Correspondence

"The Multiplicity of Reports" *

TO THE EDITOR:

For more than a century the legal profession has entertained, recurrently, the hope of being able to put an end, once and for all, to the "multiplicity of reports". This is an aspiration which a law-writer can, at first blush, share with the practitioner. On second thoughts, however, I am forced to conclude that its realization is neither possible nor, in the long run, desirable; unless we wish to go so far as to make a drastic change in our system of jurisprudence that might seriously interfere with, or alter the course of, its beneficial development. Moreover, in fact, this system of ours seems to contain within itself an automatic solution of "the problem of reports". Mr. Justice Holmes, writing to his life-long friend, the most famous of all English law editors, said:

> "As to the multiplication of reports I don't bother much — I always say the last twenty years takes up most of the law into itself". [Holmes-Pollock Letters (1944), Vol. 2, p. 20]

It was this very hope — that of putting an end to this "multiplication"— that inspired and actuated those members of the English bar who established The Incorporated Council of Law Reporting which began the publication of the Law Reports in 1865. Their object was to produce a series of reports so comprehensive and well edited that it would come to be recognized as fulfilling all the needs of the bench and bar, and, consequently, forestall the production of any new series and write "finis" on those already in existence.

Twenty years later the first volume of the Law Quarterly Review contained two articles on the subject, one by Mr. Justice (later Lord) Lindley, the other by a then editor of those reports, G. W. Hemming, Q.C. The former concluded that if the aim of the founders of the Law Reports was not realized "a great effort will have failed, and its failure will prove the necessity for legislative interference and for a monopoly of law reporting". But, after twenty years' experience as an editor of the Law Reports, Mr. Hemming wrote that the first of the requirements which would satisfy what he understood to be the then Lord Justice Lindley's ideal was: "The Law Reports should attain such a standard as to drive out of the market the Law Journal, Weekly Reporter, and Law Times". With respect to this condition Mr. Hemming said:

> "[It] assumes that it is desirable that the Law Reports should enjoy a practical monopoly, and further, that if they were perfect in all respects, the rival publications would cease to exist. *I have a doubt about the first of these propositions; and very much more than a doubt about the second.*

*This expression of views, on a subject much discussed at present by Canadian lawyers, was prepared by Mr. W. Kent Power, K.C., at the Editor's invitation.—*Ed.*

> The chief advantage of a monopoly is that it renders it much more easy to reject cases of little value. On the other hand, the stimulus of competition may have a wholesome influence on this as on every other department of work. Which way the balance of good may incline is not perhaps quite easy to determine off-hand. But assuming Lord Justice Lindley to be right in aiming at the total extinction of all rival reports, I believe he is mistaken in supposing that even ideal excellence in the Law Reports would lead to that result." [Italics by the present writer]

Today, nearly eighty-five years since the publication of the first part of the Law Reports and nearly sixty-five years since the articles referred to appeared, there are in England not three, but five series of general reports; and, also, at least twelve series of special reports, that is, reports dealing with only a particular branch of the law, for example, criminal, patent or taxation cases. Such has been the fate of the aim of Lord Justice Lindley and his associates.

The writer need not take up space in elaborating the parallel between the English situation and our own. Over fifty years ago the Canadian Law Times (1891), vol. XI, pp. 161–180, contained a very able contribution by T. B. Browning on "The Publication of Case Law" from which I shall quote later on in this letter.

It is beyond question that, in England, the product of semi-officialdom, excellent as it is, has not proved so popular with the profession as to put an end to the existence of private competitors; in fact, as we have seen, the latter have increased in number, and one of them has come into existence in comparatively recent years. In Canada, it is significant that the Law Society of British Columbia, following the course adopted many years ago by its fellow societies in Alberta, Saskatchewan and the Maritime Provinces, has recently discontinued the publication of its reports, after taking a vote of its members on the subject. Possibly non-believers in the advisability or efficiency of governmental or official enterprise may perceive in this fact an argument to support their thesis.

It is obvious, moreover, that if it has been found impossible to establish a "semi-official" monopoly of law reporting in England it will be vastly more difficult to do so under our federal system and with the wide divergencies, as between the various sections of this vast country, in the conditions of practice and the subjects of immediate interest to the practitioner.

Apart altogether from the many technical difficulties in achieving such an aim — obstacles which only an experienced editor, printer or publisher can sense and foresee — the basic fact that renders its attainment impossible, except by legislation, is one which, strangely enough, few of the writers on the subject, except Pollock and Browning, seem to have mentioned. It is that fundamental principle of our system of jurisprudence — *stare decisis*. So long as that principle is followed, so long as, in the words of Sir Frederick Pollock, "any report vouched for at the time by a member of the bar may be used in court for what it is worth" it is almost fantastic to hope — if hope be the proper word — for one, and only one, series of general reports, covering all the provinces of Canada. Assume that, for a time, there is only one such series. It will be certain not to include all the decisions. Editorial judgment will inevitably exclude many which some practitioners and courts will think of value. As the contributor to the Canadian Law Times cogently said:

> "If certain cases only shall be published, they should be of the utmost importance possible. Important — to whom? for what purpose? in whose estimation? Is the element of importance constant in law-cases or is it variable? Does not the old rule, which obtains in other matters, apply here — *quot homines, tot sententiae*? If it be constant and be recognizable, then, of so many judgments delivered, by what marks may you separate the tares from the wheat, or the chaff from either? What criterion or criteria have you to go by? I know of none and have not heard of any, unless it be the arbitrament of the editor and the selection of the best available man for the post. . . . His task, from the very nature of it, is an impossible one. . . . The decision of a Superior Court once promulgated is a precedent. A precedent is not for the past, neither is it for the present; it is for the future near and remote, the ages that shall be, the developments that are to come. . . . Cases unreported are decisions which at the time of delivery were deemed of no value but have since proved their usefulness. They are such mistakes in the art of rejection as have come to light. . . . Facility of finding does not depend on the number of cases reported, be it great or small, but on the character or reliability of the guides or aids you use in searching . . . . It is not a plethora of precedents we suffer from, but a dearth."

What then, in the event of a single series of reports being established, is there to prevent some enterprising young man from publishing a series of cases "hitherto unreported", or a series reporting only those cases decided in a particular province or provinces? Not only do natural and social conditions, and our attitude to them, vary greatly as between the provinces, but we shall find, as has come to pass in the United States, that with the growth of population and the increase in the number of reported decisions in cases of local origin, our courts and practitioners will find it more and more unnecessary to go beyond their own borders in search of authority; and will, moreover, tend more and more to regard outside authorities as of little importance. This fact may seem regrettable to those whose ideal is uniformity, but it is inherent in a federal system and an inevitable result of the great diversities, and our attitude to them, in a country so vast and with a population so various as ours. If we think in terms of defence and patriotism it is true that "in union there is strength" but if we wish, while aiming at a Canada united in fundamental essentials, to make our life in time of peace rich and interesting, we should avail ourselves, not only of the resources and opportunities for development which our various natural conditions afford, but also of the best and most attractive characteristics of that variety of human ability and talent which we have, on the one hand, inherited and, on the other, invited to help build up our country.

Moreover, is a single series of reports desirable? Mr. Hemming, as we have seen, expressed doubt. What is of more weight at the present time is that the *conclusion of the Lord Chancellor's committee on law reporting (1940) was in the negative.* They said: "If we had come to the conclusion and recommended that there ought to be one series of reports only, it would have been left to a single man or body of men to determine what decisions should be reported". In brief, if a single series were established, either by legislation or otherwise, the result would be that our law would be moulded, not by our courts, but by the editors of that series. No one can be more conscious than the present writer is that no editor is omniscient or infallible. Such an

editor in chief would possess enormous influence and power. "If England", Pollock said, "were a German kingdom, I should undoubtedly be an official person, probably rather a considerable person, with some such title as Königlich — Obergerichts — Archivs — Direktor, and a Geheimrat or Justizrat to boot. As it is I am nothing of the kind. My learned colleagues on the staff of the Law Reports and myself are not an official hierarchy. . . . In our modest and ministerial field of operation we are helping to maintain a national and more than national heritage, the ancient and still vital growth of the common law". ("English Law Reporting", a paper read to the American Bar Association's 1903 meeting; printed in 19 L.Q.R. 451, and in his *Essays in Law* (1922))

In short, a monopoly in law reporting can only be established by legislation and such legislation would be much more in keeping with that of a totalitarian state than with the Common Law and that political system of which we Canadians, whatever be our origin, are justifiably so proud.

W. KENT POWER

Calgary

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Blood Groups and Disputed Parentage

TO THE EDITOR:

I have read with interest the article entitled "Blood Groups and Disputed Parentage" by Dr. R. L. Denton, which appeared in the May issue. The practical application of scientific discoveries to the law should be approached with the utmost caution lest subsequent discoveries render obsolete tomorrow the principles that are accepted today. We must recognize that blood groups have been known for less than fifty years and that modern serological investigations are continually bringing to light new facts about them that were not even suspected a few years ago. Nevertheless, over a period of years, the science of serology has become sufficiently stabilized that new discoveries tend merely to confirm the principles already formulated rather than to disprove them. It can be said that modern serological techniques, in competent hands, are of an exactitude that is almost foolproof.

In attempting to present an unbiased picture of the present state of serological differentiation, Dr. Denton has perhaps overemphasized the apparent flaws in the system. His approach has been scientific rather than legal and the exceptions he has mentioned might not be considered valid in a court of law. Thus, in his discussion of the ABO system on page 540, the statement that "the factor O can only be presumed . . . since a specific testing reagent for the factor O is not available" lays too great a stress on scientific routine. That the factor O can be proven scientifically has been shown by Thomsen (Acta. Soc. Medic. Fenn A15: No. 9, 1932) and Schiff (Klin. Woch. 6: 303, 1927), but the specific testing reagent is so difficult to obtain and so expensive to use that it is not generally employed in routine serological tests since, by the process of elimination, the factor O can be presumed. In practice such a presumption can be supported by positive

demonstration. The other exceptions to the scientific principles of the blood groups have not, in fact, been proven by legal standards.

In scientific circles it is the practice to accept as true the conclusions of investigators until they have been disproved by a preponderance of evidence to the contrary. Such conclusions would not be accepted as evidence in a court of law unless corroborated by other independent evidence. Even the Hazelhorst case described by Dr. Denton as "unimpeachable" is not a proven exception since it has never been subjected to scrutiny by legal methods. The authenticity of this case is openly doubted by many modern serologists. It is significant that all the exceptions to the ABO system were reported prior to 1930, before improved techniques for blood study came into use. No exceptions to the rule have been noted since that time, nor have any authentic exceptions to the MN system been reported.

Although the scientific principles involved are sound enough, the suggestion that courts be empowered to order the withdrawal of blood from the unwilling seems to be a radical departure from established legal principles. It means that a defendant would be obliged to undergo what is, in law and in fact, a surgical operation to establish his innocence with but a 16% chance of coming through successfully. Such a process is vaguely reminiscent of the ancient trials by ordeal. If courts were permitted to order surgical interference without consent in this case there seems to be no reason why the principle could not be extended to allow surgical penetration of any body cavity for the purpose of obtaining evidence. Following this principle to its logical conclusion, it might be possible for courts to order analysis of cerebrospinal fluid, gastroscopy, biopsy and even laparotomy. The compulsory blood test in this case would seem to create a dangerous precedent.

Legislation giving legal effect to the results of a voluntary blood examination appears to be a more reasonable proposal though not entirely devoid of complications. Such legislation would require amendments to some existing laws for, in the Province of Quebec at least, it appears to be at variance with the principle of article 218 of the Civil Code, which creates a legal presumption of paternity.

It would be unwise to adopt legislation recognizing serological differentiation as prima facie evidence without surrounding it by legal safeguards to prevent abuse. It is noteworthy that the legislative bodies that have accepted the conclusions derived from serological tests have also seen fit to accept only those performed by specified experts. As Dr. Denton notes, certain countries have established a state institute of forensic medicine whose services are available to the courts on demand.

The scientific demonstration of blood groups is well established and its legal applications have been accepted in many countries. As in the system of finger-printing for identification, it is theoretically possible that future scientific discoveries may nullify the present system but the possibility becomes more remote with the passage of time. The scientific principle is sound and it is now a matter of deciding, on grounds of public policy, whether or not it should be included in our law.

C. U. LETOURNEAU, M.D.

Montreal

Sir Wilfrid Laurier

MONSIEUR le directeur:

Dans le numéro d'avril 1949 de votre Revue, j'ai lu avec beaucoup d'intérêt l'article de Me Maurice Riel sur "La carrière légale de Sir Wilfrid Laurier". Vous serez peut-être surpris d'apprendre que Sir Wilfrid a non seulement fait du droit civil, comme le dit monsieur Riel dans son article, mais qu'il a également fait du droit criminel et pour vous en convaincre j'inclus deux extraits de journaux du temps, à savoir, l'Union des Cantons de l'Est du 6 novembre, 1890, et La Patrie de Montréal, du 10 novembre 1890. L'avocat H. C. Saint-Pierre mentionné dans ces articles était mon père. Voici ces extraits:

Union des Cantons de l'Est, Nov. 6, 1890:

"Affaire d'Antoine Rocheleau accusé d'avoir payé $75.00 à Frédéric Poudrette pour mettre le feu chez Louis-Adolphe Plante, à Drummondville.

"L'adresse au jury par H. C. Saint-Pierre, c.r., pour la défense, commencée vers trois heures, ne s'est terminée qu'après 6 heures. M. Saint-Pierre dont la réputation n'est plus à faire s'est surpassé; son exposé de toute la cause a été excessivement clair et a paru porter la conviction dans l'esprit de tout l'auditoire. D'après l'appréciation des faits par M. St. Pierre, Rocheleau serait victime d'une conspiration. Comme la cause n'est pas terminée, notre devoir est de nous abstenir de faire plus de commentaires."

La Patrie, 10 novembre 1890:

"Arthabaskaville, 9.— Le procès Rocheleau s'est terminé au milieu d'une surexcitation immense. Vers trois heures de l'après-midi l'hon. juge Plamondon fit le résumé des débâts les jurés se retirèrent dans leur salle de délibérations jusqu'à huit heures.

"A cette heure la salle d'audience était remplie et des centaines ne pouvaient y avoir accès. Après cinq heures et demie de délibérations, les jurés ont rendu un verdict de 'non coupable' en faveur de l'accusé.

"Les avocats de la défense, MM. Laurier et H. C. Saint-Pierre, c.r., ont été chaleureusement félicités de leur succès."

Ces renseignements pourraient être ajoutés pour compléter l'article de Me Maurice Riel.

Montréal GUILLAUME SAINT-PIERRE

Stage Names

TO THE EDITOR:

The note by Middle Templar in your May issue on the "stage" names of women attorneys (page 583) moves me to call your attention to Rule 1: 10–2 of the new Rules of the Supreme Court of New Jersey, which requires that a married woman attorney shall practise either under her name as it was at the time of her admission to practice, with a hyphen after the surname followed by the surname of her "then husband", or under the name under which she was admitted to practice, as she shall choose. What occurs if the lady is afterwards divorced or widowed is not clear. Inasmuch as about 12½% of the women in the United States marry more than once, this rule is probably a reasonable one as preserving some continuity in the names of lawyers, but it does seem a bit arbitrary.

Washington, D.C. JOHN W. WILLIS