

# CORRESPONDENCE

## A Bill of Rights for Canada

TO THE EDITOR

Mr. How's arguments for a Bill of Rights in your issue for May last, while impressive, are not quite convincing. At least they have left me with a doubt and a certainty, neither of which leads me to satisfaction with his contention. The doubt springs from his inference that unlimited legislative power is something to be deprecated; the certainty I shall elaborate later.

To add one to the many definitions of democracy, my idea of what the word means is the sovereignty of the people expressed and enforced by parliament. The carrying-out of that idea of democracy requires legislative sovereignty. The adoption of a Bill of Rights necessitates the abandonment of that sovereignty and the substitution of legislative authority limited by a constitutional check, which in turn is subject to judicial interpretation. It has happened in the United States, and may happen here, that the courts are indirectly vested with a power of veto over parliament, making the wishes of the people of no effect. Whether this would be an improvement over our present state of confusion regarding legislative power I do not know. Hence my doubt.

In my opinion the Parliament of Canada should have legislative sovereignty. The provincial legislatures should have only such powers as are from time to time delegated to them by Parliament. Under such a constitution, Canadian public opinion, as distinguished from provincial public opinion, would prevent the occurrence of the particular evils which Mr. How so strongly criticizes.

Mr. How's main grievance seems to be that our courts are not empowered to check those evils. An amendment to the Supreme Court Act would cure at least one of them. A Bill of Rights would still have to be interpreted by the same courts as are now, according to Mr. How, refusing to enforce our common-law rights. It is doubtful if the situation would be much improved.

My certainty is that in contending for an extension of the purposes of the writ of *habeas corpus*, Mr. How is entirely in the wrong. Like Mr. How, I confine my argument to the writ in criminal matters. It never was, and it never should be a purpose of the writ to inquire into the question of guilt or innocence, or to review the findings of fact made by a court of competent jurisdiction. That is a function of an appellate court. Sufficient methods of reviewing such matters are already provided by the Criminal Code.

The inquiry upon the return of a writ of *habeas corpus* is generally made by a single judge. Extension of the purposes of the writ as suggested by Mr. How would empower one judge to reverse another of equal jurisdiction, or even to set aside the verdict of a jury.

The writ is generally invoked because it provides a speedy mode of bringing a person who alleges that he is wrongly imprisoned before a court, and of releasing him if his allegation is substantiated. To convert the inquiry into one on the merits is to create a new trial court, or at least an alternative method of appeal, in which the advantage of expedition will soon be lost.

Mr. How's invocation of the law in the United States on *habeas corpus* does not shake my certainty of his error. I have no first-hand knowledge on the subject, but my reading leads me to the conclusion that the writ is

relied on there more to defeat justice than to see that it is done. It seems that there a writ that was intended to secure expedition is often used to secure delay.

Certainly a uniform Habeas Corpus Act is needed in Canada, but, if it is to do more than make definite the purposes of the writ and prescribe procedure, an entirely new concept of the writ must be adopted.

Mr. How's use of the word "court" when dealing with *habeas corpus* is misleading. He should have used the word "judge".

Despite my doubt on the general issue and my certainty on the matter of *habeas corpus*, there is so much in Mr. How's article with which I agree that it is with hesitation that I mention the doubt: I have none with regard to the certainty.

R. B. GRAHAM

Winnipeg

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### Judgments from the Bench

#### TO THE EDITOR

Judgments, or rather reasons for judgment, fall into two broad categories: those which the court has reserved for consideration and which, if reported, are preceded by the mystic words "Cur. adv. vult"; and those which are delivered orally at the conclusion of the case. In his recent article on the Writing of Judgments in the March issue of the Canadian Bar Review, Lord Macmillan comments primarily on the composition of reserved judgments; the merit or otherwise of delivering judgment orally is open for reflection.

It is interesting to contrast the prevailing judicial practice in Canada, and particularly in Ontario, with that in England. On reading the various English law reports one is struck by the fact that a great many judgments, both in the trial courts and in the Court of Appeal, are delivered orally immediately after the conclusion of the case. These judgments are often lengthy and deal with complicated questions of fact and law. Many of them become valuable authorities and they are almost always delightfully expressed.

Here the practice is the other way. A host of cases which are not worth reporting are, of course, disposed of from the bench, but the reported cases show that it is the exception rather than the practice for judgment to be delivered orally. It is to the advantage of litigants that judgments should be given promptly and by giving judgment orally the court has the facts and arguments fresh in its mind; and yet judgment is often reserved in a case turning entirely on questions of fact or even on the credibility of witnesses.

One is prompted to speculate whether the fusion of barrister and solicitor is responsible for our practice. In England, the barrister lives in the courts and he alone is qualified to become a judge. At the bar he must develop the faculties of quick thinking and lucid speech and will learn by experience how to assist the court both in examining witnesses and in citing authority; his experience helps the judge and when he becomes a judge these developed faculties enable him to form a quick opinion and to deliver it with felicity of expression. Here, on the other hand, there are few lawyers who practise exclusively as barristers; many appear in court occasionally but are primarily

solicitors whose training leads them to avoid unconsidered opinions; In this connection it is worthy of note that such oral judgments as are reported here are almost invariably delivered by judges who formerly devoted most of their time to the bar.

M. H. FYFE

Ottawa

### BOOKS RECEIVED

*The mention of a book in the following list does not preclude a detailed review in a later issue.*

*Canada at the United Nations 1947: Report on the Second Session of the General Assembly of the United Nations held in New York September 16 - November 29, 1947.* Department of External Affairs, Ottawa, Canada. Ottawa: The King's Printer. 1948. Pp. 276.

*The Conflict of Laws.* By R. H. GRAVESON, Ph.D., S.J.D., LL.M. London: Sweet & Maxwell, Ltd. 1948. Pp. xxxii, 394. (30s. net)

*The Constitutional History of England 1216-1399 With Select Documents.* Volume I — Politics and the Constitution 1216-1307. By B. WILKINSON, M.A., Ph.D., Professor of Medieval History in the University of Toronto. Toronto: Longmans, Green and Company. 1948. Pp. xviii, 240. (\$3.50)

*'Current Law' Statutes 1948.* Parts 1 and 2. London: Stevens & Sons Limited and Sweet & Maxwell Limited. (Annual subscription: £1, 10s., with reductions to subscribers to certain other periodicals)

*Forward with Canada.* Montreal: Northern Electric Company Limited. 1948. Pp. 24. (No price given)

*An Index to the Australian Law Journal, Volumes 1-20 (1927-1947).* Compiled by R. ELSE MITCHELL, LL.B., Joint Editor. Australia: The Law Book Co. of Australia Pty Ltd. Pp. 216. (No price given)

*The International and National Competence of Australian Parliaments to Legislate in Respect of Extra-Territorial Crime (Including War Crimes).* By THOMAS PENBERTHY FRY. University of Queensland Papers Faculty of Law, Volume 1, 1947, Number 2. Pp. 90. (\$2.25)

- Jeremy Bentham and the Law: A Symposium.* Edited on behalf of The Faculty of Laws of University College, London, by GEORGE W. KEETON and GEORG SCHWARZENBERGER. London: Stevens and Sons Limited. 1948. Pp. viii, 266. (20s. net)
- Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission.* Volume III. London: His Majesty's Stationery Office. 1948. Pp. xi, 123. (5s. 0d. net)
- Legal Effects of War.* By SIR ARNOLD DUNCAN MCNAIR, K.C., C.B.E., LL.D., F.B.A. Third Edition. Cambridge: At the University Press. 1948. Pp. xxiii, 458. (25s.)
- MacGillivray on Insurance Law.* Third Edition by E. J. MACGILLIVRAY, LL.D., and Denis Browne, M.A. London: Sweet & Maxwell, Limited. Toronto: The Carswell Company, Limited. 1947. Pp. xcvi, 1567. (£7. 7. 0 net)
- On Being Canadian.* By VINCENT MASSEY. Toronto and Vancouver: J. M. Dent & Sons (Canada) Limited. 1948. Pp. xv, 198. (\$3.00)
- On Legislative Expression: or, The Language of the Written Law.* By GEORGE COODE. Philadelphia: T. J. W. Johnson. 1848. Pp. 49. (Reproduced by the photo-offset process; copies may be secured from Professor J. B. Milner, Dalhousie Law School, Halifax, N.S., at \$1.00 each, postpaid)
- The 'Peleus' Trial.* War Crimes Trials, Volume 1. Edited by JOHN CAMERON, D.S.C., K.C., With a Foreword by The Right Hon. Sir David Maxwell Fyfe, K.C., M.P. London: William Hodge and Company, Limited. 1948. Pp. li, 247. (18s. net)
- Prisoners of War.* Washington: Institute of World Polity, School of Foreign Service, Georgetown University. 1948. Pp. v, 98. (\$1.50)
- A Treatise on Contemporary Religious Jurisprudence.* By I. H. RUBENSTEIN of the Illinois Bar. Chicago: The Waldain Press. 1948. Pp. 120. (No price given)