Correspondence

Reform of the Law

TO THE EDITOR:

You invited me to comment upon the suggestions made by Mr. W. Kent Power, Q.C., in his letter published in the October 1954 issue of the Canadian Bar Review under the title "Reform of the Law".

For me to do other than concur in the desirability of bringing our law up to date, to meet adequately modern needs, would be quite inconsistent with what we in the Department of Justice at Ottawa have been trying to do for some years past. The statutory definition of crimes in the new Criminal Code supersedes completely the common law, and every Canadian has a notice in the code (or in other acts of Parliament defining and providing for the punishment of crimes) of the only crimes with which he can be charged. The new code is a result of many years of hard work by a Royal Commission, by the Department of Justice and by Parliament itself. The extent of the attention paid by Parliament to the code is exemplified by the many amendments made to the bill both by the Senate and the House of Commons during their consideration of it.

In addition to the consolidation of the Criminal Code, which we regard for our modern purposes as being an improvement on the common law, the Department of Justice has recommended, the Government has approved and Parliament has passed during the last few years other laws that we also regard as improvements on the common law.

The following are some examples. The amendments to the Petition of Right Act abolished the fiat necessary before certain actions could be taken against the Crown. This was later followed by the Crown Liability Act, which abolished the immunity of the Crown in the right of Canada to liability for torts committed by its servants or agents, or arising in respect of its ownership of property. The amendment to the Supreme Court Act that made the Supreme Court of Canada the court of last resort in Canada *inter alia* considerably reduced the costs to litigants of disposing of

Canadian final appeals. The Interpretation Act amendments have clarified the legal consequences of the expiry of statutes and the effect of expressions relating to time.

The listing of these examples does not at all imply, of course, that we do not continue to welcome any suggestions for the improvement of laws under federal jurisdiction. Indeed, our statute law is kept under constant review by the various departments of government and especially by the Parliamentary Counsel of the Department of Justice. In the course of accomplishing, as of 1952, a complete revision of the Statutes of Canada, substantial amendments as to form have been made to various statutes. Quite apart from both these efforts, however, Parliament in recent years has also re-enacted, and at the same time revised both as to form and substance, at least forty major statutes, including the Citizenship Act, the Income Tax Act, the Bankruptcy Act, the National Defence Act, the Post Office Act, the Weights and Measures Act, the Financial Administration Act, the Immigration Act, the Food and Drugs Act, the Trade Marks Act, and many others. In each case an earnest attempt was made to bring the laws completely up to date in the light of modern social, business and economic conditions, and to eliminate anomalies and archaic or outmoded rules.

All these legislative efforts have gone a very considerable distance in taking care of any anomalies of the common law in those matters which fall under federal jurisdiction. If there are any left in this field, our past experience indicates that those who are affected by them and their legal advisers will have no hesitation in bringing them promptly to the attention of the Federal Government.

Hence, it is not surprising that nearly all the examples which Mr. W. Kent Power cites of common-law rules which should be at least considered for amendment are those which fall within provincial legislative authority: for example, the fellow-servant doctrine; the maxim *actio personalis moritur cum persona;* the contributory negligence principle; the right of a testator to leave nothing to his wife or children (which has already been changed, has it not, by some of the provincial dower acts?); a father's almost exclusive rights to a child's custody; and the obligation of a tenant to pay rent even though the premises are burned down.

You, Mr. Editor, said in your report to the 36th Annual Meeting of the Canadian Bar Association on September 4th last that the Association is acknowledging its special responsibility in the field of legal research "by setting up . . . a strong committee, with the necessary financial backing, to investigate, among other things, the rôle of legal research in Canada, what in fact the Canadian contribution has been to constructive legal thought, and what pre-

cise steps might be taken, by the Association as well as other agencies, to further legal research".

I wonder whether Mr. Power would agree that his idea for a permanent law revision council in each province and perhaps in Ottawa might be considered by the Canadian Bar Association committee which is being set up. Such a committee could consider, for example, whether we have enough men in Canada with the necessary ability, scholarship and time to staff a federal law revision council and ten provincial law revision councils. It could consider whether at the moment there are enough common-law anomalies still remaining in the federal and provincial fields to keep eleven law revision councils busy and to warrant the expense of their maintenance. In the federal field, for example, we here do not think that there are enough of such anomalies still remaining to keep a federal law revision council busy for very long.

Notwithstanding that Mr. MacTavish has pointed out in your November issue that the law revision councils advocated by Mr. Power would not necessarily overlap or conflict with the Conference of Commissioners on Uniformity of Legislation in Canada, he doubtless would agree that uniformity of legislative treatment by provincial legislatures of the common-law anomalies would be highly desirable. These provincial law revision councils would face the same fact with which the Uniformity Commissioners are faced, that before the recommendations of the councils could be enacted as provincial legislation in effect throughout the Canadian provinces the approbation of ten individual provincial legislatures would have to be secured. It would seem that a necessary preliminary to this would be some degree of unanimity amongst the ten provincial law revision councils themselves.

On the political side there are one or two points to be kept in mind. No legislative body which has been elected by the people for the purpose of amending the law is going to delegate its responsibility for so doing to any organization outside of it. No legislative body is going to act upon the suggestions of any research body unless the credentials of that body for disinterestedness, competence and public interest are beyond question. Thus, the value of the plan we are discussing depends almost wholly upon the sponsors of the legislation. If the legislation proposed were the product of a systematic research effort made by some organization with an established reputation, that obviously would add greatly to the likelihood of its being accepted. But it would be unrealistic to suppose that measures, even so sponsored, which may command a large measure of legal agreement, will necessarily be accorded the same measure of political or legislative agreement by the governments and legislatures to which they are sent.

These considerations seem to indicate that a permanent re-

search committee of an organization like the Canadian Bar Association itself, or like the Canadian Tax Foundation representative of the Canadian Bar Association and other equally responsible bodies, might be the type of instrument most suitable for the purpose of bringing necessary reforms to the attention of the provincial legislatures of Canada. Certainly, the instrument chosen, to be effective, should possess an adequate supply of competent full-time professional research men. Lacking these, it will be attempting to advise provincial Attorneys General Departments already better equipped in most cases with competent full-time professionals than the organization which would be presuming to advise them.

STUART GARSON*

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Obscenity

TO THE EDITOR:

Professor Mackay, in his interesting and very informative case comment on "Recent Developments in the Law on Obscenity" in your November issue, mentioned the book *Tobacco Road* but did not mention the recent British Columbia case concerning a prosecution of the play *Tobacco Road* under section 208 of the Criminal Code (new section 152).

I thought that it might be of interest to Professor Mackay and those of your readers who are also interested in the subject of "judicial censorship" to know that this case had occurred and that it could be found in the reports. The case is *Regina* v. *Hellier* (one of the actors involved) and is reported in (1953) 9 W.W.R. (N.S.) 361.

The accused was convicted before McInnes P.M. and on appeal to the County Court his conviction was reversed (p. 365 of the same volume). Upon a further appeal to the Court of Appeal by the Crown the judgment of McGeer C.C.J. was reversed and the conviction restored. Sloan C.J.B.C., who read the judgment of the court (also reported at p. 365), applied the *Regina* v. *Hicklin* rule without questioning or interpreting it. His judgment was concurred in by the other four judges of the court.

The judgment itself is only a few paragraphs in length and, in view of the fact that the full court (a sixth judge has since been appointed to the court) sat on the appeal, it is extremely unfortunate, in the opinion of the writer, that the court did not feel that the case warranted a more detailed and lengthy judgment.

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