Correspondence

The County Judge in Ontario

TO THE EDITOR:

In a recent article Her Honour Judge Helen Kinnear has ably outlined the position of the county judge in Ontario. I should like to add a few words about the position of the litigant in the county courts of the province.

Let us assume a collision between two motor vehicles resulting in damage of $250 to each vehicle. Each motorist believes the other to be entirely at fault, and each rushes to a lawyer. Each is advised that he has the option of suing for his full damages in the county court or of abandoning the excess of his claim over $200.00 and suing in the division court. Let us assume further that one of them leads off by suing in the county court. The other now has, in effect, no option: he must defend in the county court and might as well counterclaim there for his damages. The action goes to trial and, out of the myriad possible results, the court selects full recovery by the plaintiff and dismissal of the defendant's counterclaim.

The defendant must pay, therefore, not only for his own damages but also the plaintiff's. But the defendant now learns that he has only just begun to pay. According to our county-court tariff, the plaintiff can tax costs of the action, without regard to the counterclaim, at least in the following amounts:

	Fees	Disbursements
Institution of action	$20.00	$4.00
Paid service of writ, say	....	4.00
Pleadings	20.00	....
Record and entry for trial without jury	5.00	6.00
Discovery of both parties	22.00	....
Paid for appointment and transcripts of mination, say	....	20.00
Preparation for trial	15.00	....

Paid for subpoena	....	1.50
Brief at trial, say	4.50	....
Counsel fee at trial, say	50.00	....
Witness fees, say	....	20.00
Judgment	8.00	4.00
Correspondence	5.00	....
Totals	$ 149.50	$ 59.50

These fees and disbursements total $209.00 and the defendant has to pay the plaintiff $459.00—$209.00 plus $250.00; but he is not finished yet. His own lawyer will render a bill for not less than the following, totalling a further $179.00:

	Fees	Disbursements
Defence	$15.00	$2.00
Pleadings	20.00	....
Discovery of both parties	22.00	....
Appointment and transcripts of examination, say	....	20.00
Preparation for trial, say	15.00	....
Subpoena	....	1.50
Brief at trial, say	4.50	....
Counsel fee at trial, say	50.00	....
Witness fees, say	....	20.00
Judgment	4.00	....
Correspondence	5.00	....
Totals	$ 135.50	$ 43.50

The defendant must expect, on the court's findings, to be out of pocket to the extent of $500.00, $250 00 for his own damages and $250.00 for the plaintiff's. Does it seem reasonable that it should cost him an additional $388.00, or more, to learn his lesson?

These figures take no account of the defendant's own loss of time in interviews with his lawyer and witnesses and in attending on discovery and trial. The plaintiff has had a similar experience, and if he ends with $200.00 of his damages, after paying all expenses, he is fortunate. If a jury trial had been held, the costs of the parties would have been increased by $3.00 and the county would have had an expense of at least $96.00, and probably over $150.00, to pay the jurors I will not elaborate on the cost of attaining any other result in the action. The reader may easily estimate how much the parties would have taken home for themselves had the court found both of them equally at fault: the calculation involves the use of minus numbers. Nor will I go into the question of costs on appeal. The whole idea of appeals involving sums not exceed-

ing $500.00, whether in the county court or the division court, is fantastic, unless the case is a test case or one involving an important point of law.

All lawyers will agree that the solicitors for the parties in my hypothetical case were hardly compensated for their services by the fees mentioned. In spite of the Austrian example referred to by Judge Kinnear, most of us would no doubt also agree that a trial with full right of cross-examination is the best method of eliciting facts so far devised, and that discovery is a valuable adjunct to trial. Nevertheless, a system which requires so much time and effort, and costs so much, to determine liability for such small sums seems grossly inefficient and unjustifiable.

One may reply that the defendant should have settled; perhaps his lawyer should have beaten him over the head until he did so. If a citizen must have his day in court, the argument runs, he should pay for it. True, but he should be entitled to his day in court without having to pay unreasonably. Of course, in motor-vehicle cases, one or both of the parties may be insured and then a settlement is more likely, but if the insurance companies have to pay heavy costs, they eventually get them back in increased premiums, and the public pays in the long run.

If we are to preserve our method of trial for such actions, we must reduce the expense to the litigant. Apparently there is resistance to an increase in the monetary jurisdiction of the division courts. Why not, then, abolish division courts and introduce a summary trial for all claims, within the jurisdiction of the county courts, involving not more than $500.00 on either side? The division court office could become a local small-claims office of the county court, and the county judge could travel for summary trials as the division-court judge now does. The procedure of the division courts for process, trial and enforcement of judgment could be transferred to the county courts. A reasonable sliding scale of profit costs, based on the amount of debt or damages proved, could be established.

If something of the kind is not done, we shall some day find that government adjusters have been appointed to settle all such claims without cost to the parties, without trial or appeal and, what perhaps will be more painful to the legal profession, without an opportunity for lawyers to intervene. Those of your readers who do not handle claims of these minute proportions won't miss the business. But will justice be done? Whether it is or not, it seems probable that the public will prefer the cheaper procedure and will take their chances on ideal justice.

STUART RYAN*

*Stuart Ryan, Q.C., Port Hope, Ontario.

Natural Law

TO THE EDITOR

Everyone interested in the natural law is indebted to the Canadian Bar Review for publishing the letters of Mr. Gerhart and Professor d'Entrèves on that subject. And I am indebted to the editor of the Review for this opportunity to add some brief comment on those letters, particularly Mr. Gerhart's.

Mr. Gerhart says that whereas men believe the natural law exists they do not agree on what it is. From this he argues that it is important that the interpretation of it be kept on a democratic rather than an authoritarian basis.

I think it is important to keep terms straight. Natural law, strictly speaking, is the first principle of laws. It prescribes that we do good and avoid evil. In the case of society, that means the *common* good. From this are derived the so-called secondary precepts of the natural law—do not kill, steal, slander; contracts must be carried out; the burdens of government must be equitably distributed; and so on. These secondary precepts are the necessary means of achieving the common good, and in that sense they are a part of the natural law. But they are too general to govern action. Therefore they must be determined—that is, transformed into positive rules of law—to serve as guides of conduct.

In the process of determination, there are two elements. One is a neutral element. Shall traffic pass on the right or left? Shall executions for murder be by hanging or electrocution? In such respects, the determination of the lawmaker is decisive. The other element is not neutral. Does the law promote the common good? If the law violates the common good, it is unjust, and is a law in name only; and that remains true whether the law is made by the people or by a dictator.

In other words, Mr. Gerhart does not solve his dilemma by putting his determination in the people rather than in a single authority. The common good, which is prescribed by the natural law, is binding on a democracy as well as on an individual ruler. "The people" can be wrong, and it would be a sad day for freedom if we were required to yield our consciences on a moral issue to the majority vote of a popular assembly. Democracy does not require us to do so. In fact the democratic procedure affords us the means of rectifying the error.

Mr. Gerhart has seen fit to add that "there is a vast difference between implications of the concept of natural law as developed by some Roman Catholic ecclesiastical scholars and the natural law concept as it has been developed in the United States". In view of the tensions that can arise from religious differences, it is at least unfortunate that a charge of this kind should be made without an explanation which would make it susceptible of a reply.

I have not space to comment on Professor d'Entrèves' letter, except to express my appreciation of its wisdom in insisting on a higher law as the only antidote to any despotism, whether of an individual or of the multitude.

HAROLD R. MCKINNON*

* * *

Natural Law

TO THE EDITOR:

The recent controversy in these columns over natural law has perhaps narrowed down, but it has not eliminated, the area of disagreement. I am not, however, certain whether differences of terminology have not, at times, obscured the issue. I am certainly in complete agreement with Professor d'Entrèves's concluding statement, which I venture to regard as a confirmation of my own position, and of that of relativism. It is precisely the recognition of the variety of basic assumptions which seems to me essential but also incompatible with the basic dogma of the natural-law philosophy. I agree entirely with Professor d'Entrèves that some of us may derive our faith from a philosophy of the right and the good, of the scholastic or some other pattern, while others may simply believe in the basic virtues of democracy, of individual rights, of the supremacy of community interests, and the like, as a matter of political philosophy. Relativism has never been a philosophy of indifference, although Roscoe Pound has unfortunately helped to spread this error by describing it as a "give-it-up philosophy". Such leading relativists as Max Weber and Gustav Radbruch took an active and courageous part in the political affairs of their country. Both happen to have been staunch democrats who did not bow to authority or, like so many legal philosophers, identify the policies of their nation with the right and the good. Although Holmes sometimes wrote as if he accepted the force behind the law as the only undeniable criterion, his basic philosophy and above all his judicial work do not warrant such an assumption. But perhaps I may quote instead the philosophy of another eminent American judge who does not seem to be subjected to the kind of attack it is now fashionable to make on Holmes:

> We are in the distressing position of all who find their axioms doubted: axioms which, like all axioms, are so self-evident that any show of dissidence outrages our morals, and paralyses our minds. And we have responded as men generally do respond to such provocation: for the

*Of San Francisco, California.

> most part we seem able to think of nothing better than repression; we seek to extirpate the heresies and wreak vengeance on the heretics. . . . Happily there are a substantial number who see that, not only when they were first announced, but as they still persist, the doctrines that so frighten us constitute a faith, which we must match with a faith, held with equal ardour and conviction [Learned Hand, The Spirit of Liberty (Papers and Addresses) pp 256-257]

Perhaps we should try to assess in practical terms how far a belief in absolute values of right and wrong, or good and evil, can lead us in the solution of legal problems. Mr. McKinnon, in common with the great majority of scholastic philosophers, believes that the concept of the "common good" gives us a practical guide. We can agree that man is (or at least should be) a rational being endowed with the capacity of distinguishing between good and evil. We can deduce from that the basic postulate of human dignity. This might enable us to judge the mass extermination of human beings in gas ovens, whether or not sanctioned by decree, as "statutory lawlessness", though it is hardly necessary to invoke natural law to condemn the mass slaughter of helpless human beings. Murder is generally taken to be a crime in positive international law.

But how much further does the concept of human dignity take us in determining what is right and wrong without denying the very freedom of human conscience which this idea is meant to assert? Pacifists may well contend that compulsion to serve in the armed forces and to kill other human beings is contrary to human dignity, but others regard the duty to serve one's country as an overriding value

Within scholastic doctrine it is the official doctrine of the modern Roman Catholic church, from Rerum Novarum (1891) onwards, and of most neo-scholastic philosophers, that the right of private property is a dictate of natural law. But St. Thomas Aquinas (*Summa Theologica,* Part II, Q 66, Article 2) and Suarez (A Treatise on Laws and God as Law Giver, Book II, Chapter 14) strongly deny the natural-law character of the right of private property and regard it (rightly as I believe) merely as a matter of social utility. Catholic doctrine regards birth control as contrary to human nature and law, but this is not the doctrine of the House of Lords (*Baxter* v. *Baxter*, [1948] A.C. 274) and of many legal systems and conscientious human beings who regard birth control as an essential condition of the survival of the human race. The principle of the equality of all human beings is a noble one, but it is certainly not universally supported by biologists. How far is it to be carried? Are unequal pay for men and women, or public-law restrictions on foreigners, offences against natural law?

Mr. McKinnon, like Grotius and many others, regards the

duty to keep promises as a principle of natural law. But how far does this enable us to decide to what extent commercial or government contracts which often give unilateral rights of terminating a contract, or statutory discharges of contracts, for example, in the case of nationalization of an industry, offend against natural law?

When faced with the solution of concrete legal problems, we find time and again that natural-law formulas may disguise but not solve the conflict between values, which is a problem of constant and painful adjustment between competing interests, purposes and policies. How to resolve this conflict is a matter of ethical or political evaluations which finds expression in current legislative policies and to some extent in the impact of changing ideas on judicial interpretations. And, of course, we all have to make up our minds as responsible human-beings and citizens what stand we will take, for example in the tension between state security and individual freedom. The danger is that by giving our faith the halo of natural law we may claim for it an absolute character from which it is only too easy a step to the condemnation or suppression of any different faith. It is significant that during the recent Congressional hearings in the matter of McCarthy versus the Army a federal employee, who in disregard of executive orders, that is, the law binding on him, had given information to the McCarthy committee, justified his action not only by the rights of Congress but also in the name of his conscience. Senator McCarthy does in effect claim that the duty to fight Communism (as he interprets it) overrides any positive duty a government servant may owe to his executive superiors. The New York Post of June 17th, 1954, had the following report:

> St. Clair: You wouldn't want any employee of the Army to violate an order of the President of the United States?
>
> McCarthy replied that during the Nurenberg Trials of war criminals it was established that no man could use an order of a superior as an excuse for his actions. He insisted any individual who knew that Communists had been wrongfully cleared and restored to secret work was bound to give that information no matter if he lost his job.

It is true that the late Gustav Radbruch, under the impact of the horrors perpetrated under the authority of Nazi law, modified to some extent his pre-war philosophy and said that certain so-called laws must be denounced as "statutory lawlessness". He did not unfortunately have time before his death in 1949 to formulate his beliefs in any final form. He did not, however, go farther than to assert that certain Nazi laws had to be retroactively expunged by subsequent legislation (as was done by military government legislation) and that a specific court, as distinct from *any* court, might have to be empowered to declare certain laws as not binding. This resolves itself into two problems. In so far as subsequent

legislation or a constitutional court (for example, the Supreme Court of the United States or the new constitutional court of Western Germany) invalidates certain legislation, this is part of the process of positive law. The authority to do so is usually derived from a specific provision of a written constitution, or implied from it as in *Marbury* v. *Madison* (1803), 1 Cranch 317. When such positive law is enacted as the result of a fundamental revolution, as in the case of post-Nazi Germany, it will much more easily than in normal times retroactively condemn certain laws enacted under the regime which has been overthrown. To that extent the doctrine of just and unjust laws forms an essential part of any successful revolution. The martyrs of the unsuccessful *putsch* of July 20th, 1944, obviously cannot be regarded as traitors by a regime purporting to repudiate the Nazi regime.

As to the second aspect—the duty to obey certain morally repugnant laws—the trials of war criminals attempted, not very successfully, to single out certain persons the tribunals thought should have risked their lives or careers to disobey the laws of the Nazi regime. These tribunals came more and more, however, to recognize that only a small minority of persons, usually those who have committed positive crimes in any case, could be punished for their participation.

To sum up, the present writer's distrust of the use of natural-law formulas is based on the belief that (a) they do not supply a sufficiently definite and practical test for the borderline cases in which justice and positive law conflict, (b) their use creates an illusion of higher and unchallengeable authority which may lead to the intolerance and suppression of conflicting faiths. Such an approach would conflict with basic beliefs of democracy.

A practical and eminently important consideration supports the belief that it is better to ascertain the greatest possible area of agreement on the legal principles it may be possible to reach from different philosophical premises rather than to reason in terms of natural law, which—at least in the case of the scholastic doctrine—means an acceptance of Christian beliefs. It has never been more important that East and West should work out together common principles of legal behaviour. This is certainly possible, but not on the basis of scholasticism or of any other specifically Western philosophy. Hindus, Buddhists and others can well agree with the West on principles of peace and justice, but their outlook on human life and its rôle in the universe is basically different from that of the West Even the distinction between men and animals—basic in Western philosophy—can hardly be accepted by Buddhism, which believes that a living being can move from one form of existence to the other The differences extend to the relative value of thought and action, the relation of individual and society, and to

many other religious and philosophical questions. The time is past when Western beliefs can be regarded as a measure of all things.

If the foregoing observations have rejected a natural-law approach of the kind that is suggested by Mr. Slattery and Mr. McKinnon—and possibly by Professor d'Entrèves—this does not, of course, mean indifference to the problem of justice. On the contrary, the use of natural-law formulas or of such ambiguous phrases as "the rule of law" has only too often deflected judges, administrators, legal writers and others from a more serious consideration of the extent to which the problem of justice is ever-present in the administration of the law. For a detailed discussion of this problem I may perhaps refer your readers to an earlier contribution of mine to this Review. To the many illustrations of the impact of legal philosophy on judicial decisions discussed there (Judges, Politics and the Law (1951), 29 Can. Bar Rev. 811, and see also the writer's *Legal Theory* (3rd ed., 1953) chap. 23) may be added the far-reaching changes in matrimonial property relations effected by the English Court of Appeal in *Errington* v. *Errington*, [1952] 1 K.B. 290, *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466, and other decisions.

Suffice it to say briefly that basic principles as they abound, for example, in the American constitution lead the courts entrusted with their interpretation to constant preoccupation with fundamental problems of justice. The recent decision of the Supreme Court of the United States in *Dennis* v. *United States* (1951), 341 U.S. 494, which deals with the adjustment of individual freedom of belief and the security of the state, and the still more recent decisions refusing to apply the "separate but equal" doctrine to negroes in grade schools,[1] are but two of innumerable examples. Nor is it an accident that such prominent members of this court as Holmes, Brandeis and Cardozo have devoted much thought to the principles of the judicial process, for they saw clearly that general formulas often disguise an inarticulate philosophy of justice.

But, outside this field of written constitutions, courts of all countries face the problem of justice in the choice between precedents, in the interpretation of public policy, and in many other ways. It is deeply to be regretted that so many lawyers, and the majority of judges, dislike to face these problems clearly and articulately. An example is the way in which Canadian courts—an exception being Mr. Justice Mackay's courageous decision in *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674—have usually avoided the problem of public policy in the interpretation

[1] See, for a discussion of the school-segregation cases, an article by Edward McWhinney, An End to Racial Discrimination in the United States?, at page 545 of this issue.—EDITOR

of racial covenants prohibiting the sale of land to Jews, "non-Caucasians" and the like (see *Noble* v. *Wolf*, [1951] S.C.R. 64, [1951] 1 D.L.R 321). The consequence of such an approach is that all too many lawyers will use such formulas as the rule of law to cover up their particular political beliefs, for example, their aversion to state interference in private enterprise and private property (the converse is of course equally possible, but a very small minority of lawyers happen to be Socialists). It is not, therefore, surprising that the study of Jurisprudence should still be widely regarded as an extravagance instead of what it is, namely, a vital and integral part of the legal process.

W. FRIEDMANN*

Books Received

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

Max Weber on Law in Economy and Society. Edited with an introduction and annotations by Max Rheinstein. Translation from Max Weber, Wirtschaft und Gesellschaft, Second Edition, by Edward Shils and Max Rheinstein 20th Century Legal Philosophy Series: Vol. VI. Cambridge, Massachusetts: Harvard University Press. Toronto: S. J. Reginald Saunders and Company Limited. 1954. Pp. lxxii, 363. ($7.85)

Notable Images of Virtue: Emily Bronte, George Meredith, W. B. Yeats. Being the Sixth Series of Lectures on The Chancellor Dunning Trust Lectures Delivered at Queen's University, Kingston, Ontario, 1954. By C. DAY LEWIS Toronto: The Ryerson Press. 1954. Pp. xiii, 77. (No price given)

Racial Equality and the Law: The Role of Law in the Reduction of Discrimination in the United States. By MORROE BERGER. Paris: United Nations Educational, Scientific and Cultural Organization. Toronto: University of Toronto Press. 1954. Pp. 76. (50 cents)

Sir William Searle Holdsworth, O.M., 1871-1944. A memorial address by A L. GOODHART, K.B.E., Q.C., F.B.A. Selden Society Annual Lecture 25th March 1954. London: Bernard Quaritch. 1954. Pp. 25. (4/- to non-members of the Selden Society)

---

*Professor of Law, School of Law, University of Toronto.