"THE LAW OF OUR TODAY"

"THE SELECTION AND TENURE OF JUDGES"—AND OTHERS WHO ACT AS JUDGES

The most recent addition to the American Judicial Administration Series, published under the auspices of the National Conference of Judicial Councils — of which, incidentally, our old friend Arthur T. Vanderbilt is Chairman of the Executive Committee — is written by Professor Evan Haynes on *"The Selection and Tenure of Judges."** Concerning the importance of a well-trained, independent judiciary to the maintenance of justice by law there can be no controversy. That "the English Bench, taken as a whole, is far and away the finest body of judges in the world"—as Professor Haynes admits (p. 154)—will be readily concurred in by any Canadian lawyer. The fact that, in the main, we believe we have adopted the English judicial system, has frequently led us to believe that the comment should also include the Canadian Bench. At least we believe this when we look with condescension and pity at systems other than our own, and draw comparisons, as we are perhaps too prone to do in wide generalities and without much specific knowledge on the subject, between our own system and that which prevails in many of the American State Courts, namely, popularly elected judges. Left to an examination of our own system, or to a comparison with that of England, we are not inclined to be quite so self-satisfied, and as the author of the present volume rightly records, "there has been considerable criticism of judicial appointments" in Canada (p. 177, citing the Canadian literature) on the ground that "there is a good deal of wire-pulling and intrigue, and that appointments are frequently dictated by political motives" (p. 178). We can, and do, however, agree with the author that the results in Canada, of appointment during good behaviour "are, generally speaking, definitely superior" to those which obtain in most of the States, whatever may be the situation in the Federal Courts.

There is, however, a human proneness to be smug and self-satisfied on reading of our own superiority, in which we believe anyway, and to lose sight of the fact that we have something to learn from the experience of others in the world-wide problem of administering justice between individuals.

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* *The Selection and Tenure of Judges.* By EVAN HAYNES. With an Introduction by ROSCOE POUND. Judicial Administration Series published by The National Conference of Judicial Councils. 1944. Pp. xix, 308.

Professor Haynes does not preach in the present volume. He, like most of the American profession at the present time, is convinced that the system of popular election of judges for short terms can be improved. He offers no solution. He does, however, examine the English, French, German and Italian systems and spreads before the reader a selection of proposals that have been made in the United States from time to time, for the improvement of judicial selection and tenure. The conclusions which any individual reader may draw are left to the reader, without much guidance, suggestion or argument from the author. Perhaps the one exception is the chapter in which is examined the question whether judges elected for short terms are more "liberal" than appointed judges with secure tenure (Chapter VII). Arguments to this effect have been made, particularly by some persons interested in the development of "labour law", but an examination and comparison of decisions of courts in which an elected judiciary participated, and those of appointed life term incumbents is practically conclusive to the effect that the argument is without foundation. Indeed, the exact contrary, so far as labour legislation is concerned, would seem to be established on the illustrations which the author furnishes. At the same time, the issues which the author presents are in the main concerned with broad constitutional or economic questions in which the courts, under a federal system of divided legislative jurisdiction, are called upon to assume the role of judicial statesmen and by a process of so-called interpretation, rule on broad questions of policy rather than decide the countless individual conflicts between individuals, and individuals and state, which form the original and true basis of the "judging" function.

In reading Professor Haynes' valuable exposition of the various methods adopted for selecting "judges" to man "courts" the present writer must confess to an uneasy feeling that the broader implications of personnel for the adjudicating process common to all countries were not dealt with, although there is sufficient given to raise the issues. This reader, at least, found that from the bare exposition of the methods adopted in various countries for improving judicial "selection and tenure" several more disturbing questions arose.

For example, the present book while praising, as we have indicated, the English judicial system, also refers to the fact that the English Bench, while handsomely paid, is of small size—less than a hundred above the rank of justice of the peace—and the volume of business handled by a Bench so manned

must be extremely small. As the author points out, there are many more judges in the State of California, receiving more in the aggregate of judicial salaries, than in the whole of England. Should this be a matter of pride to California or to England?

This is a question that demands serious consideration. To build a good system, to which complimentary adjectives may be applied is one thing. To query whether that system works as it should, toward a given goal, is another. The problem here is whether the English system furnishes as free access to individual litigants as does that of California. Even English writers are forced to admit that the costs of litigation in England are so high that, as Lord Justice Greer stated, "the remedy supplied by an action in the High Court for people who believed their rights had been assailed is in important respects so unsatisfactory that they would do anything rather than resort to that remedy." ((1937), 80 L.J. 28)

So accustomed have we in Canada become to making the losing litigant bear the costs of an unsuccessful action—adopting the English system—that the undemocratic nature of that system seldom occurs to us. It is true that burdening a disappointed litigant with costs may discourage many frivolous actions, but it is extremely difficult to understand any sound principle by which a litigant who, through several appeals, may have finally lost out by a majority of five judges to four—counting judicial heads throughout the proceedings—should be penalized for even asserting his claim. Any practitioner knows how frequently in a border-line case—and are there any others litigated?—the question of the possibility of an adverse judgment with resulting costs of the other side to be paid, has been decisive against bringing the action at all.

Whatever the shortcomings of the American democratization of the Courts may be in connection with popular election of judges, there would seem to be little doubt that due to their refusal to adopt the peculiar English system of "costs" the United States have made the courts available to the average citizen in a way in which we have not yet done. It is well to bear this in mind before complimenting ourselves too much on our own judicial system for as Haynes remarks: "If courts are regarded as existing for the purpose of seeing to it that so far as possible legal rights are vindicated and legal wrongs prevented or redressed, it is perhaps not too much to say that the English courts are about as far from that goal (although not precisely in the same direction), as our own."

A somewhat related subject concerns the question of judicial remuneration. That salaries of judges in Canada—certainly as compared with those in England—may be too low can be admitted. In any discussion of increases, however, it is usually the Supreme Court and Court of Appeal judges who are singled out for attention. Without in any way belittling the extremely important function such individuals serve, are not the trial judges of small claims and the magistrates the really important part of our judicial machinery? To the vast majority of the public such persons are the only ones with whom any contact with legal administration is possible. Further, the number of sentences alone, with resulting confinement in penitentiaries and gaols, is so far in excess of what the entire personnel of the Supreme Court may impose that it is truly amazing to think of the relative lack of care attendant on the appointment and remuneration of the lower ranks of the judicial hierarchy.

One cannot fail to be impressed again by the short outline Professor Haynes gives of the French, and particularly the German system of education (before 1933) and method of appointing judicial officials. The story of German legal education is well known, and the direct participation of the State in the training of a *referendar*, which requires amongst other things periods of time spent in rural trial courts, city trial courts, in a court of appeal, in public prosecutors' offices, inspecting prisons, etc., cannot fail to impress one with the thoroughness of training for public service. The fact that after this intensive training the student may elect either private practice or a judicial career is common to most civil law countries. It is only natural to find in such a system that the judicial officer does much of the work that is hopefully left to lawyers in private practice in the common law countries.

However foreign such a system may appear to a common law lawyer, it does seem to have the merit of bringing the administration of justice closer to the ordinary individual, and of providing a wide class of persons (Haynes states that France has somewhere between 1800 and 2000 judges corresponding to the 100 in England) trained to public service and administration.

Compared with such a system, the common law "sporting" theory of justice in which counsel struggle (for large fees) for "strategic" positions; in which but few of the countless problems of modern life ever reach the courts because of forbidding costs, raised to levels higher than they should be by countless interlocutory applications and orders—and which can produce in

Canada alone a book governing court procedure of the gargantuan proportions of *Holmested*—seems to be a form of "caste" system which is a relic of other days. No one more than the present writer appreciates the necessity of preserving the confidence of the public in the administration of justice. But to keep the stream of justice pure by limiting its applicability is surely a sorry way to preserve confidence. To have confidence in persons or institutions is not to admit that they are serving the purpose for which they were devised.

At the present time no one will gainsay the fact that our Courts—as such—are not adjudicating on even a majority of the issues which to the average individual are the most important in his life. Administration of taxation; regulation of business by licence and control of prices; settlement of labour disputes between employers and organized labour; workmen's compensation; rental boards—to mention only a few of the many truly adjudicating agencies outside of our normal courts—cover by far the most, and the most important, conflicts of the average citizen with his fellows and the state.

A court of law may be engaged for three or four days in deciding, at a trial, liability in a motor car accident case. Two appeals may involve thousands of dollars in costs and the time of anywhere from six to ten comparatively highly paid judges. The net result may determine whether insurance company A or B should make compensation of a few thousand dollars. On the other hand a labour "Board"—or arbitrator—may decide working conditions for anywhere from 100 to 10,000 employees in an afternoon. Or an official of a taxing Board—or other administrative Board—may decide in like time how an individual can exist during the next one to five years—or whether he can carry on a certain business—and how. Comparisons of relative importance to individuals can be multiplied by the score.

All these conflicts are resolved by law and it is useless for lawyers and courts to say it is not law because *they* have nothing to do with it. It is no doubt important that Courts—in the accepted sense—continue to maintain the respect and confidence which they have gained. It is equally as important that we should attempt to build that same respect and confidence in the various other adjudicating bodies which are daily increasing the scope of their adjudicating powers.

Of prime importance in this connection is the necessity for improving the methods of appointment and security in tenure of office. Strangely enough, this seems to be, in the main, of little

concern to the lawyer, who feels that all would be well if these other adjudicating bodies were abolished and all matters of adjudication returned to the "Courts". This may be so, although we doubt it. In any event it *could* not be so for mere practical reasons of congestion, to say nothing of returning to a procedure the avoidance of which furnished one of the express reasons for the creation of these other bodies.

If, as cannot be denied, the method of appointment, the development of security of tenure have all tended to establish public confidence in our Courts, is not the problem of the future the devising of means to train and establish a group of adjudicators who can act impartially and with full confidence in security of tenure? Whether such persons be called judges, commissioners or mere members of the civil service should not matter. What does matter is that we must combat an all too prevalent idea that the civil service or any other public service is not a fitting career for an ambitious young man.

Surely years of practice in the legal profession in a country such as Canada, where the lawyer is closely associated—almost identified—with his clients' interests, furnish no guarantee of impartial adjudication. The English situation is not at all comparable due to the division between barrister and solicitor. Nor can legal training or education devoted solely or chiefly to a study of "court" procedure and "court" technicalities of evidence produce persons competent to fill the increasing number of positions involving the adjudication or "judicial" process according to law in its widest sense. Whether we like it or not we are already in a period where many persons acquiring a so-called legal education will choose the path of public service, involving judicial work, from the outset of their careers, not at all unlike the situation which has for so long existed in European countries. It is significent, perhaps, that Professor Haynes mentions (p. 168) that "quite possibly our own evolution will be in the direction of the French system."

By all means let us improve the calibre of our judiciary both as to methods of appointment, salaries and security of office. At the same time, however, we must not develop a judiciary, sound, impartial and impervious to influence, which will be an ornament to society but deprived of vital adjudicating work. Wherever adjudication in the name of organized society is required there should be the same qualities as in the older courts. To accept the newer adjudicating agencies as of necessity and for all time "bad", and to laud the existing courts as of necessity and for

all time "good", is not merely to deny history, but, worse still, to aggravate an existing evil and to make no attempt to improve the quality of the administration of justice which is the sole prerogative neither of "Courts" of law, "administrative" tribunals nor any other group, but is the concern of both, and of all who are interested in the peaceful ordering of society by law.

We cannot leave this subject without reproducing the list of rules which Sir Mathew Hale prescribed for his own guidance as a judge and which Professor Haynes reprints (p. 7, quoting from Burnett, Life and Death of Sir Mathew Hale, 35). While it is stated that Lord Campbell felt these words should be "inscribed in letters of gold on the walls of Westminster Hall", we would go further and recommend them for inscription not only on the walls of our Courts of Justice but in all the little, dark, noisy and busy rooms where officials high and low—often bitterly assailed (by "Court" lawyers and clients who can afford "Court" lawyers) as "bureaucrats"—are deciding in the name of the State, issues involving the "rights, duties and obligations" of the individual.

Things necessary to be continually had in remembrance.

1. That in the administration of justice, I am intrusted for God, the King and country; and therefore,
2. That it be done, 1. uprightly; 2. deliberately; 3. resolutely.
3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.
4. That in the execution of justice I carefully lay aside my own passions, and not give way to them, however provoked.
5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions.
6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.
8. That in business capital, though my nature prompt me to pity, yet to consider, there is also a pity due to the country.
9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.
10. That I be not biassed with compassion to the poor, or favour to the rich, in point of justice.
11. That popular, or court applause, or distaste have no influence into anything I do, in point of distribution of justice.
12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice.
13. If in criminals it be a measuring cast, to incline to mercy and acquittal.

14. In criminals that consist merely in words, when no more harm ensures, moderation is no injustice.
15. In criminals of blood, if the fact be evident, severity is justice.
16. To abhor all private solicitations, of what kind soever, and by whomsoever, in matter depending.
17. To charge my servants, 1. Not to interpose in any business whatsoever; 2. Not to take more than their known fees; 3. Not to give any undue precedence to causes; 4. Not to recommend counsel.
18. To be short and sparing at meals, that I may be the fitter for business.

Ontario Regulations Act—Enactment in Ontario of the Regulations Act 1944 (Ont.) c. 52, is worthy of note as a step towards making available the many Regulations, Orders-in-Council, etc., which lawyers have had so much difficulty in finding and which may affect the rights of individuals, although they are completely ignorant of their existence.

Under the Act all Regulations, Rules, Orders and By-Laws of a legislative nature which are made or approved by the Lieutenant-Governor in Council, must be filed in the Ontario Gazette, and a regulation which is not so published has no validity as against a person who has not actual notice of it. This Act goes much further in invalidating regulations than did the Uniform Act prepared by the Conference of Commissioners on Uniformity of Legislation (See 15 Univ. of Tor. L.J. 459). Further, the Act applies not merely to future regulations but to all regulations which have been made in the past and which must be filed before the end of the current year.

The Act contemplates the appointment of a Registrar of Regulations who will have the extremely troublesome task of securing uniformity in the style of regulations and who has been given the rather extraordinary power of refusing to file regulations where doubt may exist as to the authority to make them, as to their meaning or where they do not otherwise comply with the requirements of the Act.

This work is at present well under way under the capable guidance of Eric H. Silk, K.C., Legislative Counsel for the Province, and considerable progress has been made in producing order out of chaos.

In last month's issue of the REVIEW Professor M. M. MacIntyre criticized the Ontario Act for publishing the regulations in the Ontario Gazette, the suggestion being that as the Gazette would, like most other publications of its kind, contain a heterogeneous mixture of public notices the regulations would be lost.

This is clearly not so, because the system adopted has been to publish the regulations in a separate section of the Gazette commencing on a right hand page, with a separate series of pagination. This will permit the regulations to be bound consecutively so that there should be no difficulty in a practitioner not only noting the regulations but of keeping them in proper sequence and as a separate series.

Ontario, and Mr. Silk who is largely responsible for promoting this legislation, should be congratulated for taking a step which was long overdue on matters of this kind.