Legal Periodicals and the Supreme Court of Canada[1]

G. V. V. NICHOLLS
Montreal

During the recent hearing of the Rentals Reference before the Supreme Court of Canada[2] the Chief Justice refused to allow counsel to refer to an article in the Canadian Bar Review. He remarked that "the Canadian Bar Review is not an authority in this Court" and followed with some variously-reported comments on legal periodicals in general. Possibly the Chief Justice's refusal did not represent the considered opinion of the court as a whole; even in his own case it may have been little more than a sign of impatience with the length or line of argument. But the daily press gave it wide publicity at the time, and already it has been referred to before at least one provincial court of appeal. Its implications require examination, particularly now that the Supreme Court is in all matters Canada's final court of appeal.

"Authority" is one of the most ambiguous words in the lawyer's vocabulary. It may be used either in an abstract or a concrete sense. One of its ordinary dictionary meanings is the abstract one of "influence" or "weight". Thus the layman (and the lawyer) may speak of a person or book as having "authority" or being "authoritative", meaning, non-technically, that he or it has influence. In this sense, there are of course degrees of authority; one person may have greater influence for us than another. And in the same way the lawyer, more technically, may refer to a statement as of "authority" or "authoritative", meaning that in a court of law it is either of binding (variously called, absolute, imperative, positive) authority, or merely of persuasive authority. Whether the word means binding or persuasive authority will sometimes be pretty clear, as it is in the phrase "books of author-

[1] The writer expresses his thanks to the many persons who, while this article was in preparation, sent him useful references.

[2] *Reference re Validity of the Wartime Leasehold Regulations*, [1950] 2 D.L.R. 1. The subject of this article was not referred to in the reasons of any of the judges.

ity", which usually means the limited class of books that in common-law countries have the force of law, or almost the force of law, in and of themselves; but sometimes the precise meaning will be difficult to abstract even from the context. On the other hand, "authority" may be used in a concrete sense to refer to the person or thing having authority. Thus, in its ordinary dictionary meaning, it may signify a book, article or statement that is considered as settling a question or as influencing the answer to a question. And in the same way, again, the lawyer, more technically, may intend by "authority" either binding[3] or persuasive authority, or he may use it, without implying anything about the degree of its influence, to mean any citation made to a court or by a court to support a statement.[4] It is necessary to point these things out because I intend to tell my story through the medium of quotations, and in the quotations "authority" is used with different meanings.

It does not help our understanding of a court's refusal to allow the citation of legal periodicals to say that they are not "authorities". What meaning is being given the catchword "authorities"? No one suggests that the views expressed in a periodical are binding on any court; admittedly legal periodicals are not "books of authority". But it is not only binding authorities that may be cited. If it were, the legal "essays" the judges write as their reasons for judgment,[5] even the *rationes decidendi* of courts lower in the judicial hierarchy or in foreign jurisdictions, would be excluded. The issue here is whether the material appearing in a legal periodical may ever be cited to a court for its persuasive value only, to be given what weight the court thinks proper in the circumstances.

To suggest that a legal periodical may not be cited because it is not an authority, either persuasive or binding, is to say only that it may not be cited, that the citation is not acceptable.

---

[3] See Pollock, A First Book of Jurisprudence (1896) 298: "Let the student, above all, remember that in our law text-books are not authorities, with the exception, which in usual practice is seldom material, of the limited number of old books by private writers to which authority in the proper sense has been ascribed". "Authorities" here is a concrete word meaning binding authorities. The later "authority" is an abstract word meaning binding authority, though why this should be the "proper sense" I do not know.

[4] *E.g.*, Wharton's Law Lexicon (14th ed., 1938): "*Authorities*, the citations which are made of laws, acts of the legislature, precedents, decided cases, and opinions of text writers".

[5] Professor Max Radin so characterized the opinion in, Case Law and Stare Decisis: Concerning Präjudizienrecht in America (1933), 33 Col. L. Rev. 199; and of course, as he emphasizes, it is the decision in a case, and not the opinion, that is binding.

The more one thinks about the implications of the refusal the more illogical it seems. What, for example, is the relevant distinction for a court between the opinion of a scholar in a law-review article and the opinion expressed in a judgment by the same scholar after he has gone to the bench?[6] Or, to follow the train of thought, is there a distinction, significant for our purposes, between what a judge says extra-judicially in a law review and what he says, apart from what he decides, in his judicial capacity? Counsel and judges do read and use legal periodicals. Is the only point, perhaps, that they must not acknowledge officially that they read and use them? Could a court, for example, refuse to hear counsel who, without mentioning the source of a law-review article, proceeded to read it aloud from beginning to end? And, if a legal periodical is not to be cited openly to an appeal court, may it not always be cited in a factum, for the assistance of any member of the court who is willing to read it? The refusal to allow material in a legal periodical, however competent it may be, to be cited to a court seems based on nothing more substantial than the form in which it happens to be cast.

The issue is not *stare decisis*. Counsel should of course be careful not to suggest that the proposition he is urging on the court is right only *because* such and such a writer suggested it. But in any court in Canada it should be permissible either to quote a legal writer, citing his name, the title of his work and the place where it is to be found, or merely to give the citation, leaving the court to go to the original if it wishes. Counsel's justification for citing an extra-judicial source is that he believes it to be in point, reasonable and in accord with the law, but it should not be essential for him to add ritualistically that he "adopts it as part of his argument". Admittedly his real purpose may be to impress the court with the prestige of a name; that may also be his purpose in citing a case, and facts are not altered by formulas. The weight to be given a citation from a legal writer, as any other citation of non-binding authority, will be tested by the cogency of the argument, the honesty of the scholarship and, let us be realistic, the reputation of the author.[7]

[6] One of the articles counsel intended to cite to the Supreme Court during the Rentals Reference was "Constitutional Interpretation and Extrinsic Evidence" (1939), 17 Can. Bar Rev. 77, by Vincent C. MacDonald, at the time of the hearing Dean of the Dalhousie Law School. By coincidence Dean MacDonald was appointed to the Supreme Court of Nova Scotia a few weeks later, the first full-time teacher of law in Canada to go to the bench.

[7] See Frederick C. Hicks, Materials and Methods of Legal Research (3rd revised edition, 1942) 185 ff., which seems to me to be in general the proper approach.

Admittedly there is precedent for the Chief Justice's refusal. Now and again one comes upon references in England, and to a lesser extent in the United States, to what may be described generally as the negative attitude of the courts to juristic writings. But the statement of it is not consistent. Sometimes the suggestion is that no one but a writer who has held or holds judicial office should be cited; sometimes that living authors may not be cited; sometimes, that periodicals are somehow less worthy of attention than bound books. Not only has there been no agreement in common-law countries on what precisely the attitude of the courts is or ought to be, but no one, so far as I know, has convincingly justified any one of the various statements.

An outsider may be forgiven for saying that English textbooks and reported cases on this question leave him rather mystified. This uncertainty is probably due to the fact that the attitude of the courts to juristic writing is a matter of professional convention rather than of law, and textbooks and reported cases are not always the best evidence of convention. Not only does the convention seem to vary from period to period but one can never be sure that a published statement accurately expresses the general attitude of the profession at the period. Any statement from England putting a limitation on the use of juristic writing could be balanced with another suggesting that the limitation was not generally observed by contemporaries. Reconciling them is hopeless, but in that very fact is significance. With this by way of background, here are some of the English statements on one side or the other.

My first quotation is from the old case of *Johnes* v. *Johnes*. Here Lord Eldon is reported to have said:[8]

> When that case occurred where it was thought that the mode of entering up two judgments was wrong . . . Lord Alvanley adverted to a form, of which this was nearly a transcript, which had been suggested by Mr. Serj. Williams . . . to which he (Lord A.) said he saw no objection. So far there was authority that this judgment was good, attending to what had been said by Serj. Williams in his note (2) in 2 Saund. 187, and though one who had held no judicial situation could not regularly be mentioned as an authority, yet he might say that to any one in a judicial situation it would be sufficiently flattering to have it said of him that he was as

[8] (1814), 3 Dow 1, at p. 15 (House of Lords). This passage was cited by Roscoe Pound, in The Formative Era of American Law (reprinted, 1950) 139, to support a statement that: "It is true the English have or had some strict rules as to citation [of text writers]. The writer to be cited must have been or have become a judge, and the living were not to be cited." It is also referred to by Professor G. W. Paton in A Text-Book of Jurisprudence (1946) 199.

good a common lawyer as Mr. Serjt. Williams, for no man ever lived, to whom the character of a great common lawyer more properly applied. There was however no judicial decision on the point.

The next quotation is from *Regina* v. *Ion*, a case stated on a criminal prosecution for uttering. In the course of argument an amusing exchange occurred between the judges and counsel for the prisoner:[9]

Jervis C.J. — Take the case of justification of bail; — a man produced a forged deed, or a forged lease, to prove that he is of sufficient property, would that be an uttering?

Metcalfe. — That is going farther than the present case. There there would be an obtaining credit upon it. In the 11th edition of a work, formerly edited by one of your Lordships, Arch. Crim. Pl., by Welsby, Mr. Welsby, who may be cited as authority, comments on the words, 'utter or publish'.

Pollock C.B. — Not yet an authority.

Metcalfe. — It is no doubt a rule that a writer on law is not to be considered an authority in his lifetime. The only exception to the rule, perhaps, is the case of Justice Story.

Coleridge J. — Story is dead.

Cresswell J. — No doubt the cases are carefully abstracted by Mr. Welsby in the passage you refer to.

Lord Campbell C.J. — It is scarcely necessary to say that my opinion of Mr. Welsby is one of sincere respect.

In *Union Bank* v. *Munster* the question for decision was whether in an action for specific performance brought by the vendors against the purchaser at an auction sale, it was a good defence to say that, unknown to the vendors, a fictitious bid had been made, so that the purchaser paid more than he otherwise would have. Kekewich J. had this to say about textbooks:[10]

The argument, however, has been almost entirely rested upon one passage in the work of Lord Justice *Fry* on Specific Performance. It is to my mind much to be regretted, and it is a regret which I believe every Judge on the bench shares, that text-books are more and more quoted

[9] (1852), 2 Den. 475, at p. 488. In a footnote the reporter comments as follows on the "rule" as to living writers: "This rule seems 'more honoured in the breach than in the observance'. The annotations of Mr. Greaves, Russ. on Crimes, and the learned work of Mr. Pitt Taylor on Evidence, are constantly cited in Crown cases; and the writings of Chitty, Starkie, and also of Story, were referred to in the same way in their lifetime."

[10] (1887), 37 Ch. D. 51, at p. 54. The passage quoted evoked an unsigned note in (1888), 4 L.Q.R. 236, and the note in turn a comment from Boston, at page 360 of the same volume. The passage is also referred to by Pollock, A First Book of Jurisprudence (1896) 228.

But see: Lord Cairns in *Alexander* v. *Kirkpatrick* (1874), L.R. 2 H.L. Sc. 397, at p. 400, where he said, "My Lords, looking to the unanimity prevailing in the Court below, looking to the decisions which from time to time have been pronounced, and the *dicta* which have fallen from Judges in *Scotland* upon the subject: looking also to the expressions of text-writers as evidencing the constant practice of the profession, your Lordships, in

in Court — I mean of course text-books by living authors — and some Judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author himself. I cannot forbear from quoting the words: 'There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous, the notion, I mean, that they possess a quasi-judicial authority', and then he gives a reason which must commend itself to all students why that notion is erroneous. In the passage relied upon the Lord Justice refers to the general equitable principle, and on that rests his opinion that the fraudulent act of a mere stranger to which the plaintiff was neither party nor privy, would deprive him of his right to enforce the performance of the contract. If that position were advanced by way of argument at the bar, the counsel of course would be required to say: 'What do you mean by the fraudulent act of a mere stranger?' We cannot ask this question of the author, and it may be that the learned author here did not think it wise or desirable, there being no judicial answer to the question he puts, to go into the matter more fully. . . . I decide this case on that ground without in the slightest degree impugning, and leaving for future discussion, the view stated by Lord Justice *Fry*, or rather the answer given by him to the question which he asks. I know that such an act of such a character as occurs here does not come within the fraud to which he refers.

About the same time the following unsigned note appeared in the Law Quarterly Review (the editor at the time was Sir Frederick Pollock):[11]

Mention has been once or twice made in this Review of the freedom with which text-books, even by living writers, are cited in some jurisdictions in the United States, and it has been suggested that the sharp distinction which we maintain here between judicial decisions and private or extra-judicial opinions tends to be disregarded in America. We are able to state on the best authority [Holmes?] that in Massachusetts at any rate the judicial theory is exactly the same as in England. Counsel may adopt some passage of a text-book as part of his argument, and that passage may be accepted by the Court, and, if expressly accepted, become part of an authoritative judgment. So it may here. There are one or two English judges, however, who object to text-books being specifically referred to at all in argument. We do not know whether any American Courts go so far.

---

the course of argument, came to the conclusion that . . ."; Jessel M.R. in *Re Turner and Skelton* (1879), 13 Ch. D. 130, at p. 132, "Again the same writer states — and I read these passages from a text book as shewing the view taken of the law by the profession . . ."; and Jessel M.R., again, in *Henty* v. *Wrey* (1882), 21 Ch. D. 332, at p. 348: "There is only one other point to be considered — what do the text books say? It is always very important when you want to know whether a rule of law, however erroneous, has been established, to see whether it has been accepted by the profession, and although the text books do not make law they shew more or less whether a principle has been generally adopted".

[11] (1889), 5 L.Q.R. 229.

Greenlands (Limited) v. *Wilmshurst* was a case of defamation.[12] Sir Edward Clarke, K.C., counsel for plaintiffs, prefaced his argument on the question of privilege by quoting, without apparent comment from the bench, from Halsbury's Laws of England (from a volume published in 1911) and then, the report says, "proceeded to refer to Mr. Blake Odgers's work on Libel". This brought from Vaughan Williams L.J. the remark:

> No doubt Mr. Odgers's book is a most admirable work, which we all use, but I think we ought in this Court still to maintain the old idea that counsel are not entitled to quote living authors as authorities for a proposition they are putting forward, but they may adopt the author's statements as part of their argument.

To which Sir Edward Clarke replied, in the words of the report, 'that he was only citing Mr. Odgers's proposition as part of his argument. He now wished to call attention to the facts of the present case, which were . . .". If all this means that counsel may not even mention the name of a living author, the same limitation did not apply to judges. In his judgment in the same case[13] Lord Justice Vaughan Williams himself quoted at one place from "Mr. Odgers, in his well-known book on Libel and Slander", and later:

> The decision in that case [*Macintosh* v. *Dun*] is thus summarized by Mr. Odgers in the last (5th) edition of his work on Libel and Slander at p. 262: . . . I have quoted that from Mr. Odgers' book because, having read the case of *Macintosh* v. *Dun*, I think it correctly states what the decision was. Then Mr. Odgers goes on and says something which one, of course, has to take into consideration, although it in no way binds us. 'The law is otherwise in America . . .'.

This same distinction between what counsel may do and judges may do in the way of naming living authors is suggested as late as 1925 by Professor Winfield:[14]

> Counsel are not entitled to quote living writers as authorities for a proposition, though there is of course nothing to prevent them from adopting such writers' statements as part of their own argument. The contrary practice seems to have been connived at by some judges a generation ago, though others reprobated it; nor can it be described as entirely extinct even now.[15] On the other hand, judges occasionally do learned

[12] (1913), 29 T.L.R. 685, at p. 687 (C.A.). The exchange that follows is quoted by Professor O. Hood Phillips, A First Book of English Law (1948) 156, to support his statement that "It is a strict rule, which has on occasions been broken, that living authors may not be cited *by name* in argument" (italics added).

[13] [1913] 3 K.B. 507, at pp. 518-9 and 522, respectively.

[14] Percy H. Winfield, The Chief Sources of English Legal History (1925) 255-6. All but one of his references to footnotes are omitted here.

[15] *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A.C. 36, at p. 41 (H.L.), where appellant's counsel referred, among other books, to the tenth edition of Pollock on Torts. Sir Frederick Pollock was then alive.

authors, who are still living, the honor of accepting what they have written as a correct statement of the law, though their works have not been, and ought not to be cited by name in argument.

More recent writers are less emphatic. C. K. Allen in his *Law in the Making* says: "By a well-known professional convention, living writers are not cited as authority, but Bench and Bar may 'adopt' their statements as correct expositions of the law. This is in many cases little more than a polite fiction."[16] More recently still Lord Justice Denning has stated, in an address to the Society of Public Teachers of Law:

> At one time the judges used to say that works by living authors were not works of authority and could not be cited. That was, of course, a short-sighted view: because it prevented the judges having the benefit of the most up-to-date researches and discussions on a subject. It therefore gave way to a polite fiction whereby counsel was allowed to read passages from living authors if he adopted them as part of his argument. Now that fiction has tone[?], and both counsel and judges habitually refer to the latest edition of the latest work on a subject for all the assistance they can get.[17]

No doubt Denning L. J. would agree with the statement of Professor G. W. Keeton that: "Formerly, there was perhaps a tendency in England for the work of the legal writers to be ignored, or at least to be minimised. Such an attitude is perhaps explicable if it is remembered that the growth of the scientific study of law in English law schools is still a relatively recent thing. Today, however, such an attitude is obsolete . . .".[18]

None of the suggested justifications for the "strict rule", "rule", "notion", "theory", "idea", "practice", "convention" or "fiction" carries conviction. In *Union Bank* v. *Munster* Kekewich J. suggested that a court cannot ask the author of a quoted textbook what he meant by a statement, as it can ask counsel what he means by an argument at the bar. But that learned judge had said beforehand that he had in mind only living authors, and one may be permitted to wonder whether it is easier to ask a dead than a living author what he means. I am told that another justification for the distinction in favour of the dead over the quick may be that a court can never be sure that what an author writes expresses his final opinion until he has died without recanting; but if those who advance this argument expect it to be accepted they will have to demonstrate that a

---

[16] Law in the Making (4th ed., 1945) 241 (n. 1).

[17] The Universities and Law Reform (1949), 1 Journal of the Society of Public Teachers of Law (New Series) 258, at p. 263, an address that deserves wide circulation.

[18] The Elementary Principles of Jurisprudence (2nd ed., 1949) 127.

living judge — whose opinion in his judicial capacity may always be cited — never changes his mind. One attempted justification requires to be taken more seriously. It is said that the reason a living writer, particularly in a periodical, cannot be cited may be because of the suspicion that he has written for the express purpose of influencing the decision in a pending case. If the suggestion here is that it is improper for a disinterested and unselfish scholar to attempt to assist a court to reach what he believes is a correct interpretation of the law, one can only disagree. And if the suggestion is that one of the parties may instigate an article for the express purpose of bolstering a weak case, the answer is that it can safely be left to the judges to distinguish between the scholar and the hack. Always the question should be what weight is to be given living writers, not whether they may be cited.

No doubt the explanation, if not the justification, for the English convention is to be found in the history of English law. The historic emphasis in England on case law and the rather grudging attitude, until recently, towards text writers are the two sides of a single coin, the special circumstances explaining the growth of the first also explaining the second. The English system of precedent was attributed by Sir John Salmond to "the peculiarly powerful and authoritative position which has been at all times occupied by English judges".[19] We can agree with Professor Goodhart that the strength of the English judges was the *causa sine qua non* rather than the *causa causans* of the growth of precedent and still believe that Salmond has touched on one explanation at least for the resistance to juristic writing in England as compared with Continental countries. Sir William Holdsworth put essentially the same idea when he wrote that the method of developing law in England through the authority of decided cases "could only have been invented by a learned self-governing profession, responsible only to itself" and: "But even such a profession could not have developed this method of developing law if the Courts had not been staffed by an independent bench of judges, sufficiently well paid to secure that they were, as a general rule, more able than the bar. It is true that barristers have sometimes exercised some kind of censorship over the cases which they have reported. But it is the criticism of the bench, and the use made by the bench of prior decisions, upon which the success of a system of case law in the long run

[19] Quoted by Goodhart, Precedent in English and Continental Law (1934), 50 L.Q.R. 40, at p. 60.

depends. A system of appointing judges which does not secure both the presence of the ablest lawyers on the bench, and security of tenure, will never be able to operate successfully our English system of case law."[20] If we add the centralizing reforms of English kings in medieval times and the fact that even much later there were no teachers of English law at the universities, we shall have a fairly complete picture of the forces at work.[21] These forces together no doubt made English judges in the past sensitive of the dignity of their position and ready on occasion to discourage incipient rivals. The situation was of course quite different on the Continent, where leadership in the development of law was always conceded to the jurists. And in jurisdictions like the Province of Quebec that have inherited the Continental tradition, even where circumstances discourage an active *doctrine*, no one thinks of questioning the propriety of citing authors, living or dead. It is interesting that of recent years France and England have tended to approach each other in method, the civil-law country to concede a more important function to case law and the common-law country, to *la doctrine*. The tendency of each system to approach the method of the other was long since evidenced in Quebec and, it would seem, in the United States.

Whatever English judges may have said about juristic writing in the past, what in fact is their attitude to it today? Mere statistics showing the number of times books or periodicals have been cited by counsel in his argument or by a judge in his reasons for judgment, even if they could be amassed, might not of course give a true picture. For one thing, the important question is the use judges actually make of extra-judicial materials, not the acknowledgment they publicly record. But the examples that follow are enough to indicate a clear trend. To keep them within manageable limits I have restricted them to cases where, according to the report, legal periodicals were cited. No valid distinction can be made for present purposes between material in a legal periodical and in a book, and if examples of references to books could be given the trend would be even more obvious.[22]

The instance most frequently mentioned of the debt of English courts to periodical writers is the judgment of the Court of

---

[20] Case Law (1934), 50 L.Q.R. 180, at pp. 190–91.

[21] See Pollock, Judicial Caution and Valour (1929), 45 L.Q.R. 293, at p. 294.

[22] Examples of the citation of textbooks are given by Pound, Winfield, Allen, Paton and Keeton in their books mentioned *supra*.

Appeal in *Haynes* v. *Harwood*.[23] In considering whether the doctrine of *volenti non fit injuria* applied to the facts, a question upon which there was little authority in England but a great deal in the United States, Greer L.J. said:[24]

> The effect of the American cases is, I think, accurately stated in Professor Goodhart's article to which we have been referred on 'Rescue and Voluntary Assumption of Risk' in Cambridge Law Journal, vol. v., p. 192.[25] In accurately summing up the American authorities and stating the result of *Eckert's* case the learned author says this (p. 196): 'The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty'. In my judgment that passage not only represents the law of the United States, but I think it also accurately represents the law of this country.[26]

Of course courts do not always agree with the authors. In the intriguing case of *Beresford* v. *Royal Insurance Company, Limited,* where an insured man committed suicide in a taxi two or three minutes before the policies on his life were due to expire, the trial judge, Swift J., held that the suicide did not prevent the administratrix from recovering from the insurance company.[27] Shortly afterwards Professor Goodhart wrote an article summarizing the American cases on the point, which seemed to support this conclusion.[28] The article was referred to by counsel for the respondent on the hearing before the Court of Appeal,[29] but in spite of it the appeal was allowed, on the ground that it would be contrary to public policy to assist a man who had committed a felony, or his representative, to recover the fruits of his crime. Again before the House of Lords the article was cited by counsel,[30] and again the House found for the insurance company. Nor was the author approved in *In re Schebsman,* where Uthwatt J. said:[31]

[23] [1935] 1 K.B. 146; confirming the judgment of Finlay J. reported at [1934] 2 K.B. 240.

[24] At pp. 156–7.

[25] A. L. Goodhart, Rescue and Voluntary Assumption of Risk (1934), 5 Camb. L.J. 192. The article had also been cited to the trial judge, but it was not referred to in his judgment.

[26] Maugham L.J. also referred in passing (p. 162) to the Goodhart article. The article is credited with having had a decisive influence on the decision.

[27] (1936), 52 T.L.R. 650.

[28] Suicide and Life Insurance (1936), 52 L.Q.R. 575.

[29] [1937] 2 K.B. 197, at p. 204.

[30] [1938] A.C. 586, at p. 592. See Denning, *op. cit.* footnote 17, at p. 265.

[31] [1943] Ch. 366, at p. 370; confirmed on appeal, [1944] Ch. 83.

In my opinion, the debtor was not in any way a trustee for his wife or daughter. Trusts can arise only from the intention to create a trust expressed by or imputed to the person to be considered its founder, or from the acts, generally the wrongful acts, of the party to be charged as a trustee. There must be either an intention duly carried into effect, or facts which create an estoppel precluding the denial of trusteeship. There is not, I think, any other way of creating a trust. In this connexion I was referred to Professor Corbin's [of Yale] interesting article in the Law Quarterly Review, Vol. xlvi. on 'Contracts for the Benefit of Third Persons'[32] and have considered the cases to which he refers, but I am unable to see that they justify the conclusion at which he arrived that in some cases of the class now under consideration a fiction has been resorted to in order to raise a trust. The cases, no doubt, are hard to reconcile, but, to my mind, the explanation of them is that different minds may reach differing conclusions on the question whether the circumstances sufficiently show an intention to create a trust. Inferences as to intent may vary, as the cases on general charitable intent will show.

The next English case that has come to my attention is *In re Cleadon Trust, Limited,* where Scott L.J. said:[33]

As the law stands today, it is no doubt difficult to formulate any one principle which will unify all the recognized types of common law actions upon contracts implied in law, or even upon the actions for money paid. It may even be the right view, as Lord Sumner rather suggested in *Sinclair* v. *Brougham,* that all these old common law causes of action are to be regarded as just curious survivals of past legal history, stereotyped within the rigid boundaries of the particular facts of the decided cases, but resting on no general principle capable of wider application. There has, however, been a good deal of discussion recently on the subject by jurists; for example, Professor Winfield's 'The Province of the Law of Tort' (1931), pp. 167 to 176, and his 'Law of Tort' (1937), pp. 697 to 700; Mr. Jackson on 'The History of Quasi-Contract' (1936); and in the pages of the Law Quarterly Review, by Mr. Jackson, vol. 53, p. 525,[34] and by Dr. C. K. Allen, vol. 54, p. 201;[35] and I for one should be sorry to think that the common law is condemmed out of hand to no further growth in this field . . .

Professor Goodhart was again referred to by the Court of Appeal in *Gold* v. *Essex County Council,* a case involving the responsibility of hospitals for the negligence of their staffs in their professional duties. Here Lord Greene M.R. said:[36]

I do not propose to examine the various, and often conflicting, statements as to what it [*Hillyer* v. *Governors of St. Bartholomew's Hospital*] did decide which are to be found, not only in English reports, but also

[32] Arthur L. Corbin, Contracts for the Benefit of Third Persons (1930), 46 L.Q.R. 12.
[33] [1939] Ch. 286, at p. 314 (C.A.).
[34] R. M. Jackson, The Scope of the Term 'Contract' (1937), 53 L.Q.R. 525.
[35] C. K. Allen, Fraud, Quasi-Contract and False Pretences (1938), 54 L.Q.R. 201.
[36] [1942] 2 K.B. 293, at p. 297.

in Scottish and Dominion reports of cases dealing with the liability of hospitals. Those who are interested in the subject will find the cases collected in an article by Professor Goodhart in 54 Law Quarterly Review, p. 553.[37]

In more than one of these cases Mr. A. T. Denning, as he then was, was concerned either as junior or leader. Before the next two cases were decided he had gone, first to the High Court, and then, as Lord Justice Denning, to the Court of Appeal. During the argument in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.*, when the status of the last-opportunity rule was being discussed, counsel quoted[38] against that distinguished judge a passage from his own review of Winfield's *A Text-Book of the Law of Tort* in the Law Quarterly Review. The last English case from which I shall quote contains a reference to an article by Professor John Willis that appeared in the Canadian Bar Review. In *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts* Denning L.J. said:[39]

> The first point taken here was that the town clerk was not authorized to requisition this house because his only authority was derived from a letter from an official in the Ministry of Health who could point to no authority from the minister himself. Now I take it to be quite plain that when a minister is intrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorized official of his department. The minister is not bound to give his mind to the matter personally. That is implied in the modern machinery of government: see *Carltona Ld.* v. *Commissioner of Works* and an article by Professor Willis in 21, Canadian Bar Review, at p. 257.[40] When, therefore, a government department requisitions property itself under reg. 51(1), it is not necessary for the minister himself to consider the matter. . . .

Can anyone doubt, after reading these quotations, that the convention that living writers should not be cited is dead in England, even if it is not yet completely buried?

Although recognizing the danger of generalizing about a country with so many jurisdictions as the United States, one can at least say that there appears to be no rule in the United States against the citation of textbooks or periodicals to a court by counsel or by the court in an opinion. So far as I know, it has

[37] Hospitals and Trained Nurses (1938), 54 L.Q.R. 553. The report shows that the article was cited to the court by counsel.

[38] [1949] 2 K.B. 291, at pp. 299-300. The passage quoted from the review appears at (1947), 63 L.Q.R. 516, at pp. 517-8; I shall have occasion to refer to this review again. In the same case Bucknill L.J. said at p. 311, "Evershed L.J. has drawn my attention to a note in the Law Quarterly Review of October, 1938, on the case of *The Eurymedon* . . ." (apparently a reference to (1938), 54 L.Q.R. 464).

[39] [1949] 2 K.B. 608, at p. 621.

[40] Delegatus non Potest Delegare (1943), 21 Can. Bar Rev. 257.

never been suggested that a distinction should be made between living and dead authors. In his lectures on the formative period of American law at the Tulane College of Law in 1936, Roscoe Pound said, in a passage already quoted,[41] that one of the "strict rules" in England had been that a writer to be cited must have been or have become a judge, and another that the living are not to be cited.[42] Whether or not this statement is considered quite accurate even of nineteenth-century England, an outsider must accept what so distinguished a jurist says of the position in his own country during the same period: "We had no such rules as to citation in America. Here the judicial use of text books was general and avowed and not always discriminating."[43] The statement, in so far at least as it refers to the general and avowed use of textbooks, appears to be true of the United States today.[44]

If any distinction can be drawn in the United States it is in the attitude of the judges to periodicals as opposed to bound textbooks. For example, John Henry Wigmore has criticized the lack of discrimination shown by judges in the use of expository authorities (the lack of discrimination, be it noted, not the use itself): "Almost any printed pages, bound in law-buckram and well advertised or gratuitously presented, constitute authority fit to guide the Courts", and he adds: "Note, however, that the book must be *bound:* for if it is in periodical form, it is ignored. For years past there have been at the service of the profession more than a score of legal periodicals publishing the weightiest critiques of current legal problems. There is little in judicial opinion to show that these articles have ever been read; apparently their great labor and helpful thought have been wasted on the judges."[45] And in an article in the Journal of the American Judicature Society Mr. Frank W. Grinnell challenged the wisdom of what he called the "tradition" that appellate courts should not cite legal periodicals;[46] but that "tradition" is too strong a word is suggested by his later statements that "If I am not mistaken, the Supreme Court of the United States cites periodicals more frequently than other courts" and "We all know that the best informed judges welcome the material and information contained

---

[41] *Supra* footnote 8.

[42] Pound adds in a footnote to this passage, in which he gives many references, that "Today English judges frequently refer to or even discuss the views of living text writers not on the bench".

[43] The Formative Era of American Law (reprinted, 1950) 140.

[44] Personal communication.

[45] Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (3rd ed., 1940), Vol. 1, §8*a*, p. 243.

[46] A Judicial Tradition That Encourages Ignorance (1941), 25 J. Am. Jud. Soc'y 10.

in them when it is called to their attention".[47] What Mr. Grinnell apparently had in mind was the prejudice of some judges against periodical literature, or their unawareness of its value, rather than a "tradition". The comparative frequency of references by American courts to periodicals makes the strictures of Professor Wigmore and Mr. Grinnell seem overdrawn to a Canadian.

My purpose is not to assess the contribution that legal periodicals have made, or might make, to the administration of justice, in the United States or elsewhere. It may or may not be correct, as two writers in the Harvard Law Review said in 1940, that "their direct influence on decision is not impressive".[48] Sufficiently impressive to show that, for the United States as a whole, there is no "tradition" against them is the frequency with which they have been cited by American judges, and that is my only point here. No exact figures are available, but a statistical survey made twenty years ago of all American courts over a period of approximately one year showed that 61 out of approximately 850 judges had cited 161 law-review articles and notes in 80 out of approximately 30,000 cases.[49] And the opinion seems to be that the use of periodicals by American courts is increasing.[50]

In Australia, says Professor G. W. Paton of the University of Melbourne, the High Court has shown "great industry in canvassing articles in periodicals".[51] Of the cases he mentions in support of the statement, two cited and discussed articles or notes in the Canadian Bar Review. In *Davis* v. *Bunn*,[52] a negligence case, Evatt J. referred to what he characterized as the "important article" by F. C. Underhay on "Manufacturers' Lia-

[47] *Ibid.*, p. 11.

[48] Julius Frederick Stone Jr. and George S. Pettee, Revision of Private Law (1940), 54 Harv. L. Rev. 221, at p. 228: "Legal periodicals are assuming an increased importance in the minds of judges, but, at present, their direct influence on decision is not impressive".

[49] Douglas B. Maggs, Concerning the Extent to Which the Law Review Contributes to the Development of the Law (1930), 3 So. Calif. L. Rev. 181, at p. 188.

[50] See generally: Hicks, *op. cit.* footnote 7, chap. XI, particularly at p. 219, and Lyman P. Wilson, The Law Schools, the Law Reviews and the Courts (1945), 30 Cornell L.Q. 488.

Here may be the place to point out a difference between an American "law review" and the Canadian Bar Review. Some legal periodicals in the United States are published by learned societies, some by bar associations and some by commercial houses, but the majority (50 or so) are published by university law schools. Most "learned" papers find their way to one of the law-school reviews, which for the most part are edited by students under varying degrees of faculty supervision. The Canadian Bar Review is published by the Canadian Bar Association and its audience includes both practitioners and law schools. To a greater extent perhaps than some reviews abroad it tries to be representative of the two points of view.

[51] A Text-book of Jurisprudence (1946) 201 (n. 1).

[52] (1936), 56 C.L.R. 246, at pp. 270–71.

bility: Recent Developments of Donoghue v. Stevenson",[53] and to Professor Paton's own article, "Res Ipsa Loquitur".[54] In *Chester* v. *Waverley Corporation*,[55] also a negligence case, the same judge referred among other periodical material to the "valuable comment in the *Canadian Bar Review*, vol. 11, at pp. 516, 517".[56] Professor Paton's Australian cases are impressive evidence of the help that courts can draw from legal writers.

And what of the practice of the provincial courts in Canada?[57] To start with the westernmost province, British Columbia, there is the Court of Appeal's judgment in *Kennedy et al.* v. *Union Estates Ltd.*,[58] where O'Halloran J.A. referred to "what was said in 17 Can. Bar Rev. (1939), pp. 445 and 448, by the learned editor, Dr. Cecil A. Wright".[59] This note was again referred to by Macdonald J.A. of the same court in *Hiatt* v. *Zien & Acme Towel & Linen Supply Ltd.*[60] Two years later, in *Crewe* v. *North American Life Assurance Co. & Star Publishing Co. Ltd.*,[61] O'Halloran J.A. said: "In his article on the History of Negligence in Torts found in (1926), 42 Law Quarterly Review, p. 184, Professor Winfield in Appendix B catalogues some 35 decisions in which omission appears to ground liability for the tort of negligence just as much as an act of commission. But *vide* also Professor Wright in (1941), 19 Can. Bar Rev., p. 465."[62] And in *Rex* v. *Hess (No. 2)*[63] we find O'Halloran J.A. this time citing an article of his own on "Inherent Rights" in Obiter Dicta, the student publication of the Osgoode Hall Law School.

In the Prairie Provinces, there is the judgment of the Appellate Division of the Alberta Supreme Court in *Re Waines*, a wills case.[64] Here Parlee J.A. referred to a note in the Law Quar-

[53] (1936), 14 Can. Bar Rev. 283.
[54] (1936), 14 Can. Bar Rev. 480.
[55] (1939), 62 C.L.R. 1, at p. 47.
[56] J. P. McGregor, Negligence — Nervous Shock — Physical Impact — Damages (1933), 11 Can. Bar Rev. 515.
[57] The list of cases that follows is not exhaustive and no attempt has been made to distinguish between those in which the periodical was cited to the court by counsel and those in which the judge referred to it of his own motion. My assumption is either that counsel cited the periodical or that the court would not have objected if he had. No significance should be attached to the number of cases given from the different provinces or, necessarily, to the fact that some writers are referred to and not others. The collection of citations on a matter of this sort is always difficult and my method of proceeding has been haphazard to an extreme.
[58] [1940] 1 D.L.R. 662, at p. 672.
[59] Negligence — Liability to Trespassers (1939), 17 Can. Bar Rev. 445.
[60] [1940] 1 D.L.R. 736, at p. 738.
[61] [1942] 4 D.L.R. 75, at p. 93.
[62] Wright, Negligent "Acts or Omissions" (1941), 19 Can. Bar Rev. 465.
[63] [1949] 4 D.L.R. 199, at p. 209.
[64] [1947] 2 D.L.R. 746, at pp. 757-8.

terly Review[65] and quoted, "with deference and with a measure of concurrence", a note of Dr. Wright's in the Canadian Bar Review.[66] In the Court of Appeal for Saskatchewan Mackenzie J.A. in *Purdy* v. *Woznesensky*,[67] after mentioning the criticism that the Privy Council's disposal of *Victorian Railway Commissioners* v. *Coultas* had received from learned writers, referred in support to a note in the Canadian Bar Review.[68] A year ago in the Saskatchewan case of *Nykiforuk* v. *Kohut*,[69] which concerned the contentious question of the application of section 734 of the Criminal Code, Mills D.C.J. approved a remark by Professor Bora Laskin in a note in the Canadian Bar Review[70] and extensively quoted from and "adopted" the reasoning in a note by the present editor.[71] I do not happen to have any references from Manitoba to periodical literature, but references to two books by Canadian authors, fortunately still alive,[72] will do as well. In *Re Nanton Estate*[73] Williams C.J.K.B., on a question of testamentary trusts in the conflict of laws, quoted and "respectfully adopt[ed]" as "a correct statement of the law" a passage by Dr. J. D. Falconbridge in his *Essays on the Conflict of Laws*.[74] And when *Riley* v. *Riley*[75] was recently before the Manitoba Court of Appeal Coyne J.A., dissenting, said: "The matter of collusion is also fully dealt with in the excellent work of *W. Kent Power, K.C., on Divorce*, pp. 47 to 66, where the English and Canadian authorities are discussed or noted. It is not necessary to repeat what is so well said in the *Dutko* case and in *Mr. Power's* treatise."[76]

[65] (1936), 52 L.Q.R. 321 (signed "H.P.").

[66] Wills — Vested or Contingent Interest (1936), 14 Can. Bar Rev. 349, at pp. 351-2.

[67] [1937] 2 W.W.R. 116, at p. 123.

[68] Irving S. Fairty, Negligence — Nervous Shock — Damages — Privy Council — Binding Effect of Decision — Canadian Courts (1933), 11 Can. Bar Rev. 281.

[69] [1949] 1 W.W.R. 708 (District Court); [1949] 3 D.L.R. 399.

[70] Constitutional Law — Right of Dominion to Bar Civil Action After Summary Criminal Proceedings for Common Assault (1941), 19 Can. Bar Rev. 379.

[71] Criminal Law — Conviction for Common Assault — Release from Further or Other Proceedings — Sections 732, 733 and 734 of the Criminal Code — Amendment to Criminal Code (1948), 26 Can. Bar Rev. 1001.

[72] In *Nicholls* v. *Ely Beet Sugar Factory, Ld.*, [1936] Ch. 343, at p. 349, Lord Wright M.R. remarked that "the matter is very clearly stated in a work, *fortunately not a work of authority*, but to which we are all as lawyers indebted, Sir Frederick Pollock's Law of Torts". The printer, or reporter, of the Law Times Reports, forgetting the formal distinction between the authority of living and dead authors, changed the "fortunately" to "*un*fortunately" and thus spoiled the compliment. The story is told in a note (1936), 52 L.Q.R. 303.

[73] (1948), 56 Man. R. 71, at p. 79; [1948] 2 W.W.R. 113, at pp. 117-8.

[74] (1947) 560.

[75] [1950] 1 W.W.R. 548, at p. 554.

[76] Another reference to Mr. Power's book, The Law and Practice Relat-

Ontario furnishes many examples. For instance, in *Re Ashby et al.*[77] Masten J.A., speaking for the Court of Appeal, quoted with approval a lengthy passage on the distinction between judicial and administrative tribunals from an article by Mr. D. M. Gordon in the Law Quarterly Review.[78] The article was again quoted and praised by Roach J. in *Re Brown and Brock and the Rentals Administrator.*[79] In *Crompton* v. *Williams,*[80] Rose C.J.H.C. twice referred to another note by Dr. Wright.[81] In *Hynes* v. *Swartz; Re Architects Act*[82] Middleton J. said: "I desire to express my obligation to Dr. D. M. Gordon for [a] thoughtful article upon this question in Can. Bar Rev., p. 174. I do not agree with all the writer's conclusions, but the article is stimulating."[83] In *Mathews* v. *Coca-Cola Company of Canada Limited*[84] Gillanders J.A. cited an article by Professor A. L. Goodhart in the Law Quarterly Review[85] and two notes by Dr. Wright in the Canadian Bar Review.[86] Finally Urquhart J. in *Kamin* v. *Kirby*[87] mentioned an article by Mr. J. D. Arnup in the Review.[88]

Two cases remain for mention from the Maritime Provinces.[89] In *Re Bill 136 in the Nova Scotia Legislature, 1947,*[90] a reference on the delegation of legislative powers, the late Sir Joseph Chisholm C.J. said: "The expressions of opinion quoted and contended to be *obiter,* are not different in the sense of being *obiter* from the various opinions cited to us from recent contributions to legal periodicals. When one considers the eminence and great learning of the members of the Judicial Committee of the Privy Council whose opinions I have quoted, one should not lightly cast them

ing to Divorce and Other Matrimonial Causes in Canada (1948), was made by Beaubien J. in *Chabauty* v. *Chabauty and Lezubski,* [1949] 2 W.W.R. 587, at p. 590 (Man.).

[77] [1934] O.R. 421, at p. 428.

[78] 'Administrative' Tribunals and the Courts (1933), 49 L.Q.R. 94. The article is concluded at p. 419 of the same volume.

[79] [1945] O.R. 554, at pp. 563-4. The Court of Appeal judgment dismissing the appeal is reported at p. 565.

[80] [1938] O.R. 543, at pp. 577 and 586.

[81] Wills — Testamentary Capacity — 'Suspicious Circumstances' — Burden of Proof (1938), 16 Can. Bar Rev. 405.

[82] [1938] 1 D.L.R. 29, at p. 36.

[83] D. M. Gordon, Persona Designata (1927), 5 Can. Bar Rev. 174.

[84] [1944] O.R. 207, at p. 223 (C.A.).

[85] Dransfield v. British Insulated Cables, Ltd. (1938), 54 L.Q.R. 59.

[86] Negligence — Manufacturer's Liability — 'Proximity' — Possibility of Intermediate Inspection (1939), 17 Can. Bar Rev. 210; and Negligence — Manufacturer's Liability — Dead Mouse in Coca-Cola Bottle — Intermediate Examination — Res Ipsa Loquitur (1942), 20 Can. Bar Rev. 65.

[87] [1950] O.W.N. 68, at p. 69.

[88] Recent Cases on Rental Regulations (1947), 25 Can. Bar Rev. 625, at p. 630.

[89] Quebec is omitted as a civil-law jurisdiction.

[90] [1948] 4 D.L.R. 1, at p. 7.

aside." And then he quoted an article by A. V. Dicey in the Law Quarterly Review on the nature of the Dominion's constitution.[91] In *Re Gilbert*[92] Harrison J. in the Chancery Division of the New Brunswick Supreme Court made use of an "illuminating article" by John Chipman Gray in the Harvard Law Review.[93]

If there can be said to be a "current of professional opinion" in Canada, there it is.

All the judges who have sat on the Supreme Court of Canada during the last six years (except of course the two most recent appointments) have on occasion cited textbooks in their reported judgments, with Mr. Justice Kellock and Mr. Justice Estey doing so more frequently than the others. Textbooks have also been cited during the same period by the President and most of the puisne judges of the Exchequer Court of Canada. And if a book whose original author is dead, but whose editor in the edition cited is alive, is considered a work by a living author, as it must be, the judges of both courts during that period have cited living authors.

A hurried survey of the reports for the last six years reveals the following citations of textbooks written by Canadian authors who are still alive.[94] In *Lister* v. *McAnulty*[95] the late Mr. Justice Hudson quoted a passage from Mr. Walter S. Johnson's *Conflict of Laws*, which he said "accord[ed] with the generally recognized rule of private international law".[96] In *Fleming and Adams* v. *Watts et al.*[97] the same judge, but writing this time for the Chief Justice and Kerwin and Taschereau JJ. as well as himself, quoted two passages from Dr. John D. Falconbridge's *Law of Mortgages*[98] where, he said, "the law is succinctly stated". Another book of Dr. Falconbridge's, *Banking and Bills of Exchange*,[99] was quoted by Mr. Justice Estey, writing for Taschereau J. and him-

[91] Federal Government (1885), 1 L.Q.R. 80.

[92] [1948] 3 D.L.R. 27, at p. 33.

[93] Powers in Trust and Gifts Implied in Default of Appointment (1911), 25 Harv. L. Rev. 1.

[94] The citation of English textbooks is more frequent, partly perhaps because there are more of them.

[95] [1944] S.C.R. 317, at pp. 327-8.

[96] Johnson, The Conflict of Laws: With Special Reference to the Law of the Province of Quebec (Vol. III, 1937). Cannon J., dissenting in *Stephens* v. *Falchi*, [1938] S.C.R. 354, at pp. 373-4, had already quoted Mr. Johnson's Volume II (1934).

[97] [1944] S.C.R. 360, at pp. 364-5.

[98] Falconbridge, The Law of Mortgages of Land: Including Mortgages or Charges under the Land Titles System (3rd ed., 1942).

[99] The Law of Banks and Banking, Clearing Houses, Currency and Legal Tender, Bills, Notes, Cheques and Other Negotiable Instruments (5th ed., 1935).

self, in *Keyes* v. *The Royal Bank of Canada.*[100] In *Esquimalt and Nanaimo Railway Company* v. *Attorney-General of British Columbia*[101] Mr. Justice Estey referred to "Plaxton" and a page reference.

Dr. Harold G. Fox's various books have of course been cited in the Exchequer Court. Angers J. quoted from his *Canadian Patent Law and Practice*[102] in *Wandscheer et al.* v. *Sicard, Ltée.*[103] and from his *Canadian Law of Copyright*[104] in *Louvigny de Montigny* v. *Révérend Père Cousineau,*[105] and Thorson P. referred to his *Canadian Law of Trade Marks and Industrial Designs*[106] in *Union Oil Company of California* v. *Registrar of Trade Marks.*[107] In *The Economic Trust Company* v. *Minister of National Revenue*[108] Angers J. referred to the first edition of Plaxton's *Canadian Income Tax Law.*[109] Duncan and Reilley's *Bankruptcy in Canada*[110] was mentioned by the same judge in *Lamarre* v. *The King.*[111] Plaxton and Varcoe's *Treatise on the Dominion Income Tax Law*[112] was quoted in *Flinn* v. *Minister of National Revenue.*[113]

References to periodical literature by the Supreme Court during the last six years have been fewer than to textbooks, and my casual check revealed none by the President and puisne judges of the Exchequer Court. In *Canadian Pacific Railway Co.* v. *Kizlyk,*[114] where a child was crushed between two railway cars, the late Mr. Justice Hudson, writing for the Chief Justice (at the time of the hearing a puisne judge) and himself, quoted from a note in the Law Quarterly Review by Sir Frederick Pollock.[115] In *Pouliot* v. *Cloutier*[116] Mr. Justice Kerwin, speaking also for the Chief Justice and Taschereau J., quoted and discussed a passage from an article by Dr. Falconbridge in the Canadian Bar

[100] [1947] S.C.R. 377, at p. 386.
[101] [1948] S.C.R. 403, at p. 466.
[102] Fox, The Canadian Law and Practice Relating to Letters Patent for Inventions (the third and most recent edition appeared in 1948).
[103] [1946] Ex. C.R. 112, at p. 139.
[104] Fox, The Canadian Law of Copyright (1944).
[105] [1948] Ex. C.R. 330, at p. 354.
[106] Fox, The Canadian Law of Trade Marks and Industrial Designs (Including the Law of Trade Names and Unfair Competition) (1940).
[107] [1949] Ex. C.R. 397, at p. 401.
[108] [1946] Ex. C.R. 446, at pp. 458, 465.
[109] Herbert A. W. Plaxton, The Law Relating to Income Tax and Excess Profits Tax of the Dominion of Canada (2nd ed., 1947).
[110] Lewis Duncan and William John Reilley, Bankruptcy in Canada (1933, the second edition of Duncan on Bankruptcy).
[111] [1948] Ex. C.R. 115, at p. 132.
[112] Charles P. Plaxton and Frederick P. Varcoe, A Treatise on the Dominion Income Tax Law (2nd ed., 1930).
[113] [1948] Ex. C.R. 272, at p. 280.
[114] [1944] S.C.R. 98, at p. 101.
[115] (1930), 46 L.Q.R. 393.
[116] [1944] S.C.R. 284, at pp. 288-9.

Review,[117] which, "I think, not only correctly expresses the law but is a practicable rule". Finally, in the *King* v. *Richardson and Adams*[118] Mr. Justice Kerwin said for himself and Taschereau J.:

> On this point [whether the Crown may claim for pay where a member of the armed forces is injured] the decision in *Attorney-General* v. *Valle-Jones* is of importance and the opinion expressed in 52 L.Q.R. 5, that the conclusion reached in that case was obviously a desirable and reasonable one may, I think, in view of the eminence of the commentator be placed in the balance.[119]

The significance of the contribution made by legal periodicals has been generously acknowledged by distinguished judges in England and the United States. The latest testimony to come from England is the address by Lord Justice Denning before the Society of Public Teachers of Law to which I have already referred. After a tribute to the assistance rendered the courts by textbooks he went on to say:

> The influence of the universities on present law is not, however, confined to text-books. The last 50 years have witnessed the development in the universities of law reviews. These contain critical discussions of current decisions in the Courts. The *Law Quarterly Review* was the first of these reviews and it is still the most important. It is not the preserve of any single university, but its predominantly Oxford flavour has led to the foundation of the *Cambridge Law Journal*, and the *Modern Law Review*, which has predominantly a London flavour. The articles and contributions to these reviews have a considerable influence. Current decisions are discussed and their correctness canvassed. The result is that when the cases reach the appellate Courts, the judges have the benefit of these criticisms before them. Points which escape the advocate in the case may be found in these reviews. Let me give an illustration . . .[120]

In a review of the third edition of Winfield's *A Text-Book of the Law of Tort*, the same distinguished judge had previously written:[121]

> It [*Winfield*] is the book which is called for whenever anyone is not certain of the law. The place which was first occupied by *Pollock*, and to which *Salmond* succeeded, is now filled by *Winfield*. The reason why such books are so useful in the Courts is that they are not digests of cases but repositories of principles. They are written by men who have studied the law as a science with more detachment than is possible to men engaged in busy practice. The influence of the academic lawyers is greater now than it has ever been and is greater than they themselves

[117] Administration and Succession in the Conflict of Laws (1934), 12 Can. Bar Rev. 125.

[118] [1948] S.C.R. 57, at p. 62.

[119] Unsigned note (1936), 52 L.Q.R. 5, presumably by the Editor, Professor A. L. Goodhart.

[120] The Universities and Law Reform, *op. cit.* footnote 17, at p. 264.

[121] (1947), 62 L.Q.R. 516; also quoted in Keeton, The Elementary Principles of Jurisprudence (2nd ed., 1949) 127.

realise. Their influence is largely through their writings. The notion that their works are not of authority except after the author's death has long been exploded. Indeed, the more recent the work, the more persuasive it is, especially when it is a work of such an authority as Professor Winfield: because it considers and takes into account modern developments in case law and current literature. *Winfield* is now cited in place of *Pollock*; and *Cheshire and Fifoot* in place of *Anson*. The essays of Professor Goodhart have had a decisive influence in many important decisions. The vast tomes written and edited by practitioners for practitioners fulfil a different purpose. They are valuable as works of reference. They are cited not for principles but for detailed rules on special subjects. They are most important in day to day practice, but do not compare with books such as *Winfield* when it comes to fundamental principles.

No less impressive is the testimony of American judges. In 1931 Benjamin N. Cardozo, then Chief Judge of the New York Court of Appeals and later to go to the Supreme Court of the United States, wrote, in a long passage but one worth reproducing:[122]

Certain, in any event, it is that the old prejudice [against law reviews] is vanishing. Within the last ten or fifteen years the conspiracy of silence has been dissolving, with defections every year more numerous and notable. To trace the reasons for the change with adequacy and fulness would be a slow and heavy task. Minor factors have had their share. The leading cause, however, has been a dislocation of existing balances, a disturbance of the weights of authority and influence. Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of universities.

In the engulfing flood of precedents the courts are turning more and more to the great scholars of the law schools to canalize the stream and redeem the inundated fields. . . . Partly because of the growing complexity of life, the overwhelming demands that modern litigation makes upon the powers of the judges, both intellectual and physical, chiefly indeed for these reasons, and yet partly, one may fear, from inertia and weakness, the vanguard of the column which in our common law system was once led by the judges, is led by them no longer, though, even now it is true, as in the past, that the vanguard is helpless when deprived of their support. The transformation in all likelihood has been inevitable. Something might have been done to make it a little less abrupt, but the outcome would have been much the same. In any event the outstanding

---

[122] From his introduction to Selected Readings on the Law of Contracts from American and English Legal Periodicals (Compiled and edited by a Committee of the Association of American Law Schools, 1931) pp. ix ff. In December 1923, in a series of lectures to the Yale Law School, Judge Cardozo had paid a similar tribute to the law schools and law reviews: Cardozo, The Growth of the Law (1924) 11ff. This series was in the nature of a supplement to the now-famous lectures delivered at Yale in 1921 and published under the title "The Nature of the Judicial Process". See also Lyman P. Wilson, *op. cit.* footnote 50, particularly at p. 493.

fact is here that academic scholarship is charting the line of development and progress in the untrodden regions of the law.

This change of leadership has stimulated a willingness to cite the law-review essays in briefs and in opinions in order to buttress a conclusion. More and more, the law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in the prestige of the universities has been accompanied, as might be expected, with a corresponding advance in the prestige of their organs. Not long ago there was published in the University of Southern California Law Review an interesting study of the extent of citations of the law reviews in courts of high authority. The statistics would be amazing to a student of our opinions a score of years ago.

The new habit of citation is symptomatic of something more, however, than a developing recognition of the authority of the modern law school; it is symptomatic also of a new conception of the function of citations, of the meaning of authorities. There have been attempts in the past to put citations in a strait jacket.... So, later, in France, the framers of decrees and codes and 'ordonnances' have attempted from time to time to give to their mandates an authority unique and self-sufficient, but with no greater success, it seems, than had attended like endeavors a millenium and more before. Even in our own law there was a tradition for many years that outside of Coke and Kent and Blackstone and a few other acknowledged masters, the judge belittled his office if he quoted anything as authority or even as argument that was not embalmed in an opinion.

The modern outlook is levelling these barriers to a freer and larger vision. It is bringing us to a recognition of the truth that an opinion derives its authority, just as law derives its existence, from all the facts of life. The judge is free to draw upon these facts wherever he can find them, if only they are helpful. No longer is his material confined to precedents in sheep-skin. 'His decision', says Mr. Allen in his book, Law in the Making, 'is given in the form of a structure of logic, in which he may use *any* material which he considers *ad rem.*' He may look to law or to literature, to economics or to philosophy, to saints or to sinners, to workers or to drones. If his seigniory extends to fiefs not marked as legal, the impulse becomes the stronger to exert it in regions where the denizens are near of kin. Under the drive of this impulse, the law teacher and the law reviews are coming into their own.

Another Chief Judge of the New York Court of Appeals, Frederick Evan Crane, wrote in 1935:[123]

Courts are busy places. Decisions must be made with expedition. Serious and important questions of law must be disposed of one way or the other by men who have little time for study or for research. Any court which hears seven to eight cases a day involving disputed questions of law and seeks to decide them within the month has very little time for deep and thorough study. We must all more or less depend upon the research of others, whether it be in textbook, previous decisions or in papers printed in our law reviews. The latter has supplemented the textbook and the decision because we have found from experience that

[123] Why Law School Reviews? A Symposium (1935), 4 Ford. L. Rev. 1, at p. 3.

> the modern professor or teacher — perhaps jurist would be a better name for some of them — has had time as well as desire to enter thoroughly into the study of a particular subject and has given the result of his efforts for the benefit of the profession. Much of this work is done gladly, without compensation, from a mere desire to be helpful.
>
> Without saying more I shall merely add that we of the bench, as well as the lawyer at the bar, should make this acknowledgment, though somewhat belated, of the help which we get from the younger men and from the college professor in the disposition of the every-day work of the courts.

And then Charles E. Hughes, while Chief Justice of the Supreme Court of the United States, wrote that "it is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical.[124]

* * *

The refusal of the Chief Justice of the Supreme Court of Canada during the Rentals Reference to allow the citation of a legal periodical may not have been intended to set a precedent. Yet it raises the question whether the Supreme Court's approach to the judicial process is to be as broad and forward-looking as is expected from Canada's final court of appeal. The theory that courts never do more than declare a rule implicit from time immemorial in the common law (or, as an exception, in statute) is now outmoded, but it is one of the influences that sometimes lead lawyers to an over-technical and insular manipulation of precedents. It is true that many of the questions that come before courts, particularly lower courts, can be decided adequately by reference only to the binding authority of statute or precedent; indeed where the law is clear the court has no choice but to apply it. But law cannot be divorced from its social context, and especially where the court has a choice, where it is playing a creative rôle, it must turn wherever it can for assistance and by the discriminating use of aids supplementary to precedent and statute — one of which is the legal periodical — strive to make the law serve social ends. To suggest that courts should do this is not in any way to deny their paramountcy in the administration of justice.

---

[124] Foreword to the 50th anniversary number of the Yale Law Journal (1941), 50 Yale L.J. 737.