Correspondence

Charitable Trusts

TO THE EDITOR:

I have just read with much interest Mr. Todd's excellent and timely comment (1953), 31 Can. Bar Rev. 1166, upon the decision in *Re Cox* (unfortunately referred to by its subtitle, *Baker* v. *National Trust*, [1953] 1 S.C.R. 94; 1 D.L.R. 577). We are all, of course, awaiting the Judicial Committee's opinion. May I however, in the meantime, put before your readers what I think is the real danger in accepting Mr. Todd's suggestion that trusts for poor employees and dependents of employees of a specific corporation should be valid charitable trusts on the basis of a valid extension of the present poor relations cases which, without the element of public benefit, are recognized as valid, though anomalous, charitable trusts?

Mr. Todd asks (a) if the law of the horse and buggy could be adapted to the automobile age, why a modern court should find itself unable to recognize the changed structural organization of modern society; (b) whether the same human sentiment is not involved in relieving poverty by benefiting necessitous ex-employees of a firm as in donating money to one's poor relatives (p. 1170). Yes. But is either of these the basis upon which we should recognize the gift in the corporate employee case as a charity? Why is it necessary so often in these cases to rely on charity? In the *Cox* case the gift fails for a violation of the perpetuity rule if not charitable. In others it may fail to obtain a tax exemption in favour of charities. What is our policy behind charities? Why do we give them a special status of immunity from ordinary laws? Mr. Todd, I suggest, unwittingly provides a very excellent illustration: Smith and Jones each leave by will a large sum of money to trustees to provide for needy and necessitous persons (a) resident in Steeltown, a company town (Smith's will) and (b) who are employees or former employees of the *X* company, the company which founded Steeltown (Jones' will). Subject to the caveat that the court might look behind the facts to ascertain the nature of the residence in Steeltown and its special relationship to the company, Mr. Todd suggests that Smith's gift is good, Jones' bad, if we accept *Re Cox* as decided to

date (Supreme Court of Canada), and leaves the impression that this result is not sound. But does not this illustration raise the fundamental question: Are we going to give the benefit of "charity" (without distinguishing for the moment between that term as applied to next-of-kin problems and that term as applied to tax problems) to gifts tied to private persons, whether natural or corporate? It may be true that residents of Steeltown need the permission of the corporation to reside there: will they twenty-five or 250 years hence? And this is not necessarily true of all company towns. If it is a true company town in every sense, perhaps the gift should be treated as a gift to the relief of poverty among the employees of the company, and stand or fall as such. Persons connected with a place geographically are not subject to the private and personal (natural or corporate) selection or rejection upon which persons connected by reason of relationship or employment depend. Trusts for the latter lack, admittedly, that public character which trusts for the former enjoy. Anyone is free to move into the hamlet of Scott (one hundred inhabitants); no one is free to become an employee of the Tobacco Trust (110,000 employees), of the Canadian National Railway System, or of Canada Life without the intervention of an act of hiring. Yet I feel somewhat safer in upholding a charitable gift to the residents of Scott than I do one for the employees of any of the corporations named. Mr. Todd suggests we should recognize the changed structural organization of modern society. That is just what I do recognize. Are we going to extend the benefits of charity (perpetuity, tax exemption) to the changed structural organizations in modern society—large monopolistic corporations controlled by a few individuals? Is this the type of judicial extension of existing rules that we should approve? And it must be remembered that this is not a case of "extending" or "applying" a regular common-law rule to new situations, but of an attempt to extend a very small and, it has been said, an anomalous, *exception* to a basic common-law rule—the requirement of public benefit if the gift is to get the blessing of "charity". Do we want to extend such an exception in such a situation? (And there has been express reservation in the House of Lords in the *Oppenheim* case as to the validity of the exception itself.)

Mr. Todd mentions the unsatisfactory state of the English authorities in this matter. I agree. But I do not agree that Canada's departure from some lower English precedents is in this instance "regrettable". It is, I suggest, a very commendable effort, at least in the judgment of Roach J.A., to clarify this unfortunate English muddle. But even here I wonder whether it is a muddle, or whether the *Oppenheim* decision in the House of Lords has not forecast further clarification. The fundamental soundness of the *Oppenheim* decision (denying "charity" benefits to a trust for the *education* of

children of 110,000 employees of the Tobacco Trust, a private corporation) on the point which I raise in this letter is perhaps a warning to our courts. Parenthetically, I am bound to admit that the United States has so far not seen the problem in the same light and has recently held valid an educational trust somewhat similar to the *Oppenheim* trust, where the company was a large railroad corporation, but the benefit for the children was to only a portion of the employees (children of those employees residing in Fort Wayne, Indiana): *Quinn* v. *Peoples Trust and Savings Co.* (1945), 60 N.E. 2d 281 (Ind. Sup. Ct., aff'g lower courts).

These thoughts are thrown out as suggestive of another approach to this problem. Perhaps in this modern day and age I, too, have failed to realize the advance of modern society. Perhaps trusts for employees of large monopolies are good things. Perhaps such private trusts should gain the benefits of charity. For the moment, however, I put in my caveat. Private trusts of the type discussed in this letter are to be commended for their spirit of charity and benevolence. But do they need in perpetuity the benefits of formal charity?

GILBERT D. KENNEDY*

TO THE EDITOR:

I am grateful to Professor Kennedy for stating what may be termed the conservative approach to charitable trusts. Professor Kennedy rightly asks: "What is our policy behind charities?" If either legislatures or courts would give a positive answer to this question, the principles might be reinstated in logic rather than in casuistry.

It would not appear that decisions such as the one under consideration encourage the "spirit of charity" on the part of either natural or corporate persons. That is my real concern.

ERIC C. E. TODD

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Judges and Book Forewords

TO THE EDITOR:

The respect which members of the bar normally have for judges is (in this writer's opinion) being severely tested by actions of judges at all levels in writing pretty forewords to legal publications. There has been quite a spate of this sort of thing in Canada in the last year or so. An endorsement of a book by a judge cannot make a bad book good, or a good book better. Commercial law publishers

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who seek to use a judge's name as voucher of their publications do not do so because they fear that otherwise scholarship will go unnoticed. It is a safe surmise that their interest is in the promotion of sales. Why should judges lend themselves to this kind of promotion?

Perhaps they look upon their rôle as that of patrons lending respectability to authorship. But the product must stand or fall on its own merit, and a judge who writes an uncritical foreword (and this has been the typical kind) is fair neither to the author nor to the potential buyers. The author may be satisfied with even the slightest flattery for his effort, yet, if his book is very good, the slight flattery is a reflection on the judge's understanding of the subject, and if the book is bad the judge's position is equally indefensible. Again, high eulogy for a good book is pure supererogation, and for a bad book it is misleading to prospective buyers.

Buyers perhaps deserve to be misled if they buy because of judicial endorsement. This writer has no statistical data which measures the effect of judicial endorsement on the sale of a book. It is a fact that most of the endorsements in Canada have been given in respect of "form" books or "annotated act" books — publications of a routine kind which may be useful to practitioners as time savers but have otherwise very little claim to eulogy, be it by a judge or by anyone else. I risk, of course, the charge of being unrealistic ("ivory towerish", I suppose, is the proper phrase to fling at a law teacher) in this apparent failure to understand that all a lawyer has to sell is his time. (We must assume that all have equal ability and comprehension.) If judicial commendation is considered appropriate for books of the type referred to, then we are primitive indeed in our legal development.

I would not have it thought that I believe it inappropriate for judges to write, even if the writing takes the form of a book introduction. But what the lawyer is entitled to expect is some contribution to the subject of the book, by way of critical exploration, or evaluation of, or even addition to, the ideas of the author or the basic assumptions of the subject. Who will cavil, for example, at Wade's Introduction to the 9th edition of Dicey's *Law of the Constitution?* Or Morgan's introductory chapter to Robinson's *Public Authorities and Legal Liability?* Or some of the introductions written by Dean Roscoe Pound? Or the introduction by C. K. Allen to Sieghart's *Government by Decree?* These are random illustrations of how a foreword can give perspective or add depth to the author's own presentation. Mr. Justice Roach's introduction to N. L. Mathews' *Labour Relations Handbook*, brief as the introduction is, is in this tradition (the brevity may be not unrelated to the sparseness of the book). Here we have critical commentary of recognized authorities directed to the author's theme.

Compare this with some of the innocuous little phrases of praise strung together to form forewords to a few recent Canadian publications: (1) "After perusing the proofs of the author's work I can readily appreciate that the need for such a manual has existed for a very long time . . ." (from the foreword to *Division Court Handbook* by C. F. McKeon); (2) "The authors have in my opinion produced a book containing a careful and comprehensive treatment of the whole subject . . . the full set of forms which is provided should save much time." (from the foreword to *Canadian Mechanics' Liens* by Macaulay and Bruce); (3) "In this new, comprehensive and most welcome text on the Ontario Land Titles Act the Master of Titles at once speaks with knowledge and authority. He is to be commended on the arrangement, content, style, competency and skill with which he deals with the interpretation of the Act and Rules." (from the foreword to *The Ontario Land Titles Act* by W. Marsh Magwood); (4) "I have read the handbook in proof form and I have had my expectation of the quality of the work fulfilled. The handbook without question will fill a much needed place as a guide in this field of labour relations." (from the introduction to *Labour Relations Handbook* by Mathews); (5) "Mr. Sheard is now presenting to us a volume in which, drawing upon his lengthy practical experience as a trust officer and an executive of a well known trust company, he has set out a large number of carefully settled forms, prefaced by a valuable article on the problems of drafting, with a check list of the points to be considered, and followed by 150 pages of an excellent digest of the law relating to the subject" (from the foreword to *Canadian Forms of Wills* by Terence Sheard).

The excerpts I have set down read, in general, as if they were parts of book reviews rather than forewords. The objection to this type of foreword is not that it contains gentlemanly tribute but rather that it contains nothing else. One is almost reminded of the radio and television endorsements of a certain kind of soap, or cigarette or detergent. The judicial endorsement is, of course, kindly meant. If any proof of this is needed, it can be seen in a recent endorsement of an encyclopaedia of Canadian conveyancing and commercial forms, in which the judge writes that "this foreword has had to be penned before the preparation of the work, and therefore before I have seen even the first volume . . .". What is the value or, indeed, the purpose of such a display of kindness? Would it not be better for the judge to wait until the work has been published and then give us the benefit of his considered views in a review?

Surely lawyers do not have to be "sold" in any commercial sense on the desirability of adding to their libraries. And surely the judicial office rises above empty, if pretty, commendation,

solicited for its usefulness as advertising material and useful for nothing else.

BORA LASKIN*

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A Reply to Mr. Jamieson

TO THE EDITOR:

I have read with personal interest the paper by D. Park Jamieson, Q.C., in the October 1953 issue of the Review at page 894, setting out the scheme of the four-year law course in Ontario. As a fourth year student under this scheme, my views are not entirely in agreement with those expressed by the author.

Mr. Jamieson sums up the view of those in authority in Ontario thus: "In the last analysis it is the responsibility of the benchers to certify that persons called to the bar and admitted as solicitors are qualified to practise law and serve the public". With deference to this generally adopted view, it is submitted that the benchers should not alone assume the responsibility of laying down educational conditions precedent to practising law. Although they have undertaken this duty with the highest of motives, their guiding principles prove unsuccessful in application.

The author states that the "future lies in the proper integration of the humanities, the social sciences and the natural sciences with law. A beginning has already been made in the fusion of legal and non-legal materials in the subjects on the law school curriculum." Mr. Jamieson is right in the first instance but mistaken in the second. Law is a branch of the humanities and cannot be separated from other humanities if it is to develop. But in four years at Osgoode, I have not been aware of more than the slightest passing reference to "non-legal" materials, unless it be in a course on legal history in first year—which covered little more than a few prominent dates in English history and passing references to Roman jurisprudence—or in the course on bookkeeping in fourth year. There is no real suggestion of a fusion of legal and non-legal materials. It is virtually impossible if for no other reason than the lack of facilities for discussion. The few full-time lecturers who presumably might sponsor such a fusion could not possibly do so because their time is already over-demanded, and their classes so large that it is only with the greatest ingenuity that they provoke mental activity and prevent mere verbatim scribbling of lectures. Owing to the absence of teacher-student relationships, and the use of loudspeaker mass-lectures, students have merely to develop a quasi shorthand, and disgorge the given material, to pass exam-

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inations. Intellectual development is at a minimum. Mediocrity is the result.

The basic fallacy is that the school presumes to teach law from a so-called practical viewpoint, divorced from the study of other aspects of moral development. A law school existing apart from a university cannot teach law. It may teach the superficial practice of law but it cannot do more. To consider law apart from philosophy and its kin is to deny the human process. This divorce has resulted in the absence of intellectualism, or even stimulation, which must be developed in at least a few if the practitioners expect to maintain competent libraries. New developments originate among the intellectuals—those who devote their energies to study and writing—and the current view of emphasizing "practical" aspects of training, in order to prevent public ridicule, is an impractical and short-sighted notion.

The policy and facilities at Osgoode choke stimulation. Those few students who might develop into thinkers are prevented from doing so in their final year by lack of time. Most of their time is taken in gaining office administrative experience, which is essential to a practitioner but does not develop his intellect. The fourth year is the one to push through. The student has learned only to sop up dictated material like a sponge and squeeze his mind dry at examinations, and certainly he has not enough time apart from his office work to explore beyond the realm of his notes.

Mr Jamieson states that the Law Society requires as a condition to admittance to the school a degree from a recognized university That would be laudable provided the school was maintained at a postgraduate level and not at that of a technical school. The majority of students from our universities are just beginning to think when they graduate from a university, but those going to Osgoode will not be provoked to higher intellectual activity. A half-dozen full-time lecturers, together with part-time lecturers, cannot educate some 800 to 900 students at a postgraduate level.

It is suggested that the profession reconsider its position with regard to the law school. To stress merely practical matters at a specialized school separated from the true center of social study which is a university is likely to result in producing mediocre lawyers. Law should be taught in conjunction with other material of essentially moral nature, which is most critically examined at universities. Osgoode would then be free, in good conscience, to teach material relating entirely to practice.

W. P. G. ALLEN*

* Of Toronto.

Chemical Tests for Alcoholic Intoxication

TO THE EDITOR:

The letter which recently appeared in the Canadian Bar Review on "Chemical Tests for Alcoholic Intoxication" is of considerable interest. In the course of it Dr. Rabinowitch raises many points which could be clarified by further discussion. It is not my intention to discuss "breath alcohol" tests for I have had no experience with them. I should, however, like to comment on certain other things which are mentioned in his letter.

It is hardly necessary to point out that in our present-day complex society social drinking and car driving have become an integral part of many peoples' lives. Most people also agree with the broad generalization that "drink and driving do not mix". It is equally obvious that it is everyone's duty to drive as well as he possibly can in all circumstances. People vary greatly in their ability to drive, the good drivers compensate for the poor ones and the net result is the general level of road safety achieved in the community. No one can deny that alcohol produces impairment of ability to drive a car and that, the more alcohol consumed, the greater is the impairment. It is a specious argument to suggest that, because a good driver after imbibing alcohol can drive better than a sober bad driver, the good driver should not be penalized. Any driver by becoming impaired lowers the general level of road safety.

A fundamental question is how laws pertaining to drinking and driving should be formulated and on what type of evidence people should be judged. The following methods are available and variously used in different countries: firstly, there are the laws which take no cognizance of chemical tests for alcohol and rely only on clinical evaluation; secondly, there are the laws which admit a chemical determination for alcohol as contributory evidence; and, thirdly, those so formulated that a person whose blood alcohol is above a fixed statutory level is automatically guilty of a driving offence.

The first method, of relying only on a clinical examination, is in my opinion grossly inaccurate unless a complete clinical examination specifically designed to evaluate alcoholic intoxication is carried out. This means a physical examination, evaluation of the mental status, as well as the conducting of certain co-ordinating and reaction-time testing. One of the most important features of early alcoholic impairment is the impairment of judgment. How can, or how is, this being assessed by a brief routine medical examination or by a police officer who attends at a scene of accident? What is the margin of error by this method as compared with chemical tests?

My experience has shown that there is relatively good correlation between degrees of intoxication and the blood alcohol level. I agree with Dr. Rabinowitch that some people exhibit signs of alcoholic impairment at 0.05% of alcohol in the blood. I would also agree that it might be possible, though it must be extremely rare, for a man to appear superficially sober with a blood alcohol level of 0.273%. I should, however, disagree very strongly with him if he suggests that a man with a blood alcohol level of 0.273%, when carefully examined by special tests, would not show considerable impairment of those functions which enable him to drive a car to the best of his ability when there is no alcohol in his blood. Complete sobriety (people showing "no evidence of intoxication") at blood alcohol levels in excess of 0.273%, as reported by Dr. Rabinowitch, has not been encountered by most authorities whose investigations are recorded in the vast published literature on this subject.

Many complicated tests have been devised to measure the degree to which such things as judgment, co-ordination and reaction time are affected by different levels of blood alcohol. The most important experiments are of course those which use actual road driving tests to evaluate the effects of alcohol. A close correlation between the degree of impairment shown by those special tests and different levels of blood alcohol has been found to exist. Some results have belied the superficial appearance of the person being tested. A person may appear sober and be capable of performing certain gross procedures and yet show impairment of certain higher faculties which are important in safe driving. I believe that in practice the blood alcohol level is the best form of evidence presently available in cases of alleged intoxication. It hardly needs to be stressed that blood tests are only reliable if done by competent people. There is always the danger that they may not be accurately performed, but unfortunately this applies equally to all forms of law enforcement in which the human element is involved.

One of the points often emphasized is that people differ in their behaviour with similar blood alcohol levels. Nobody will deny that certain differences do exist, since behaviour in the absence of alcohol is not identical in all people. It is most important, however, to realize that alcohol produces certain remarkably similar changes in totally different people. Early loss of a critical sense of judgment and a much later loss of co-ordination are changes which occur in all people under the influence of alcohol. It is this deviation from a person's normal behaviour which is so similar at the various degrees of alcoholic intoxication. Speaking specifically of car driving, it may be said that, following the consumption of moderate amounts of alcohol, all people are impaired in their ability to drive as compared with their best performances in the absence of alcohol.

If we are to use chemical tests for intoxication, we must consider the question of the statutory figure for the concentration of alcohol in the blood. A number of possibilities exist:

(a) To permit no alcohol in the blood while driving. This might be ideal as Dr. Rabinowitch suggests, but certain practical problems arise. Enforcement of such a law in our present day society might well be impractical if not impossible. How would one interpret very low or borderline negative chemical results?

(b) A commonly suggested possibility is to set an arbitrary figure for alcohol concentration in the blood above which a person is considered to be an unsafe driver. This figure varies in different countries from 0.05% to 0.150% of alcohol in the blood. The level one chooses will depend upon many factors, including the accident liability society wishes to tolerate. As the blood alcohol level is increased above 0.05% the accident liability increases. Setting some statutory level, such as 0.150% of alcohol in the blood, might suggest that at a level of 0.140% a person is not intoxicated or impaired, whereas at 0.150% or above, he is. This is obviously not so, since alcoholic intoxication is a matter of degree which starts after the first drink and progressively increases as the blood alcohol level increases. There is a real difference between these two figures, but when using them as a basis to interpret human behaviour there is little difference. However, from the practical standpoint it might well be that some such arbitrary figure would have to be used. The adoption of an arbitrary figure would be entirely in keeping with other traffic laws, for example, the thirty mile an hour limit. No one would suggest that there are not a number of drivers capable of driving as safely at 38 miles an hour as there are at 28 miles an hour. Nor is there any significant practical difference between 30 and 32 miles an hour, except that 32 miles an hour is in excess of the legal limit.

Many differences of opinion about drinking and driving would be eliminated if it were possible to create a precise legal and medical definition for such terms as "intoxication" and "impaired ability". Scientifically speaking, the difference, if any, between impairment and intoxication is only a matter of degree. The present law makes a differentiation between these two without adequate definition. From a medical standpoint one might simply define alcoholic impairment or intoxication as the altered state (from normal) which is produced by alcohol. It would then be necessary to qualify this further by designating grades or stages of intoxication. The various degrees of alcoholic impairment could be defined and called grades one to four.

If blood alcohol concentrations are used to interpret human behaviour under certain conditions, does the fact that human behaviour is very complex and difficult to interpret invalidate the

use of the method? I believe it is because of the very complexity of human behaviour that the use of chemical tests for determining intoxication is both practical and reasonable. The correlation between alterations of those human functions most necessary for driving and blood alcohol concentrations has been well worked out experimentally both in the laboratory and under actual road conditions. And, this correlation has been shown to exist despite discrepancies between superficial appearance and blood alcohol concentrations.

It seems reasonable, then, to conclude that, in the face of the complexities of human nature and the very difficult practical problem of clinically evaluating alcoholic intoxication, there should be traffic laws that make full use of the chemical determination of blood alcohol concentrations.

D. W. PENNER*

Books Received

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

Annual Digest and Reports of Public International Law Cases: Being a Selection from the Decisions of International and National Courts and Tribunals and Military Courts given during the year 1948. Edited by H. LAUTERPACHT, Q.C., LL.D., F.B.A. London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1953. Pp. xxviii, 706. ($17.50)

Canada's Food and Drug Laws. By ROBERT EMMET CURRAN, Q C., B.A , LL.B. Chicago: Commerce Clearing House, Inc. Toronto: CCH Canadian Limited. 1953. Pp. 1138. ($19.50)

A Concise History of the Law of Nations. By ARTHUR NUSSBAUM. Revised edition. New York: The Macmillan Company. Toronto: The Macmillan Company of Canada Limited. 1954. Pp. xiii, 376. ($5.75)

Criminal Law. By GLANVILLE L. WILLIAMS, LL.D. (Cantab.). The General Part. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xliv, 736. ($11.25)

Definition & Theory in Jurisprudence. An inaugural lecture delivered before the University of Oxford on 30 May 1953. By H. L. A. HART. Oxford: At the Clarendon Press. Toronto: Oxford University Press. 1953. Pp. 28. (40 cents)

Division Court Handbook: Including the Act, Rules, Forms and Fees, with special sections on Practice and Procedure in the Division Courts. By CHARLES F. MCKEON. With a foreword by A. H. YOUNG. 1953. Toronto: The Carswell Company, Limited. Pp. xxi, 434. ($12.50)

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