Correspondence

Reform of the Law

TO THE EDITOR:

Perhaps you will welcome some further comment upon the timely suggestion made in your October 1954 issue, by Mr. W. Kent Power, Q.C., that Canadian lawyers should emulate their confreres in the United Kingdom and the United States by taking the initiative in law reform before ill-advised legislative changes are made at the behest of organized laymen. It is interesting to read the opinion of the Minister of Justice in the January 1955 issue that anomalies of the common law in the field of federal jurisdiction have been to a large extent corrected by recent legislation.

As the Minister indicates, the greater part of so-called "lawyer's law" in Canada is constitutionally within the legislative jurisdiction of the provinces. Should not, therefore, the organized research necessary for wise statutory change be done by groups within each province, leaving the problem of achieving Canada-wide uniformity, when it is desirable, to the Conference of Commissioners on Uniformity of Legislation? Whether each provincial group is organized under governmental, law society or other auspices, or some combination of auspices, the particular type of organization might well be left to determination by available local resources and preference. At least one province has made a small beginning in this way. In 1950, the Nova Scotia Centre for Legislative Research was established at Dalhousie Law School and, in 1954, a Board of Legal Research was organized by the Council of the Nova Scotia Barristers' Society.

The Legislative Research Centre was the first co-operative project of its kind to be undertaken by a law school and a government and is, on a modest scale, an experiment in both legal education and public service. Its purposes are, first, to provide law students with some experience in methods of research and drafting essential for effective legislation and, secondly, to make the results of their work, whatever its worth, available to the legislature. The project was made feasible by endorsation of the late Honourable Angus L. Macdonald, Q.C., while he was premier, and the co-operation

of the legislative counsel, who acts as associate director of the centre. A room is provided in the law school building. Work done by the students is the practical laboratory portion of their course in Legislation and faculty members are consultants in their special fields. The amount of careful work that can be accomplished by forty or fifty students in an academic year is limited, but much of it has proved useful. For example, over a three-year period, they did the basic research and preliminary drafting for the revision of the Nova Scotia statutes, covering the period since 1923, that has recently been brought into force under the title, "Revised Statutes of Nova Scotia, 1954". In addition, they have done the research upon which several statutes making significant changes in the law have been based. In each case, they investigated and made comparative analyses of the methods of handling the same or similar problems in other provinces and countries, and consulted welfare agencies, provincial and civic organizations, and government departments.

The Board of Legal Research is just getting underway, but it has already begun studies on the simplification of conveyancing, modernizing the administration of estates, what to do about the Statute of Frauds, and improvement of judicial procedure. The chairman has enlisted the aid of other practising lawyers, law teachers and students.

Patterns for a permanent law reform organization may be found in England and the United States. In the former country, as every lawyer knows, a standing committee, the Lord Chancellor's Law Revision Committee, was first appointed in 1934, "to consider how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to them require revision in modern conditions". As reconstituted in 1952 under the name, Law Reform Committee, it consists of five judges, four barristers, two solicitors and three law teachers. Several reports of the committee have led to reformative legislation of a politically non-controversial character. It has been said, at least of the original committee, that reliance has necessarily been largely upon the accumulated knowledge of the subject matter by committee members in each undertaking, since its part-time membership and lack of a research staff have limited the scope of investigation. Consequently, when changes in the law have been deemed to be urgently required, heads of government departments have appointed ad hoc committees, who have had access to the knowledge and research facilities of the departments. Under the 1952 changes the chairman of the Law Reform Committee has power to work through subcommittees in which he may include experts on the particular matter being considered.

Probably the most successful permanent body so far established by government as an aid to legislative reform and revision of law is the New York State Law Revision Commission, which also was created in 1934. It consists of five members appointed for five-year terms, four of whom must be lawyers and two of them members of law school faculties. A record of the commission's accomplishments will be found in (1949), 35 American Bar Association Journal 512, which relates that sixteen hundred suggestions for study had been received by the commission since its establishment and that one hundred and twenty-seven statutes making substantive changes in the law had been enacted on recommendation of the commission, affecting many fields of law. The statutory duties of the commission are:

> 1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
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> 2. To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.
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> 3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
>
> 4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.
>
> 5. To report its proceedings annually to the legislature on or before February first and, if it deems advisable, to accompany its report with proposed bills to carry out any of its recommendations.

The Executive Secretary and Director of Research, with a well-trained staff, is housed at Cornell Law School.

Another type of organization established by statute at the state level is the Judicial Council, of which there are at least twenty-one now functioning in the United States. The council is responsible for formulation of better methods of procedure and for recommending other improvements in judicial administration. Membership is usually composed of lawyers, judges and legislators, who serve gratuitously. The principal weakness has been the lack of adequate research assistance, a defect which has been remedied by the recent foundation of the Institute of Judicial Administration at New York University Law School.

While well-trained and adequately-staffed permanent agencies can do much by providing legislators with the results of thorough and disinterested research, it may be more desirable to re-shape the law, so far as practicable, by judicial rather than legislative action. What may be needed is to provide a judicial "new start",

a series of systematic hints to the courts, indicating how they may free themselves from limitations self-imposed by strict adherence to stare decisis, as was done by the American Law Institute under the guise of re-stating the law. The remarkable reformative effect of that unofficial undertaking is apparent from a study of the volumes on "Restatement in the Courts". Apparent, also, is the value of utilizing the services of combined groups of judges, practitioners and law teachers who are particularly authoritative in the branch of the law under review.

The membership of the Committee on Legal Research, recently set up by the Canadian Bar Association, is an eminent example of the sort of group just mentioned. It would ill become me to attempt to anticipate the committee's recommendations to the association, but to me it appears obvious that one of the steps most likely to ensure advancement of the law is for the association to provide money grants to enable members of the faculties of Canadian law schools to devote adequate time to large-scale research and to enable the purchase of library and other facilities. It will be insufficient to finance merely the purchase of books, because research confined to books is not enough. The type of research that is most needed is what has been called research in the relationship between the "law" and the "world". As Braden said in his article in 5 Journal of Legal Education 39, that type of research requires a lot of field work, "and at that point the legal scholar usually gives up, for such research requires money and lots of it". Research of the required character, as Lord Justice Denning has pointed out, can be most effectively done at the universities. To me it seems relatively futile to embark upon a programme of subsidized research on particular problems without at the same time providing the university law schools with general financial support to enable salaries to be paid and facilities provided sufficient to attract to and retain in the faculties an increased number of men of superior ability. John G. Hervey demonstrated at the last meeting of the Association of American Law Schools that the lawyers have fallen far behind the medical profession in financial support for professional education. An essential step is for the Canadian Bar Association and its members to contribute funds and to influence clients and university governing boards to donate funds to the law schools to enable them to meet the operational cost of both adequate legal educational programmes and large-scale research. This will lay the necessary foundation for keeping the future development of the law in pace with the changing needs of the community.

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The Governor General

TO THE EDITOR:

There are three passages in Mr. Franck's valuable article on the Governor Generalship in your December issue on which I should like to comment.

1. The footnote reference (p. 1093) to the Tupper-Aberdeen crisis of 1896: that Aberdeen refused to make the appointments recommended by Tupper after his defeat, "even though the Governor General of New Zealand had in 1892 been specifically instructed by the Colonial Office to permit his ministers to 'swamp' the upper house of that Dominion". I cannot see the relevance of this case at all. What does "swamping" mean? Surely it means appointing to the upper house enough new members to produce a majority there for the party which already has a majority in the lower house. Tupper already had a huge majority in the upper house. He had just lost his majority in the lower house. He was trying to appoint to the upper house all the new members he could, to produce an even more overwhelming majority there for the party which had a *minority* in the lower house. Anything farther from "swamping" it would be hard to imagine.

Besides, the crucial point is that Tupper had just been defeated at the polls, whereas the New Zealand government had won a victory at the polls the year before. It might be added that the New Zealand upper house was not limited in number, while the Canadian Senate was. There is, in fact, not one single point of resemblance between the New Zealand case of 1892 and the Canadian case of 1896.

The really relevant precedent is the New South Wales case of 1894, when Sir George Dibbs, after defeat at the polls, recommended the appointment of ten members of the upper house, and the Governor refused. The Governor's position was weaker than Aberdeen's, because the New South Wales upper house was not limited in number, so that Dibbs' successor could have "swamped" his appointments, while Tupper's successor could not. None the less, the Colonial Office approved the refusal. It is odd that Mr. Franck seems to be unaware of this case. It is also odd that he does not mention that the Colonial Office explicitly approved the principles on which Aberdeen had acted.

Surely the fact is that the propriety of Aberdeen's action, for which Laurier took full responsibility, has never been seriously questioned, except by Tupper himself and, much later, by some academic writers who have ignored alike the essential facts and the dictates of common sense?

2. The comment (p. 1094) on the Byng-King crisis. To say that if the Governor General refuses to dissolve parliament "he must

find strong support for his position among the opposition" is a curious understatement. Actually, he must have good reason to believe that an alternative government can be formed which can carry on without a dissolution.

"More important", says Mr. Franck, "his refusal must have the support of the people, and must be vindicated at the polls." This is a strange doctrine. The Governor General, *ex hypothesi*, refuses to dissolve because he thinks an alternative government can be formed which can carry on without an election. But, says Mr. Franck in effect, the only way to show he was justified is to have an election. To prove that a dissolution is not necessary, he must grant a dissolution!

Mr. Franck also produces, on the same page, an extreme variant of the Liberal theory that the Governor General must be a clairvoyant: "Lord Byng's mistake lay not in insisting on the Governor General's right to a measure of discretion, but in misjudging the mood of the people, who did not think that Mr. King's advice was sufficiently heinous to warrant the intervention of the discretion". We have all heard that Lord Byng ought to have been able to foresee that several Progressives would turn a back somersault over night, and that Mr. Bird would break his pair. But this is a new suggestion: he ought also to have been able to foresee the results of a general election!

3. The quotation (p. 1096) from Keith, to the effect that the Governor General has lost his reserve power because he can now be dismissed by his own ministers: witness the Irish case of 1932. But did that case prove anything of the kind? The Irish Governor General in 1932 could not find an alternative government. But if he could have, could Mr. de Valera have got him dismissed? No: witness the South African case of 1939, where Sir Patrick Duncan refused dissolution to General Hertzog, and was certainly not dismissed. This case, indeed, seems to have convinced Keith himself that the opinion which Mr. Franck quotes (and which Keith made perfectly explicit elsewhere) was wrong, for it finds no place in his later works. It ought to convince anyone that the Governor General is not "dependent for his tenure solely upon the pleasure" of the particular ministers who happen to hold office at a given moment.

EUGENE FORSEY*

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The "Dominion" of "Canada"

TO THE EDITOR:

May I very briefly add to the discussion of this matter of Canada's

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name? A book review by Professor Scott in last year's volume at page 804 provoked a comment by Dr. Forsey and a reply by Scott at pages 1061-1062 of the same volume. Then, at pages 1188-1189, Mr. Cantlie suggests that Canada is in a minority of one among the nations of the world if its full name is simply "Canada". He refers to a few examples. May I add one more? The Dominion of Wales. Perhaps Wales is not one of the nations of the world, but it is interesting to note how the term (to use a neutral word) "Dominion" has been dropped in referring to Wales. And no legislation was apparently necessary, even though the old phrase "Dominion of Wales" has been enshrined in the statutes in such earlier enactments as 22 Car. 2, c. 1, s. 1. This was a statute passed in 1670 to prohibit certain meetings "in any Place within the Kingdom of England, Dominion of Wales, or Town of Berwick upon Tweed". In the earlier enactment by which the incorporation of Wales into England was confirmed (27 Hen. 8, c. 26) it is referred to variously as "the Dominion, Principality and Country of Wales", "Dominion and Principality of Wales" and "Dominion of Wales". It is true that modern statutes of the United Kingdom use the simple term "Wales" and, on occasion, "Canada". But neither, it is thought, can be put forward as the basis for a formal statutory change. Perhaps one of our Welsh scholars will tell us something of the history of the term "Dominion" and its gradual disuse or demise with respect to Wales. In any event, a similar development in Canada should occasion no concern.

In his second paragraph, Mr. Cantlie refers to an inconsistency in referring to "Canada" and yet to the "United States" rather than "America". It may be inconsistent or illogical. But it is also interesting to note that in one and the same preamble the English parliament recently refers to the parliaments of "Canada" and of the "United Kingdom". Yet no one apparently protested. See the British North America Act, 1946.

GILBERT D. KENNEDY*

The Judge's Creative Rôle

The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man. When he sees his office in this light, the judge will realize, I think, how significantly creative his work is, and how sinister is the temptation to evade his responsibilities to the future by adopting a passive and positivistic attitude toward 'the existing law'. (Lon L. Fuller, The Law in Quest of Itself (1940) pp. 137-138)

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Books Received

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

Clerk & Lindsell on Torts. 11th edition by A. L. ARMITAGE, G. ELLENBOGEN, HIS HONOUR JUDGE CHARLESWORTH and T. A. BLANCO WHITE. The Common Law Library, No. 3. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1954. Pp. clvi, 1097. ($17.00)

Due Process on the Railroads: Disciplinary Grievance Procedures before the National Railroad Adjustment Board, First Division. By JOSEPH LAZAR, Los Angeles: Institute of Industrial Relations, University of California, 1953. Pp. ix, 38. ($1.00 U.S.)

Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat. By C. J. HAMSON. Published under the auspices of the Hamlyn Trust. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1954. Pp. x, 222. ($2.75)

The Landlord and Tenant Acts 1927 and 1954. By LIONEL A. BLUNDELL, LL.M., and V. G. WELLINGS, M.A. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited, 1954. Pp. xvi, 251. ($4.75)

Law and Disorders: Legal Indiscretions. By SIR CARLETON KEMP ALLEN, Q.C. Illustrated by LESLIE STARKE. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1954. Pp. vii, 162. ($2.25)

Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law. By CLYDE E. JACOBS. Berkeley and Los Angeles: University of California Press. 1954. Pp. x, 223. ($3.50 U.S.)

Précis du Droit public de la Finlande. PAR V. MERIKOSKI. Traduit par Arvid Enckell. Ius Finlandiae, No. 1. Helsinki: Akateeminen Kirjakauppa. 1954. Pp. xii, 294. (1,500 Finnmarks)

The Quantum of Damages in Personal Injury Claims. By DAVID A. MCI. KEMP and MARGARET SYLVIA KEMP. With a foreword by THE RIGHT HONOURABLE SIR NORMAN BIRKETT. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1954. Pp. xviii, 462. ($6.75)

Report Concerning Alleged Instance of Resale Price Maintenance in the Distribution and Sale of Television Sets in the Toronto District. Restrictive Trade Practices Commission, Department of Justice. Ottawa: Queen's Printer. 1954. Pp. vii, 54. (No price given)

Report Concerning an Alleged Combine in the Distribution and Sale of Coal in the Timmins-Schumacher Area. By the RESTRICTIVE TRADE PRACTICES COMMISSION. Ottawa: Queen's Printer. 1954. Pp. vii, 56. (No price given)

Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Wire Fencing in Canada. By THE RESTRICTIVE TRADE PRACTICES COMMISSION. Ottawa: Queen's Printer, 1954. Pp. ix, 116 (No price given)

Report of Proceedings of the Eighth Annual Tax Conference convened by the Canadian Tax Foundation at the Windsor Hotel, Montreal, November 15-16, 1954. Toronto: The Canadian Tax Foundation. 1955. Pp. 153. (No price given)

The Right to Counsel in American Courts. By William M. Beaney. Ann Arbor: University of Michigan Press. 1955. Pp. xi, 268. ($4.50 U.S.)

The Role of the Solicitor in Modern Society. BY RICHARD C. FITZGERALD. An Inaugural Lecture Delivered at University College London 4 February 1954. London: Stevens & Sons Ltd. Pp. 24. (No price given)

Sir Edmund Head: A Scholarly Governor. By D. G. G. KERR, with the assistance of J. A. GIBSON. Toronto: University of Toronto Press. 1954. Pp. xi, 259. ($5.00)

Social Credit and the Federal Power in Canada. By J. R. MALLORY. Toronto: University of Toronto Press. 1954. Pp. xiv, 204. ($5.00)

The Trial of Kurt Meyer. By B. J. S. MACDONALD, O.B.E., Q.C., Toronto: Clarke, Irwin & Company Limited. 1954. Pp. xvi, 216. ($3.00)

University Teaching of Social Sciences: Law. Report prepared by CHARLES EISENMANN, Professor at the University of Paris, for the International Committee of Comparative Law. Paris: United Nations Educational, Scientific and Cultural Organization. Toronto: University of Toronto Press. 1954. Pp. 133. ($1.00)

Where Knowledge is Free. BY THE HONOURABLE MR. JUSTICE J. A. HOPE. Toronto: University of Toronto Press. 1954. Pp. 11. (75 cents)

Winfield on Tort: A Textbook of the Law of Tort. Sixth edition by T. Ellis Lewis, B.A., LL.B., Ph.D. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1954. Pp. xl, 837. ($9.50)

Woodfall's Law of Landlord and Tenant. Permanent Supplement to the twenty-fifth edition, by LIONEL A. BLUNDELL, LL.M., and V. G. WELLINGS, M.A. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. Pp. xxxi, 367. ($5.75)

Your Local Government: A Sketch of the Municipal System in Canada. By DONALD C. ROWAT. Toronto: The Macmillan Company of Canada Limited. 1955. Pp. x, 148. ($2.50)

Zuni Law: A Field of Values. Papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University, Vol. 43, No. 1. By WATSON SMITH and JOHN M. ROBERTS. With an appendix by STANLEY NEWMAN. Reports of the Rimrock Project Values Series No. 4. Cambridge, Mass.: Peabody Museum. 1954. Pp. ix, 175. ($3.00 U.S.)