Correspondence

Penal Reform in Canada

TO THE EDITOR:

I have read your November issue, on Penal Reform in Canada, with much interest and, while entertaining great respect for the opinions of those who are more closely in touch than I with the problems of criminal law, I feel obliged to point out what are, in my opinion, serious defects in the approach of some of the contributors.

It would appear that here, as in so many departments of modern life, the counsel of the pragmatist has subverted our institutions while the materialist tries to justify him by altering our concept of human nature. It is apparently assumed throughout the articles in question that the end to be achieved in sentencing offenders is the protection of society, and that the principal defects in the existing means of achieving this object are unnecessary expense and the corruption of the criminals. That the protection of society is one element to be taken into consideration in dealing with offenders, and, in fact, that it is an end in itself in the case of offences which are merely *malum prohibitum*, is not to be denied, but my contention is that the primary aim of punishment for offences which are *malum in se* should be the vindication of the law itself by the exemplary punishment of the transgressor.

Despite the denial that Christianity is part of the law of England for the purpose of determining the validity of trusts, it should not be forgotten that ours is essentially a Christian civilization based in no small degree on the presupposition that there exists a known, objective code of moral conduct of universal validity. The Christian jurist is obliged to trace the prohibitions of the law beyond mere legislative fiat, beyond the conscience of the community or the custom of the realm, to their source in the divine enactments if we are to continue to accept the position of the Reformed churches that the first duty of the civil magistrate is to enforce outward conformity to the law of God. Moreover, since it is the basic assumption of Christian theology that the inevitable consequence of transgression of the law is divine punishment, a Christian jurisprudence could scarcely assert that what is appropriate in God's administration is unbecoming the civil magistrate in his enforcement of the same law in a more restricted sphere. Nor can the moral force of the argument be evaded by the use of such opprobrious epithets as "social revenge".

On the other hand, the Christian concept of the nature of man comes into conflict with that of the materialist by condemning as superficial the assumption that the criminal is a normal, but somewhat bewildered individual — maladjusted is the word — whom society has pushed willy-nilly

into a breach of an arbitrary code. Such a view, which treats the manifestations of human depravity as a disease, can never prove a satisfactory substitute for the Christian concept of man's nature since it ignores the need for any radical change by deprecating spiritual values.

This is not, however, to minimize the very real problems created by the custodial approach to crime, but to demonstrate the fallacy of the argument that since imprisonment is not only expensive but corrupts the prisoner and renders his rehabilitation difficult, we must avoid actual incarceration whenever feasible and, where it is unavoidable, make it as interesting, improving and homelike as possible. In my opinion, a far more fruitful field would be that of historical and comparative research designed to discover more effective methods of punishing criminals.

Some suggestions in this direction might include the extension of mandatory capital punishment to certain calculated and brutal crimes of violence, and of some form of corporal punishment as a substitute for imprisonment for lesser crimes of violence. In the case of crimes relating to property and of minor crimes relating to the person, an appropriate form of punishment, which has for many years been closed to English law by the rigid separation of crimes and torts, might be the payment to the victim of punitive damages several times in excess of those actually suffered.

This latter suggestion raises, of course, the same problem as the fine regarding alternative punishment in the event of non-payment. The real necessity of our criminal law at this point, it seems to me, is some means of forcing offenders to work out such penalties in some constructive employment in circumstances less enervating and corrupting than those in our penal institutions. We must, I think, come to realize that, although criminals should be treated decently and humanely, involuntary servitude is the best method of punishing certain types of crime.

These are merely a few suggestions which would require careful working out but which, I believe, indicate the direction in which penal reform ought to move. We must never lose sight of the fact that the punishment of criminals is the chief end of the criminal law. There remains, too, much work to be done by various agencies in assisting in the re-orientation of criminals.

I pass these suggestions along with the diffidence of one who has not made a detailed study of the history of punishment for crimes but in the confidence that my basic position is sound and, in fact, the only one tenable on the basis of the Reformed world and life view which has contributed most of what is best to our theories of the state and the law.

J. W. YOUNGER

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Legal Verbiage

TO THE EDITOR:

In legal phraseology there still lingers a strong infusion of redundancy, the recurrent use of words that in fact add nothing to the sense.

One instance is the reiteration *ad nauseam* of "said", "hereby", "hereto" and similar words when they could safely be omitted.

Let us suppose that a dear old lady desires to set up a substantial trust fund for the benefit of "my beloved cat, Jemima". Only one cat, Jemima,

is ever mentioned; no rational person could for one moment suppose that any other cat, any other Jemima, was meant; yet the document will again and again speak of "the said cat" or "the said Jemima".

So often one sees the word "hereby" — hereby covenant and agree, hereby repeal, etc. It is clear that the document (if valid at all) does covenant and agree or does repeal: if so, the "hereby" is superfluous. Small points, perhaps, but they clog a document and tend to obscure the meaning. "All and singular that certain parcel or tract of land and premises situate, lying and being in . . ." means "land in . . .": it means just that and no more. What is the sense of using five words "situate, lying and being in" when the one word "in" means the same? I shall go to my grave without knowing the esoteric significance of "All and singular".

Another beautiful example of redundancy is found in the Ontario Short Forms of Leases Act. The root trouble here is that there has been a slavish adherence to historic forms, with no real advantage accruing. I do not know what magic there is in the word "demise"; to me it is merely an archaic word for lease. What is gained by continuing, after the term of the lease has been precisely stated, "and from thenceforth next ensuing and fully to be complete and ended"? The object of the Act was to shorten and simplify; that principle should have been applied throughout and the entire form cast in the simple, direct language of a commercial agreement.

No wonder the public thinks that lawyers wrap up the sense in a cocoon of words, and charge accordingly.

J. N. HERAPATH

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Shakespeare or Lord Chancellor Bacon?

TO THE EDITOR:

The learned discourse between the two gravediggers quoted from Act V, Scene I, of Hamlet in the June-July issue, in which the two clowns discuss whether or not Ophelia should have Christian burial, is vastly amusing and the first Clown's meticulous reasoning — a lawyer out of professional interest should not of course call it casuistry! — must still arouse admiration and humour. It may be of interest to point out that the passage is founded on and is itself a paraphrase of the learned argument by counsel and of the judgment of Brown J. in the celebrated case of *Hales* v. *Petit* (1562), 1 Plowd. 253, the sort of case that illumines the otherwise dark and obscure pages of the English Reports, and causes the chance reader to violate the silence of the library with chuckles.

Sir James Hales, a judge of the Common Pleas Bench, committed suicide by drowning himself in a river, or to paraphrase the first clown, "he went *to* the water". This felonious termination of his own life raised the question whether his widow, as the surviving holder of a joint lease, should continue to have the benefit of it, or whether it should be forfeited to an assignee of the Crown. Counsel for the widow had to argue that Sir James was not a felon until after he was dead, for the same reason that one cannot be convicted of murder if the victim has not died. The effect of their argument was that the forfeiture had to relate to the death, not to the act caus-

ing death, and that therefore, since there was no felony in merely being dead, the felony following death, forfeiture should not take place.

The argument was unsuccessful and rightly so, for the successful argument was far more amusing and ingenious. The first clown sums it up well.

As to the question of authorship — if indeed there can be said to be any question — the passage offers no proof one way or the other. Bacon, who wrote of the desirability of "casting a stern eye on the Precedent", never would have had the "Crowner" (Coroner) decide that Ophelia deserved Christian burial in view of *Hales* v. *Petit*, although the first clown obviously felt himself bound by the same authority. Plowden's reports were circulated widely outside the profession and for that reason, and because of the fame of the case, Shakespeare must have read the report. It was a mark of his genius that his version excels that of Plowden.

DAVID R. WILLIAMS

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Books Received

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

Buckley on the Companies Acts. Twelfth edition By THE HON. D. B. BUCKLEY, assisted by NIGEL WARREN AND G. BRIAN PARKER. Consulting editor: CECIL W. TURNER. Toronto: Butterworth & Co. (Canada) Ltd. 1949. Pp. ccxxiii, 1236, 140. ($26.25)

Commercial Arbitration and the Law throughout the World: Summary of the Rules concerning arbitration agreements, procedure, arbitral awards, enforcement of awards, means of recourse. Montreal: Canadian Section, International Chamber of Commerce. 1949. Loose-leaf binder. ($8.90)

Crime and Abnormality. By CECIL BINNEY, M.A. Toronto: Oxford University Press. 1949. Pp. viii, 176. ($1.25)

Current Legal Problems: 1949. Edited By GEORGE W. KEETON AND GEORG SCHWARZENBERGER, on behalf of the Faculty of Laws, University College, London. Volume 2. London: Stevens & Sons Limited. 1949. Pp. ix, 288. (21s. net)

Freedom under the Law. By THE RIGHT HONOURABLE SIR ALFRED DENNING. The Hamlyn Lectures, First Series. London: Stevens & Sons Limited. 1949. Pp. viii, 126. (8s. net)

General Principles of Criminal Law. By JEROME HALL. Indianapolis: The Bobbs-Merrill Company. 1947. Pp. x, 618. ($7.00)

History and Sources of the Common Law: Tort and Contract. By C. H. S. FIFOOT, M.A. London: Stevens & Sons Limited. 1949. Pp. xvii, 446. (£2, 5s. net)

An Introduction to Legal Reasoning. By EDWARD H. LEVI. Chicago: The University of Chicago Press. 1949. Pp. 74. ($2.00)

Joint Obligations: A Treatise on Joint and Joint and Several Liability in Contract, Quasi-Contract and Trusts in England, Ireland and the Common-Law Dominions. By GLANVILLE L. WILLIAMS, LL.D. Toronto: Butterworth & Co. (Canada) Ltd. 1949. Pp. 179. ($5.25)

Law and the Executive in Britain: A Comparative Study. By BERNARD SCHWARTZ. New York: New York University Press. 1949. Pp. viii, 388. ($5.50)

Lawyer Reference Plans: A Manual for Local Bar Associations. By CHARLES O. PORTER. Boston: Survey of the Legal Profession. 1949. Pp. iv, 62. (No price given)

Lex: The Lawyers' Magazine. Edited By GERALD D. SANAGAN, M.A., Barrister-at-Law. Toronto: Commercial Publishers. Published monthly from September to June. Vol. 1, No. 1. (Per copy 35 cents; 10 months $3.00)

The Men of the Mounted. By NORA KELLY. Toronto and Vancouver: J. M. Dent & Sons (Canada) Limited. 1949. Pp. 398. ($5.75)

Poetic Justice. By J.P.C. Illustrated by LESLIE STARKE. London: Stevens & Sons Limited. 1947. Pp. xii, 84. (6s. net)

The Scottish Legal Tradition. By THE RT. HON. LORD COOPER, LL.D. Saltire Pamphlets: No. 7. Toronto: Clarke, Irwin & Company, Limited. 1949. Pp. 31. (50 cents)

Second Thoughts on Life, Law and Letters. By A. LAURENCE POLAK. Illustrated by LESLIE STARKE. London: Stevens & Sons Limited. 1949. Pp. ix, 134. (6s. net)

The Supreme Court and Civil Liberties: How Far Has the Court Protected the Bill of Rights? By OSMOND K. FRAENKEL. Third revision. New York: American Civil Liberties Union. 1949. Pp. 80. (25 cents)

A Treatise on the Law of Prize. By C. JOHN COLOMBOS. Third edition. Grotius Society Publications, No. 5. London: Longmans, Green and Co. Ltd. 1949. Pp. xiii, 421. (30s. net)

Trial of Nikolaus von Falkenhorst. Edited by E. H. STEVENS, with a Foreword by THE RIGHT HON. SIR NORMAN BIRKETT. Vol. VI, War Crimes Trials. London, Edinburgh and Glasgow: William Hodge and Company, Limited. 1949. Pp. xlii, 278. (18s. net)