of the Dominion, and not as a measure of direct Imperial responsibility.
>
> " I have endeavoured to show that the apprehended difficulty was non-existent, because, subject of course to the necessary appropriation, the sanction for the contemplated force already existed under the provisions of the Militia Act and the Order-in-Council of 6th August, passed in the execution of the statutory powers. It may be said, moreover, if there could be any possible doubt as to the legality of the Order-in-Council of 6th. August, that the doubt is removed by the War Measures Act which sanctioned antecedent executive measures."

Only one obstacle now remained in Newcombe's way if he was to establish the independent status of the Canadian soldier. That was the attestation oath. There was some difference in wording between the oath as prescribed for the Militia and that prescribed for the C.E.F. but he did not consider the discrepancy essential:

(20) *Ibid*

> " It cannot I imagine be said that a militia force is any the less a militia force because it is denominated an Overseas Expeditionary Force, and it seems to be quite obvious that the preliminaries of attestation prescribed or in use for the expeditionary force are merely an adaption of the requirements of the Militia Act to the case of volunteers engaging to serve for the special purpose of the existing war.
> " There is only one attestation, and that defines the engagement of the recruit from the time he joins until he is regularily discharged, whether in Canada, in the United Kingdom or at the seat of war."

Having breached the last of the legal barriers, Newcombe dealt summarily with the inconsistencies which had been expressed in a contrary view by the Militia Department:

> " I might observe here that if the force raised for service Overseas occupy the dual capacity which is incident to the view which seems to have been entertained at the Militia Department; if it consists of units of the active militia while in Canada, and of something different when it goes Overseas, and if there be no authority in the Governor-in-Council to despatch the force Overseas as a militia force, it is difficult to realize by what authority these troops could ever be sent out of Canada. They could not, being a militia force, be despatched under their constitution by order of the Imperial authorities; and they could not, upon the above hypothesis, be despatched by the Governor-in-Council; they would, moreover, as a colonial force raised by order of His Majesty, be independent of local administrative control. But if by any means they may be legally sent abroad, and if from the moment of going abroad they become nothing but a colonial force raised by order of His Majesty, they pass from that moment from under the jurisdiction of this Government, and neither the Governor-in-Council nor the Minister of Militia could constitutionally exercise any control over them."

These equivocations were resolved by one sentence: "*All difficulties disappear, however, when the force is attributed to its proper place under the law as a force of volunteers, or of militia or any other force, raised, equipped and paid by Canada under the authority of the Militia Act and sent abroad to serve with His Majesty's forces for the defence of the country, subject to substantially identical provisions* for such a case, contained in *Section 74 of the Militia Act*, and in *Sections 175, 176 and 177 of the Army Act*." (21) Basing his opinion on this view of the status of the Canadian Expeditionary Force, Newcombe declared that: "If the view which I submit be adopted the relations of the force to the Government of Canada, as well as to the Imperial Government, become clear, or at all events, as clear as anything governed by a variety of statutory provisions, and affected by constitutional limitations can usually be."

This important distinction made, the path was clear to deal with the main issue—the control of the Forces overseas. He began by listing the functions of the Minister of Militia, as defined in Section 5 of the Militia Act: "There shall be a Minister of Militia and Defence, who shall be charged with and be responsible for the administration of militia affairs . . . including the initiative in all matters involving the expenditure of money." Newcombe was clear that all expenditures for the Forces, everywhere, "must be appropriated by Parliament and paid by the authority of the Governor-in-Council, subject to the provisions of the Militia Act and the Consolidated Revenue and Audit Act." Appointments, promotions, and discharge or retirement were "vested solely in the Crown, exercisable in the case under consideration by the Governor General of Canada, upon th advice of his Council." On the question of command Newcombe was specific: " . . . all military power must be based upon and emanate from the civil power; and the commands of the Sovereign to the Army can only be conveyed to the

(21) *Ibid*

Commander-in-Chief through the channel of responsible ministers and the army is then brought into accord with the civil institutions . . . "

He thought that: "Perhaps except for the fact that the theatre of war is so remote from Canada, and the delays or misunderstanding incident to the transmission of messages at such a distance so great, it would not be found necessary to devise any means other than those already established by law for the purpose of working out these constitutional principles in their application to the Canadian Force." He conceded, "it may seem expedient and perhaps essential to the proper exercise of this command" that corps and divisional commanders should be named by His Majesty's Government; but, "Apart from such dispositions as may result from considerations which point to the desirability of mutual reliance and confidence as between the general officers directing operations, it would seem that all appointments and promotions in the Canadian force should be sanctioned by the executive authority of Canada." This opinion was suited to the rising nationalism of the country and to the policy of the Government. To exercise this control of promotion and policy Newcombe considered that, due to the magnitude of the overseas forces, "some provisions should be made to bring the Government of the country more immediately into touch with the theatre of actual operations." "The War Measures Act", he observed, "affords a means of accomplishing this, and moreover of modifying the law or of enacting any legislative provisions which may be necessary to provide for the very special situation which has arisen."

> Newcombe then made the recommendation Sir Robert Borden was to follow:
> " Details affecting matters of discipline should perhaps be suggested and considered in consultation with the military advisors of the Government, but if I may venture to suggest, I should think that the executive or administrative requirements of the case would be best satisfied by the establishment of a Canadian Ministry of War in London, charged with the administration of the Overseas forces, to be held by a member of this Cabinet, assisted if thought advisable by a council of Competent experts, whose advice would be considered by the Minister in submitting his recommendations to the Governor General in Council for approval. This would, in my humble suggestion, afford the most satisfactory means which can be devised for exercising the authority of this Government with despatch and in harmony with the policy of the administration; and it would moreover provide a ready agency of communication as between His Majesty's Government and the Government of Canada by which the joint service could be articulated."

This recommendation was accepted. Its implementation led to the appointment of Sir George Perley as Minister of Overseas Military Forces of Canada, to the Cabinet crisis of October-November, 1916 and to the resignation of Sir Sam Hughes.

But Newcombe's memorandum had more extensive repercussions. His clear exposition of the independent status of the Canadian soldier helped to establish the independence of the Dominion within the Commonwealth, led to international recognition of that independence at Versailles, and to its steady elaboration in the years since 1919. Once understand Canadian troops overseas as "Canadian volunteer Militia on active service . . . defending their country abroad" and the control of an army—as much a sign and symbol of independence as control of foreign relations—becomes immediately possible. Between 1916 and 1919 this possibility became actuality through that vigorous assertion, expansion and consolidation of Canadian military administrative autonomy which marked the portfolios of Sir George Perley and Sir Edward Kemp (22) and which was exemplified in the appointment of a Canadian Officer—Lieutenant-General Sir Arthur Currie—to command the Canadian Corps.

(22) Sir Albert Edward Kemp, P.C., KCMG, Minister of Overseas Military Forces, October, 1917 — March, 1920.

This consolidation of military autonomy, given impetus and emphasis by the sheer fighting prowess of the Corps, was Borden's most formidable argument for representation at Versailles. How this argument was accepted; how his desires were gratified; how this gratification led to Balfour's definition and universal recognition of Dominion Status; all this is history. Since that time another war has raged and the links of Empire remain as obviously weak as they are potentially strong. Thirty-two years now separate Versailles' Hall of Mirrors from Korea's barren hills where a nationally independent battalion of Canadian Light Infantry are fighting as part of the 29th Commonwealth Brigade. The background of the P.P.C.L.I.'s jointure in this Brigade is virtually the entire, multi-coloured, still-unfinished tapestry which depicts the steady, constitutional development of the British Commonwealth and Empire. In that tapestry as in that development Newcombe's yellowed legal memorandum has its small but significant place.

—Captain Donald M. A. R. Vince, M.A.,
Department of National Defence, Ottawa.

LA SENTENCE INDÉTERMINÉE

"La science de la justice et la science de la nature sont unes. Il faut que la justice devienne une médecine s'éclairant des sciences psychologiques."

—Michelet.

L'acceptation par le Parlement Canadien (1947, Ch. 55, sec. 18, Code Criminel 575A-575H) du principe de la sentence indéterminée pour tenter de prévenir le récidivisme marque l'aube d'une ère nouvelle dans l'histoire du crime au pays et indique le rôle primordial que doivent jouer l'anthropologie, la sociologie, la psychologie, la criminologie, et la pénologie dans l'orientation de notre législation criminelle et pénale.

Afin d'empêcher cette législation de dégénérer en instrument de persécution et de tyrannie et d'éliminer toute possibilité d'abus de pouvoir de la part du tribunal, le Code prescrit de condammer comme "habitual criminal" seul le criminel dont le dossier révèle trois condamnations antérieures sous des chefs d'accusation susceptibles d'au moins cinq ans d'emprisonnement.

Cette détention préventive indéterminée pourrait fort bien se tourner en détention à perpétuité si ce n'était que le Code éxige aussi qu'au moins une fois tous les trois ans le Ministre de la Justice étudie le cas du détenu afin de déterminer s'il doit demeurer en détention ou être réintégré au sein de la société.

La section laisse le choix du traitement disciplinaire et réformatif aux autorités pénitentiares et permet, sans le prescrire, la ségrégation ou l'isolement du détenu dans des institutions spéciales.

Il est intéressant de se rappeller qu'auparavant nos législateurs, tout en reconnaissant tacitement le précepte que la récédive entraîne en théorie une aggravation de peine, empêchaient en pratique notre jurisprudence de suppléer au silence des lois. Nos tribunaux ne pouvaient pas dépasser les bornes plus ou moins restreintes de peines prescrites avec une exactitude quasi-mathématique de sorte que notre Code devenait une véritable Magna Carta pour le criminel endurci qui, avant de perpétrer son crime, pouvait prévoir avec certitude la sentence maximum que pourrait lui imposer le tribunal.

L'introduction de la sentence indéterminée dans notre Code Criminel indique que nos législateurs ont enfin réussi à se débarrasser des derniers vestiges laissés par la théorie primitive de responsabilité pénale basée sur les principes barbares de vengeance motivée par la nécessité de défence individuelle et surtout des principes pseudo-scientifiques de liberté morale et de "libre arbitre" subséquemment introduits en Europe par les tribunaux ecclésiastiques.

Beaucoup d'intellectuels, malheureusement, préfèrent les généralités abstraites de la doctrine métaphysique du "libre arbitre" et de la sentence fixe aux principes "d'utilité sociale," de "défense directe" et de "nécessité politique" énoncés par de célèbres érudits, tels que Beccaria, Bentham, Romagnosi, Comte, Carmignani, etc. et insistent avec ténacité à maintenir intacte un système criminel et pénal à base de culpabilité morale diamétralement opposé aux systèmes scientifiques préconisés par de grande savants comme Lombroso, Lacassagne, Saleilles, Brockway, Parmelee, etc., pour n'en nommer que quelques uns.

A mon avis, il est puéril de recourir à la culpabilité morale du criminel pour justifier la peine qu'impose la societé par ses tribunaux. Ce droit de sévir contre le criminel puise son origine dans la nécessité qu'a l'organisme social de réagir contre toute force contraire à sa survivance. L'histoire et les sciences naturelles nous enseignent que tout être organique dépourvu de cette capacité de réaction ne saurait survivre. Si la société a le droit de recourir à des mesures de répression et d'élimination temporaires lorsqu'il s'agit simplement de crimes d'occasion et de passion, elle a le droit à fortiori de condamner à une sentence indéterminée le récidiviste qui résiste aux méthodes ordinaires de persuasion et de réforme.

Dans les rapports entre l'individu et la société partout où le point de vue individuel s'oppose au point de vue social, ce sont les intérêts de l'individu qu'il faut sacrificer. . . . . La justice criminelle reconnait que l'intérêt de la société dépasse celui de l'individu.

Tout en concédant la nécessité et les nombreux avantages de cette innovation législative, il me semble toutefois y trouver une grande lacune. Cette importante section devrait catégoriquement défendre l'emprisonnement du condamné dans une institution pénale ordinaire. La condamnation de l'accusé sous cette section ne présente pas de grandes difficultés parce que le problème juridique tel que soumis au tribunal selon la section ne saurait être que relativement simple; il serait bon de se souvenir, cependant, que le problème pénal qu'elle engendre ne fait que commencer là où se termine le problème légal.

La justice demande que la solution du problème légal révélé par le crime détermine le problème pénal de sorte à resoudre le problème social en conciliant autant que possible les intérêts opposés de la société et du criminel. Soumettre le criminel condamné sous cette section aux règlements inadéquats d'une institution pénale ordinaire serait plutôt ignorer le problème épineux du récédivisme que le résoudre. Pour rendre cette section efficace et permettre l'usage grandissant de la sentence

indéterminée, il faut absolument pourvoir une institution spéciale gouvernée par des administrateurs compétents et capables de recourir aux données de la science moderne dans l'accomplissement de leur mission de réforme. Le tribunal serait mal avisé d'incarcérer indéfiniment et sans les classifier ces pauvres infortunés qui, par suite d'hérédité ou d'atavisme, de passion ou d'habitude, d'occasion ou de nécessité, d'abnormalités physio-psychiques ou d'aboulisme, de déséquilibre mental ou de dégenérescence morale, n'ont pas su se conformer aux éxigeances de l'organisme social.

Qu'il soit dit, en conclusion, que seule la sentence indéterminée saurait revêtre l'administration pénale d'un véritable caractère réformatif et permettre l'individualisation de la peine sans laquelle aucun traitement ne saurait être efficace.

—by J Wilfred Senechal,
U. N. B. Law School.

CLASS OF '50

News from the CLASS OF '50 of the U.N.B. Law School shows that the members have undertaken practically every type of legal work. Many struck out for themselves, others are practicing with legal firms, two have acquired positions with government agencies, and our President is continuing legal studies in England.

Eleanor Baxter is working for T. C. A.

Vernon Copp is studying at the London School of Economics this year as a result of his winning a Beaverbrook Scholarship.

John Coughlan is in private practice in North Head on Grand Manan Island after spending a couple of months in P. E. McLaughlin's law office in St. Stephen.

Jim Crocco has finally deserted the legal section of the Veteran's Land Act Office in Saint John and opened his own office in Woodstock.

Len Fournier is another member of the class practicing on his own having gone to Dalhousie after spending the first part of the summer working in the Probate Office in Saint John.

Doug French is another member of the class presently working in the Law Office of B. R. Guss in Saint John.

Ted Gilbert is still with the legal department of Central Mortgage and housing but is drawing his contracts in Ottawa now instead of Saint John.

John Gray is now in Ottawa also with the Department of Justice dealing with claims in the Exchequer Court after spending a short time in Leo Cain's law office in Fredericton.

Lib Hoyt acquired a position with the Law Firm of Sanford and Teed a short time ago and is now working with them in Saint John.

Irving O'Donnell opened his own law office in Fredericton the first of July after working a short time with Rollie Brewer.

Doug Rice is, of course, with his father in the firm of Rice and Rice and is also running the Petitcodiac Collection Agency which he started there.

Percy Smith has his own law office in Newcastle and has also been appointed Deputy County Magistrate for Northumberland County.

Tracy-Gould struck out on his own shortly after admission and now has quite a practice of his own in Newcastle.

Eric Young spent the summer working with Sanford and Teed but opened his own office in Bathurst the end of September.

Bea Sharp opened her own law office in Hampton the middle of June and is practicing there.

SOME THOUGHTS ON LEGAL EDUCATION

Broadly there are two systems in modern legal education: the lecture-text book system and the case book system. Each of these have their attributes, merits, and advocates. Who is to say that one is better than the other?

On the other hand the lecture system endeavours to put forth principles of the law relying on and referring to the cases for authority. A lecturer would enunciate such a principle, discussing it and giving for his authority a case which he leaves to the student to look up at a subsequent time. The average student who often tends toward laziness may neglect to do this, with the result that he does not receive the full value of the system.

The case book system on the other hand takes a firm grip on the case itself and from it wrings and extracts the principles. This is no field for a lazy student for by his neglect he loses every merit to be drawn from the system.

If our student had a choice he would, like electricity, choose the path of least resistance, namely, the lecture system. Indeed, this point may be the chief weakness of the system. The term "spoon-feeding" has often been applied to education such as this. Here the case system serves as a check. It stresses research and initiative which ultimately leads to clear, original legal syllogism, which is an admirable and probably a necessary quality in a good lawyer. For both systems there is much to be said but whichever one is used the student will get out of his course what he puts into it and no more.

Both systems have been tested and both have proven successful. The modern trend seems to be away from the lecture method towards the case method. This is quite evident when one visits the law schools across the country and there sees our average student staggering under the weight of these voluminous works.

Having been exposed to both systems, a dialectical process is envisioned by the writer, the lecture system being the thesis and the case system being the antithesis. The one rising up to challenge the other, the struggle for existence and the ultimate emergence of a new system, which is devoid of the defects of both and which combines the better qualities of each. Here is a system for our average student who might have lost sight of his goal in the one system or floundered in the realm of initiative in the other. Says he, "I have to use a certain amount of initiative but I am guided in such use by men much more qualified than myself," for our student is fundamentally very humble.

Again our student is often of a delicate nature and subject to various nervous disorders so that this middle road which we would have him follow would seem a desirable means to nurture him to legal maturity with the least number of psychological complexes.

No doubt this idea of combination has been proposed before, for as a student newly introduced to the case system the writer finds himself yet unable to have an original thought. The idea has probably been put to use to some extent by individual lecturers throughout the English legal system. But as far as can be known it is not in general use.

However let us think of it and mull it over, for this infant may grow to be a powerful and effecacious adult who could more than adequately fill the shoes of his ailing predecessors.

—By J. P. FUNNELL,
II Law, U.N.B.

CASE AND COMMENT

PRACTICE

ADDING PARTIES AFTER JUDGMENT–DEATH OF JUDGMENT CREDITOR

Wilson v. MacKellar
and
Wilson v. U. S. Fidelity Assurance Co. (assignee)

The question of what to do after a judgement creditor has died in order to carry on proceedings in an ancillary to the action is one which arose recently in the case of Wilson v. MacKellar (unreported).

In this case the defendant recovered judgement for costs and assigned the judgement debt. He subsequently died and the judgement assignee was placed in the position of being unable to take further proceedings under the judgement by the use of the defendant's name, which right was acquired when the judgement debt was assigned.

By Order 17 rule 4 of the Rules of the Supreme Court, when by virtue of the death or other event, occuring after the action is commenced, causing a change of interest, it becomes necessary or desirable that a person should be made a party to an action, an order that proceedings shall be carried on between the continuing parties may be obtained on an exparte application. However does this mean that parties can be changed after judgement has been signed?

The power of the Court over an action was stated by Jessel M.R.in his judgement in Salt v. Cooper (1880) 16 Ch D 544 at p 551 as follows: "A cause is still pending even though there has been final judgement given, and the court has very large powers in dealing with a judgement until it is fully satisfied." This statement indicates that the Court can change parties after judgement. The New Brunswick Court of Appeal clearly indicated that this proposition was correct in the case of McPhail v. Winslow 8 M.P.R. 552. In that case the Court ruled that proceedings for the examination of a judgement debtor cannot be taken out by a successor in interest of a deceased judgement creditor without such party being first added as a party to the action by an appropriate application under Order 17.

Several English decisions are of the same effect. In Norburn v. Norburn (1894) 1 Q.B. 448 the judgement creditor died before realizing on his judgement. His executors made application for a receivership against the defendant but the Court held that the executor must first be added as a party before further proceedings could be taken under the judgement. Accordingly, application being made, an order was granted adding the assignee of the Judgement creditor to be added as a party on the record of the origional action.

by ERIC TEED,
Saint John, N.B.

DEVOE V LONG AND LONG

An important question that has always been a source of arbitration is the right of recaption of chattels by an owner. *Devoe V. Long*, a recent case in the New Brunswick Supreme Court, Appeal Division has done a great deal to shed a clearer light on this heretofore confusing issue. The judgments of Richards, C. J. Harrison and Hughes J. J., go to great lengths reviewing the history of recaption, and give a distinct view of its application and scope. This case is especially beneficial to students who are pursuing the laws of Choses in possession.

The basic facts of the case are clearly outlined by Anglin J. and briefly they are as follows: The plaintive had once worked for the defendent J. Long as a clerk. In November 1947 Long received a letter from the Income Tax Department advising him that the inspectors had found he was not keeping a proper set of books. Long went to the plaintiff's house, handed him the letter to read and accused him of reporting him. The plaintiff vehemently denied this and ejected Long who forgot to take the letter with him. Long sent a man for the letter, but the plaintiff refused to surrender it because he wanted to have the date of the letter in order to write the Department to confirm that he had not so reported Long. The latter then took his son Rodolphe to the plaintiff's house where they forced their way in and demanded the letter. When he refused to give it up, they assaulted the plaintiff, and took it from his coat pocket. No reference was made to the letter in the pleadings, but the point of law is whether in the circumstances recaption of the letter by self-help was justified.

The case brings out three basic questions that seem to govern the decision of this recaption case. First, the defendant's right to possession of the chattel. Second, the tresspass of the defendant in his recaption. Thirdly, the amount of force that might be used in recaption.

The first question can be readily dealt with. While the plaintiff had been given the letter by the defendant, he had lost his right to it by the defendant's request for its return. Thus the defendant had a legal right to his chattel.

The second question is intrinsically linked to the third one. The defendants were undoubtedly trespassers. Recaption through trespass may not be predicated on the mere fact that the defendant's chattel is on the premises of the plaintiff. The circumstances under which it happened to be there must be shown, and they may or may not justify self help: *Anthony V. Haney* (1832) 8 Bing. 186,*Sweeney V. Staviat* (1931) 2 D.L.R. 473. From the evidence it seems as though Long through his own negligence left the letter at the home of the plaintiff. That alone would render Long's trespass unlawful, but the plaintiff's own action subsequent to Long's carelessness seems to have intervened. The plaintiff refused to surrender the letter first to Long's messenger and then to Long himself.

The final question as to the amount of force a person may employ in recaption, seems to be the main issue of the case. Was Long's right to recaption outweighted by the force he employed? There are several cases and authorities that deal with this point.

Regarding this subject Salmond on Torts, 10th Ed., p. 191, states "There are two circumstances where a man is entitled to another's land for recaption of his own goods: If they came there (1) by accident e.g. if a fruit tree grows in a hedge and the fruit falls on another's land; (2) by the felonious act of a third party. Winfield on Torts P. 369 seems to give a broader scope; he thinks that when the owner of goods was under no tortious liability for their appearance on the occupier's land, he ought to be able to retake them in any event provided he does no injury to the premises. However self help ought to be strictly limited even against a wrongdoer and forbidden altogether against one who is not a wrongdoer. However, in *Hamilton V. Calder* (1883) 23 N.B.R. 373. Fraser J. stated "I think the

right of the owner to enter and remove his goods from the soil of another does not depend upon a wrongful taking of the goods by the owner of the soil but upon the fact whether the owner of the goods has a present right of property in and a present right to be permitted to enter for the purpose of taking them away then his entry is justifiable: This argument is carried on further by the same Fraser J. in *Turner V. Smith* (1888) 29 N.B.R. 567 " . . . if there was a demand and a refusal that would constitute a wrongful detention of the goods, and the party would enter upon the land for the purpose of taking them away.' ' Mr. Justice Harrison supported the view of Clerk and Lindsell on Torts, 10th Ed., P. 219. "He who is entitled to the immediate possession of a chattel may commit an assault to receive it from anyone who has it in his actual possession and wrongfully detains it, provided that such possession was wrongful in its inception."

In Blackstone's Commentaries, Book 3, pp. 4-5 he states " . . . But as the public peace is a superior consideration to any one man's private property; and if individuals were once allowed to use private force as a remedy for private injuries all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nation.

In *Read V. Smith*, 7 N.B.R. 288, Chipman C. J. said "where there has been any fault or neglect on the part of the owner of the goods he cannot justify entering the soil of another to take them and he is bound to show that there has been no such fault or neglect on his part."

In the present case the entry of the defendant was not justified because the plaintiff's original possession was lawful and the entry was not peaceable, the plaintiff being present and having refused entry to the defendant who then broke the door of the plaintiff's house thus endangering the peace. The assault upon the person of the plaintiff causing a breach of the peace, was quite unjustifiable. The defendants were found liable in trespass for breaking into the plaintiff's house, damages of $1000.00 were awarded to the plaintiff.

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BOOK REVIEWS

ORDEAL BY SLANDER; by Dr. Owen Lattimore

Bantham Books, New York, 1950. PP. 198. 25c plus tax

This book tells the thrilling story of Dr. Lattimore's defence against the slanderous charges made against him by that most irresponsible U. S. Senator, Joseph McCarthy.

It is a tale of frustration and a story of the immense physical and organizational effort necessary to defend oneself against such a sensational charge and one which is harder to combat for its having been made in the safety and immunity of the Senate Chamber.

I kept wondering, as I read Dr. Lattimore's book, just how he could ever gather together the resources necessary for his defence. The battle raged in the seemingly limitless "confines" of the newspaper "arena" and in order to save himself Dr. Lattimore must battle his accuser in the same arena—he must hold press-conferences, hire staffs of research workers and lawyers—he must leave his home in Maryland and move to Washington to be closer to the fight—in short he and his wife must dedicate themselves completely for a period of six weeks to answering the groundless charges of a neo-fascist Senator from Wisconsin.

Dr. Lattimore "pulls no punches" and this book is written with vigor to say the least. As Mrs. Lattimore says they were "operating in a situation characterized by insanity."

Dr. Lattimore makes several worthwhile observations about the methods and operation of the Senate sub committee. For my part I felt he was much too lenient in his criticism of the procedure of the Senate Committee—its methods brought to mind the inquisition and the Star Chamber. I submit that far from being a necessary part of the "checks and balances" of the Constitution and Government of which Americans are so proud—such a committee and its rules are quite definitely "balanced" against the citizen appearing before it. As I read the account of the Committees hearings I wished that the entire affair could be subjected to that forum where liberty means more than "checks and balance," namely, a court of law.

by GORDON FAIRWEATHER,
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FAMOUS TRIALS NO. III; By James H. Hodge

Penguin Books Ltd., 1950. PP. 236. 1s. 6d.

As a continuation of the FAMOUS TRIALS series, this book follows in the tradition of the NOTABLE BRITISH TRIALS with the added quality of readability for both the layman and the lawyer. The five trials here portrayed are of interest to the layman not only because of the prominence of the cases but also because of the insight into the methods of the police and criminal courts in seeing that "by whom man's blood is shed, by man shall his blood be shed."

For the lawyer there are special attractions. Each case differs greatly from the others and each has played an important part in the history of the law. The

book provides an opportunity to view the methods of such eminent advocates as Sir Charles Russell and Sir Norman Birkett and that famous pathologist Sir Bernard Spilsburg who was as much at home in the court room as were the leading barristers of his day.

The author has made a successful attempt to probe the murderer's psychology with an objectivity that can only be obtained with the passing years. He has expressed a doubt as to guilt in some cases. The conclusion is almost inescapable that sometimes the hangman's noose is placed around the wrong neck.

It is not a book that will be read lightly and forgotten. The chronologies, the personalities and above all the misgivings will remain in the reader's mind.

by EDWARD O. FANJOY,
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