CURRENT LEGAL PERIODICALS

The Establishment of the Supreme Court of Canada. Frank MacKinnon. 27 Canadian Historical Review: 258-274.

The Canadian Historical Review is not a legal periodical but Canadian lawyers will, naturally, be interested in this account of the founding of the Supreme Court.

The Parliament of Canada was given power by the British North America Act to make provision for a "General Court of Appeal for Canada", but, although bills were introduced by Macdonald in 1869 and 1870, it was only in 1876 that a Supreme Court Act, introduced in 1875 by Mr. Fournier, Minister of Justice, was passed. It had been feared in Quebec that the proposed court, being a creature of the Dominion Parliament, might "infringe on provincial rights", but an amendment to the 1875 bill provided that two of the judges should be from that province. Macdonald did not intend to do away with the appeal to the Privy Council and this was not proposed in Mr. Fournier's bill, although he said in debate that he would like to see the practice "put an end to altogether". One member, speaking of the arrangement where-by appeals might still be taken from provincial courts to the Privy Council, said that he "could not imagine a more dismal spectacle than would be afforded by six melancholy men living in this city endeavouring to catch an appeal case . . . ". An amendment was finally passed, which provided that no appeals should be taken from a judgment of the new court "to any court of appeal established by the parliament of Great Britain and Ireland . . . saving any right which Her Majesty may be graciously pleased to exercise as her royal prerogative".

The Imperial authorities objected to this clause, although it did not really cut down the right to appeal since the Privy Council was not a court "established by the parliament of Great Britain and Ireland". The Colonial Secretary, Lord Carnarvon, argued that British residents with rights in Canada needed the protection of the right to appeal, that it would help to maintain uniformity of law in the provinces, that a court outside Canada would be "most impartial and valuable" in dealing with questions arising under the Canadian federal constitution and that the clause would infringe the royal prerogative. Edward Blake, then recently appointed Minister of Justice, answered firmly all these objections. He resented the presumption that Canadian judges could not be trusted to deal justly with British subjects and foreigners, said that the law among the provinces was already

different, that "the feelings of Canadians" would be deeply wounded by an "insinuation that their judges could not be expected to give impartial decisions", and that the Canadian parliament had power to abolish Crown prerogatives. In the result, the clause remained, but the Court's authority was "overshadowed" by the right of appeal to the Privy Council which survived.

In 1879 a bill was introduced to abolish the Court as "entirely unnecessary and useless". Critics objected to the expense to the taxpayers, the cost to litigants and the delay in rendering decisions. Political influence was charged. However, the leaders of both parties defended the court and a second bill for the abolition received a six months hoist by a decisive vote in 1880. Relations within the Court were anything but pleasant. The deliverances of one of its members were described by another as "long, windy, incoherent masses of verbiage . . .", while the Chief Justice was said to be "never ready with his judgments". However, the Court quietly remedied its "inner weaknesses" and its position steadily improved. Procedure was improved and its work was speeded up. In 1885 Louis Davies, later to be Chief Justice, was able to say in the House of Commons: "It is quite evident the Court has given great satisfaction to the majority of the provinces".

The author of this article says that "Canadians permitted themselves the luxury of criticizing, ridiculing and obstructing their Court" but it had the support of the leaders of both parties, who "had great hopes for it", stood by it, and probably "saved it from destruction and helped it forward to a respected place in Canadian life".

Reforms in Criminal Procedure. C. G. L. Du Cann. 15 Medico-Legal Journal: 147-156.

The English system of criminal judicature, says Mr. Du Cann, is "a palpable failure", for which the lawyers are blamed although they do not make the laws but must "make the best or worst of them when made". There is no doubt that reform is needed but an "innate and inveterate distrust of ideas" prevents serious discussion of change. "If things work at all why need they work better?"

Certainly crime can never be abolished; some are born to it or achieve it, while others have it thrust upon them "as nowadays when taking and spending your own money abroad is punished more severely than taking and spending someone else's

at home". But it should be lessened and should be dealt with to the best advantage of the individual and the state.

The sentence is "the most important part of criminal judicature" and "wise sentences are most difficult". The "single-judge sentence" is undemocratic; the offender may be the victim of "individual idiosyncrasy". Sentences should be decided not by lawyers alone but by committees, on which would be doctors, psychologists, psychiatrists and penological experts as well as judges. There should be a Sentence Revision Board which could review sentences and vary their terms, and "make recommendations for treatment". At present, there are "frightful cases of disparity". Justice should not be retributive or retaliatory; "moral indignation is the snare of judges". Different kinds of sentences might be imposed to take some of the glamour and profit from crime, for example, restitution and payment of costs; a sentence to "life-long lavatory cleaning" is suggested for murder.

Courts, instead of being, as Bacon said they should be, hallowed places, are too often "very slums of justice"; the house of justice "should appear so". The dock should be abolished or, at least, retained only for violent prisoners. It is entirely unsuitable for an accused person, presumed to be innocent, and it separates him from his counsel. The form of oath should be recast because no one, "not even a woman", can tell "the truth, the whole truth and nothing but the truth". Atheists are not required to take it; is it felt that "orthodox religionists need something stronger" than atheists do?

The judge is the second most important person in the court. He should not be a "censorious moralist" but should have a "touch of the saint". Opposite the Bench there might be inscribed the rule "Thou shalt love the prisoner better than thyself". Formal treatment is "quite useless to save or to heal".

The law itself should be brought up to date and made simple and intelligible. There should be a permanent revising committee as there was in Ancient Rome, but this should not be of the "too familiar sparetime variety". Trials are too hasty, sixty or seventy motor cases being decided in an afternoon. There are too few courts and judges and the salaries of Recorders are too low.

Mr. Du Cann suggests that the Court of Criminal Appeal should be composed of judges of appeal and not of trial judges who must "dislike to upset their equals" and "be upset themselves". The appeal court should not be able to increase sen-

tences, since this practice deters too many would-be appellants from appealing. Appeals to the House of Lords should be made as easy in criminal matters as in civil, and "the Attorney-General's 'fiat' should go". Prisons also, as we know them, must go and so must punishment. Punishment is "only a tame kind of revenge" and its value as a deterrent is doubtful. The test of justice is "to right the wrong and to reform the wrong doer", not to punish.

While modern advances in knowledge make reform imperative, the writer does not see who is "to strike the necessary iconoclastic blows".

The Twilight of Landowning. Harold Potter. 12 Conveyancer and Property Lawyer: 3-15.

The Agriculture Act, 1947, is concerned with "land used for agriculture", including any land which in the Minister's opinion "ought to be brought into use for agriculture". In this article Dean Potter outlines the provisions of Parts II and V of the Act, which deal with the powers of management, control and acquisition of land.

In section 9 the purposes of Part II are said to be, "securing" that owners shall "manage the land in accordance with the rules of good estate management" and that occupiers shall "farm the land in accordance with the rules of good husbandry". When the Minister is satisfied that an owner or an occuper is not fulfilling his responsibilities he may make a Supervision Order, under which any person authorized by him may enter and inspect the management or farming and the Minister may exercise powers of direction or of dispossession. The persons affected are entitled to notice and to be heard by the Minister. The order is to be registered as a charge, but it is not clear how a purchaser is to be protected if it is not registered or if it is made between contract and conveyance. Directions may be given that the management of an estate be entrusted to a person approved by the Minister, or may specify the purpose or the manner in which land is to be used. Penalties for failure to comply with a direction are, first, a fine not exceeding £100, secondly, entry on the land to carry out the work required and, thirdly, compulsory acquisition by the Minister.

Under Part V of the Act a survey of all agricultural land, perhaps more complete than that provided by the Domesday Survey, is to be made. The Minister may then acquire land by agreement or compulsion, with a reference in certain cases to a

commission for report. If a conveyance of a fee simple or a lease for an interest greater than a tenancy from year to year is made of part of an agricultural unit without his consent, the Minister may acquire it, together with the rest of the unit, if he thinks it necessary to avoid "a less efficient use for agriculture". This is not required if the conveyance or lease is made pursuant to a specific testamentary devise, bequest or direction. Finally, the Minister may make Orders, when he considers them necessary "in the interest of the national supply of food or other agriculture products", as to how any land is to be used.

Dean Potter says that this Act "bears the same relation to the modern law of agricultural land as that borne by the Statute Quia Emptores in 1290 to all land not held of the Crown". By that Act tenants in fee simple were given freedom of alienation. Now the Government is to determine the proper use of land and freedom of alienation is to be limited in scope and purpose. The sale of part of an agricultural unit will be practically impossible without the consent of the Minister and it will, therefore, be necessary to inquire whether land being purchased or mortgaged has been farmed as an agricultural unit. "The fee simple becomes a fee conditional — subject to the right of compulsory purchase or hiring wherever circumstances prevent the occupier from fulfilling the conditions of farming laid down by the Minister." What is being performed is a "major operation".

The Nature of a Lease in New York. Milton R. Friedman. 33 Cornell Law Quarterly: 165-194.

The law as to leases is not a matter of logic but "a matter of history that has not forgotten Lord Coke". Many of the elementary rules of contract law are not applicable. Covenants are independent. A landlord is not generally under any implied duty to repair nor could he under common law terminate a lease for non-payment of rent. However, delivery of a lease appears now to be unnecessary, although it has commonly been supposed that leases, like deeds, must be delivered before they can take effect.

While in some states the English rule prevails that actual possession must be given by a landlord, a tenant in New York is entitled only to the "right to possession". In the leading case on the subject it was held that a tenant, held up for six months by an overholding tenant, had no claim against the landlord. This rule does not hold where the premises are occupied "as of right". Ordinarily a written agreement cannot be varied or con-

tradicted but there are a good many exceptions to this principle. The parol evidence rule is a "frequently recurring" problem in lease cases by reason of the fact that leases are often drawn or filled out by laymen. In some lease cases New York courts have admitted parol evidence of collateral agreements and conditions precedent. For instance, a tenant of part of a building was allowed to prove an agreement by his landlord not to renew the lease of the tenant of another part, who carried on a business of a hazardous nature. Generally, however, it has been difficult in New York to have parol evidence admitted in lease cases.

Unless covenants are made dependent by clauses in leases they are considered to be independent. Thus, failure to pay rent does not entitle a landlord to refuse to perform any of his covenants. Where a landlord cancels a lease because of the tenant's default the tenant's liability for rent is ended and, on the other hand, when a tenant vacates, he remains liable although the landlord does not relet, the usual obligation to reduce damages having no application to a contract of leasing. When a landlord does relet the tenant often remains liable under a "survival clause" in a lease but courts have been "frankly unfriendly" to these clauses. In a 1918 case where a tenant under a 21 year lease had been dispossessed a few months after the commencement of the lease, the landlord's claim was postponed for over 20 years. The tenants had agreed by the survival clause "to pay a deficiency after the landlord's re-entry", and the liability, it was held, could arise only at the end of the original term when the deficiency would be ascertained.

Mr. Friedman's survey indicates "that most of the law of leases is based on a lease as a conveyance and the rest on a lease as a contract".

The Courts in a Democracy. Harold C. Havighurst. 42 Illinois Law Review: 567-583.

While judges are traditionally impartial and "above the struggle", their decisions must consciously or unconsciously reflect their attitudes and points of view. In a democracy they are often, by reason of their long tenure of office and the nature of their work prior to appointment, "unsympathetic with the trends of the day". The courts may "represent pockets of resistance" to change, upholding groups which have passed the peak of their power. Their influence is weakened, however, by their lack of a programme and of cohesion. The judicial institution is, undoubtedly, a "stabilizing force in society".

The courts may be considered "agencies of social therapy" as well as dispensers of justice. Legal certainty and the speeding up of court proceedings have long been ideals with reformers but it is suggested here that, "to minimize social tension", hope should be kept alive and that a degree of legal uncertainty may be "a positive good". Shakespeare and Dickens have attacked the judicial institution on the ground of the slowness of its process, but Rabelais' Judge Bridlegoose defers, protracts, delays and shifts off the time for judgment "in order that the cause may be ripe before it is decided". There is little danger that reformers will be too successful in eliminating the law's delays. Judgments will continue to be given "in pudding time" when the parties have had enough litigation. Protracted litigation has the advantage of providing opportunities along the way "for the relief of tension". A party broods less over his grievances when he puts his case into his lawyers' hands; even if he loses he has had the satisfaction of hearing his side "sympathetically presented" and his "hate for the adversary" may subside.

Another criticism of the law is that the matters disputed in the courtroom have little relation to the issues. It is a "hocus-pocus science", "a ass, a idiot", its jargon obscures from the layman the subject under discussion. This is partly the result of the fact that it is built on "the heritage of the past". Also, so much of our law has to do with procedure that a case may become involved in "mazes of pleading", and cases are complicated by the number of "litigable issues" which appear when a suit is once commenced. Many "highminded individuals" have striven to "eliminate the absurdities" and "make law more sensible". They would like to bring about a system where every controversy could be decided "on the basis of a scale of exposed values", thus stripping from the judge his "intellectual robes" and showing him up as "only a man upon a bench".

Professor Havighurst would not do away with law reform but stresses his point that "there is social value in tension-relieving exercises". The judicial institution contributes to the cause of peace in a democratic society, which is achieved "through the maintenance of a balance of power between opposing groups" and "wide opportunities for the dissipation of hate in non-violent modes of struggle"; among these modes court battles "rank high in importance".

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