Correspondence

Unfusing the Profession

TO THE EDITOR:

The recent letter of Mr. Joseph Sedgwick, Q.C., on the subject of an Advocates' Library[1] is both interesting and provocative—indeed, those qualities, and its attractive persuasiveness, are characteristic of Mr. Sedgwick's always delightful discussions upon any legal topic. With both diffidence and regret, therefore, I submit that his proposal is impractical, and to be considered only as a fruitful subject for the pleasant atmosphere of after-dinner conversation.

One can agree at once with many of his facts. The general level of advocacy has deteriorated; the number of counsel has been cut in half; busy solicitors have neither time nor taste for casual litigation. Clients are rendered a disservice in court by the efforts of lawyers who have not learned from their golf that, to play well, one must play regularly. Solicitors *have* lost clients by introducing them to another lawyer. But other and more practical solutions can ease these problems.

Mr. Sedgwick agrees that his goal cannot be reached by legislation, but only by voluntary action of the profession. While the distinctions in England may have grown up over the centuries, and by voluntary action, they have long been rigid, and they are strictly enforced both by the Law Society and by the Bar Council. What a solicitor must, and may not, do is clearly laid down; so also are the rights and the limitations of the junior bar and of the "silks". Any system which entitles a lawyer to move at will from one category to another would never work in Canada, or anywhere.

Seventy-five per cent of the actions instituted in Ontario arise out of motor accidents. The great bulk of them are settled. Often counsel is retained only when settlement appears impossible. (I do not commend this; I state it as a fact.) Of the remainder, a substantial number are divorce actions, in which counsel is very sel-

[1] (1955), 33 Can. Bar Rev. 499 (April).

dom retained at all. Are the "solicitors" concerned going to favour the suggested change?

A second objection affects the younger lawyers in a vital way. A young Englishman starting at the bar will be very fortunate to earn £100 in his first year, and will probably pay 100 guineas to the barrister whose pupil he is. He will do well to earn £1,000 in his *fifth* year. Young lawyers in Ontario can step out of law school to-day into positions paying from $3,000 to $4,500 a year. With real-estate sales at fever pitch in most urban areas, many young lawyers, practising "on their own", can make and are making from $5,000 to $10,000 in their third year out. How likely are *they* to join an Advocates' Library? In the larger firms, the security of a regular salary and an assured future compensates for smaller initial remuneration. Only a barrister with a wealthy family or an inclination towards celibacy could afford to join the "Advocates' Library" upon graduation.

Thirdly, the proposal would sound the death knell of partnerships among barristers. It is true that some lawyers are happier alone than in a firm, though I am not one of them. It may well be that, as independent "silks", senior counsel who are now partners in firms could earn more than they do as members of their firm. But are they to shut their eyes to their earlier years, especially during the depression, when their firms carried them along as juniors, providing them with training and clients and a reasonable living? To-day *their* juniors look to them for advice and help (and clients!). What of their strong bonds of association, built up over two or three decades of co-operation and friendship? Are they simply going to "withdraw" from association with a firm of "solicitors"? I don't believe it.

Fourthly, the "Advocates' Library" would fail unless joined by the great majority of those now devoting their time to counsel work. In my opinion, most of those who are in a firm would never leave it and, of the few who are not, most are already practising as barristers. Some are associated as "counsel" with a firm of solicitors, but take work regularly from other firms as well. What would they gain from severing even *that* loose connection to join the Library? Let's be realistic—lawyers aren't going to accept this kind of legal revolution unless they as individuals would be better off.

Lastly, the plan could never work outside Toronto. I can count on two hands the lawyers outside Toronto who make their living almost exclusively in the courts. I would need only my thumbs to count those who would be willing to give up every single piece of "non-counsel" business they now enjoy. Could an Advocates' Library be established in Hamilton—Ottawa—London—Windsor?

One final word. I am deeply conscious that in the last analysis the test is, and should be: How best can lawyers serve the public? I am quite unconvinced that the people of Canada would be better served, or at less expense, by separation of the legal profession. Unless they were, the proposal cannot be justified.

JOHN D. ARNUP*

TO THE EDITOR:

I refer to the letter of Mr. Joseph Sedgwick, Q.C., published in the April issue.

I agree heartily with the suggestion that "Unfusing the Profession" is desirable. I do not agree with Mr. Sedgwick's proposed solution to the problem. I have no reason to quarrel with his guess as to the proportion of solicitors who prefer not to go into court. There are a great number of barristers and solicitors who practise both professions quite competently, however, and, under present conditions, these men cannot afford to cast aside either branch of their parctice. It is not difficult for a young man, who has just graduated, to persuade a client that senior counsel should be engaged in important litigation, and the problem does not arise in the case of the elderly solicitor who has absented himself from the court room for a long period.

So long as men are qualified and authorized to practise both professions, no great headway will be made toward unfusing. I should expect that, if Mr. Sedgwick's suggestion were adopted, the Advocates' Library would consist of a comparatively few leading counsel who are so well established at the bar that they have neither the desire nor the need to do any work normally done by the solicitor. There would still be a great number who would continue to carry out the duties of the solicitor and the duties of a barrister at the same time. Thus there would be no real change. Those who joined the Advocates' Library would only be making a public declaration of an intention which is already apparent.

The separation of barristers from solicitors will come about only if people are qualified as one or the other and not as both. It may be that it would take a generation to effect the change, but I do not consider that as a reason for not taking the first step, which obviously has to do with the education and qualifications of persons entering the profession.

I think Mr. Sedgwick is too diffident when he suggests that, although he is convinced that the public would be better served if we had a separate body of advocates, he does not think legislative

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action either desirable or practicable. It seems to me that, if his conviction is right, legislative action is definitely desirable and not necessarily impracticable.

MAXWELL F. REYCRAFT*

TO THE EDITOR:

Mr. Joseph Sedgwick's letter in the April number of the Review will undoubtedly arouse keen interest among the junior bar. From the point of view of those in their first ten years of practice —a crucial period, as all will agree—the choice between office and court is most frequently governed by economic pressures. The annoying necessity of providing the staff of life often precludes indulgence of one's preference for advocacy and public contention. In Canada we have no counterpart of the starving young barrister because our juniors enjoy the economic privilege of performing the functions of the solicitor. I even suspect that many of our leading counsel—those without independent means—would never have taken call in the first place if the profession had been "unfused" in their student days.

The modern law office in this country may be likened to the commercial "tied-house". The solicitors of the firm have first claim upon the time and talents of their leading counsel and his energetic juniors, together with the advantage of exploiting new business attracted to the firm by the leader's reputation in the community. The leader's reward, in turn, is his commercial marriage to a group of competent solicitors whose services and instructions are unavailable to outsiders except in the odd cases of conflicting interest. Not only does this union provide the barrister with an assured flow of briefs, it comforts him in his declining years with semi-retirement at no heavy financial loss. To understate the case, most Canadian counsel find greater economic success through their commercial union with solicitors than they would ever gain through professional independence on the English model.

From the point of view of the young lawyer, the key to Mr. Sedgwick's proposal seems to be his suggestion that Queen's Counsel of the Advocates' Library should not appear unless briefed with a junior. The younger members of the outer bar in England normally derive most of their fees from county and police court work. Appearances with a leader are the exception rather than the rule. Under the voluntary system of the Advocates' Library it may reasonably be expected that most litigation in county court and below will continue to be handled by juniors who have not joined

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the Library. From what source, then, will the junior *barristers* find their daily sustenance? In all probability, from briefs with a leader, until their personal competence is widely known and respected.

I volunteer the opinion that if most of our leaders undertook to join the Advocates' Library, subject to the English rule governing appearances by Queen's Counsel, some form of selective qualification will be required to limit the admission of juniors: there will be a thundering herd at the door to ensure the success of the society.

How many leaders are prepared to take the initiative?

JOHN G. MCDONALD*

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Supreme Court of Canada: Canada's Final Court

TO THE EDITOR:

In the March issue I discussed some of the problems facing the Supreme Court of Canada, and its unfortunate decision in *Brewer* v. *McCauley* (pp. 340-345). Two or three of my friends have directed my attention to a point which I should have considered. With your permission, I should like to take this opportunity to deal with it. The point runs somewhat as follows:

What the court had to apply in the *Brewer* case was the law of New Brunswick, which, in turn, was the law of England, unless some local condition rendered that inapplicable, a suggestion not advanced in that case I believe. In 1947, the House of Lords, which has been described as the highest tribunal for the determination of English law, had determined that law in the *Diplock* case. Unquestionably, the Judicial Committee, had it been called upon the next day to deal with the same point, would have considered itself bound by the judgment of the House of Lords. If that be so, according to this argument what changed or could have changed the law by 1950, other than some action on the part of the legislature?

As I understand the argument, it stems from the introduction of English law into each province. In the case of New Brunswick, this would be English law as of sometime in the eighteenth century. Clearly English statutes thereafter do not automatically form part of the law of the colony, and the question may arise whether the common law is similarly divided, or is one law, always existing, of which more recent cases are just illustrations. It is, I suggest, all too clear that the English common law is not static; it does change and has changed considerably since its introduction into the old colony

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of Nova Scotia, out of which New Brunswick was carved in 1784. Apart from House of Lords' reversals after introduction of earlier lower-court rules, there has been the vast expansion of the common law in England, over the last two centuries. The court's duty, in New Brunswick, to apply English law is not necessarily to apply English law as of 1955, but to apply New Brunswick law, which includes English common law as of the date of introduction. Thereafter, the development of the common law in New Brunswick was that province's concern, subject, until 1949, to the power of the Judicial Committee to rule, as an appellate court from New Brunswick, and not as an English court, that the lower courts had erred. It is true that the Judicial Committee and the House of Lords were not likely to differ in their interpretation of the common law, whether it be that of England or of New Brunswick. But today, with appeals to the Judicial Committee gone, there is greater apportunity, depending upon our views of any particular problem, to expound the common law in Canada for our own needs and purposes.

It is not, I assume, questioned that it is the courts which should adjust the common law—should direct or limit its application to new situations. This has always been part of the traditional functioning of the common law. No two courts will necessarily do it in the same way. Yet one is not necessarily right or correct in time and place, as "the" common law, and the other necessarily wrong, *unless* we say that the common law as expounded from time to time by the *English* courts is the one and only common law. The latter, I suggest, is clearly not the case.

I admit that, as posed in the illustration, had this question come before the Judicial Committee the day after the House of Lords' decision, the second decision would probably have followed the first. And if that appeal to the Judicial Committee had been from New Brunswick, it would have imposed upon New Brunswick the more recent versions of what the English common law was. The same men, to a large extent, sat in both bodies. It was not surprising that they applied English law in the Judicial Committee unless a different law was proved before them, as was easier to do in appeals from Palestine, India or South Africa, by way of illustration—and as was done in appeals from Canada whenever a Canadian statute, differing from English law, governed the situation. Equally in cases governed by common law rather than statute law the Judicial Committee might have applied Canadian common law. The change in 1949, I suggest, took us out from under the accidental, though perhaps automatic, application of *English* common law.

If I am wrong, then presumably every time the House of Lords decides a point of common law differently from an earlier view taken by our Supreme Court, our court can consider itself overruled, even though it had followed an earlier English Court of Ap-

peal decision, now also overruled. This technical point is, however, merely an incidental application of the theory that the House of Lords is the supreme authority on the common law not only in England but throughout the Commonwealth.

This leads to a further problem of equal magnitude. Is it wise for us to attempt to preserve uniformity of the common law throughout the Commonwealth? I know this problem has been troubling some Canadians. May I suggest that the time to uphold such a view has long since passed, even if it was ever a wise one. Our equal status within the Commonwealth allows not merely our legislatures but our judiciary freedom to grow—to apply the common law in such manner as we in our wisdom deem suitable for Canadians. We will look to the experience of others, especially other parts of the Commonwealth, for guidance, not direction. Yet, if the uniformity principle prevails, are we not back to the omnipotence of the House of Lords throughout the Commonwealth? It is uniformity merely through acceptance of one Commonwealth court as superior to all others on the question of the "common law", whether it be English, Irish, Nova Scotian or Victorian. And I suppose this theory would extend to the interpretation of a common statute or of a common document, the principles of interpretation presumably being common-law principles. It is true that the Australian High Court has reversed itself merely to bring Australia into line with the House of Lords. We have yet to decide whether we should do so. Assuming we decide not to follow the Australian pattern, there would not be an overthrow of all English cases. It would mean merely that we should examine them carefully and decide for ourselves whether we wish to apply the same rule in Canada.

May I suggest that our Supreme Court faces the very great challenge to develop, over the next few years, not merely the law in a few individual cases but the approach to law in this country for years to come? Any attitude which ties us blindly to the House of Lords is, I suggest, merely the green light for a continuance of the stagnation in Canadian legal thought and development of which many of us are all too aware. On the other hand, we appreciate the care and wise caution shown over the past five years in not rushing in too quickly with bold pronouncements on the court's policy in relation to (a) its own past decisions, (b) past decisions of the Judicial Committee on appeal from Canada, (c) decisions of the House of Lords before 1950, and (d) decisions in the House of Lords since 1949. While these problems are met with in all fields, constitutional issues especially raise the questions of policy which only a highest court can determine. We all know that law cannot exist in the abstract, but must live in the light of the social, political and economic factors in which the problem arose.

To answer the question posed at the beginning of this letter, the

Diplock case may never have been law in Canada. It now is, rightly or wrongly, under our Supreme Court decision in the *Brewer* case.

GILBERT D. KENNEDY*

Books Received

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

The Age of Reason. By LOUIS L. SNYDER. Van Nostrand Anvil Books, No. 6. Under the general editorship of LOUIS L. SNYDER. Toronto, New York and London: D. Van Nostrand Company, Inc. N.D. Pp. 185. ($1.35)

American-Dutch Private International Law. By R. D. KOLLEWIJN. Bilateral Studies in Private International Law, No. 3. New York: Columbia University, Parker School of Foreign and Comparative Law. 1955. Pp. 63. ($2.00 U.S.)

The American Revolution. By RICHARD B. MORRIS. Van Nostrand Anvil Books, No. 2. Under the general editorship of LOUIS L. SNYDER. Toronto, New York and London: D. Van Nostrand Company, Inc. N.D. Pp. 192. ($1.35)

Byles on Bills of Exchange: The Law of Bills of Exchange, Promissory Notes, Bank Notes and Cheques. Twenty-first edition by MAURICE MEGRAH. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1955. Pp. lxxvii, 439. ($11.25)

The Canadian Criminal Code of Canada. With Annotations and Notes by J. C. MARTIN, Q.C. Toronto: Cartwright & Sons, Ltd. 1955. Pp. lxxxiii, 1206. ($20.00 post free)

Canadian Income Tax: A Treatise on the Income Tax Law of Canada. By JOHN G. MCDONALD, LL.B., LL.M. Associate editor: STUART D. THOM, B.A., LL.B., Toronto: Butterworth & Co. (Canada) Limited. 1955. Pp. xxx, 794, 45. ($35.00, inclusive of service to December 31st, 1955)

Cases on Torts. Selected and edited by W. L. MORISON, D. Phil., B.A., LL.B. Published at the request of The Australian Universities Law Schools Association. Sydney, Melbourne and Brisbane: The Law Book Co. of Australasia Pty. Ltd. Toronto: The Carswell Company Limited. 1955. Pp. xviii, 811. ($14.25)

The Colonial Office and Canada, 1867-1887. By DAVID M. L. FARR. Toronto: University of Toronto Press. 1955. Pp. xii, 362. ($5.50)

Digest Analysis of the Report of the Attorney General's National Committee to Study the Antitrust Laws. By the NAM Law Department. New York: National Association of Manufacturers. 1955. Pp. 36. ($1.00 U.S.)

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Le Droit des Etats-Unis d'Amérique: sources et techniques. Par ANDRÉ et SUZANNE TUNC. Collection "Les Systèmes de droit contemporains". Paris: Librairie Dalloz. 1955. 527 pages.

Employment Problems of Former Offenders. By JOHN MELISHERCIK. Being part of a thesis prepared at the Toronto School of Social Work in 1954. Ottawa: Delinquency and Crime Division, The Canadian Welfare Council. 1955. Pp. 19. (10 cents)

Fifty Major Documents of the Twentieth Century. By LOUIS L. SNYDER. Van Nostrand Anvil Books, No. 5. Under the general editorship of LOUIS L. SNYDER. Toronto, New York and London: D. Van Nostrand Company, Inc. N.D. Pp. 185. ($1.35)

Grounds for Divorce in European Countries. By ERVIN DOROGHI. New York: Research Division of the New School for Social Research. 1955. Pp. 51. ($1.50 U.S.)

The Late Victorians: A Short History. By HERMAN AUSUBEL. Van Nostrand Anvil Books, No. 3. Under the general editorship of LOUIS L. SNYDER. Toronto, New York and London: D. Van Nostrand Company, Inc. N.D. Pp. 188. ($1.35)

Latey on Divorce: The Law and Practice in Divorce and Matrimonial Causes. Fourteenth edition. First Supplement (to January 1, 1955). By WILLIAM LATEY, Q.C., M.B.E., and JOHN B. GARDNER, M.A. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1955. Pp. xxvi, unnumbered paragraphs. ($2.25)

The Law of Damages in Scotland. By DAVID M. WALKER, M.A., LL.B., Ph.D. Edinburgh: W. Green & Son Ltd. 1955. Pp. lxxii, 843. (126s. net)

Law and Morality: Leon Petrazycki. Translated by HUGH W. BABB. With an introduction by NICHOLAS S. TIMASHEFF. The 20th Century Legal Philosophy Series, No. VII. Cambridge: Harvard University Press. Toronto: S. J. Reginald Saunders and Company Limited. 1955. Pp. xlvi, 335. ($9.75)

Lowndes & Rudolf's Law of General Average and the York-Antwerp Rules. Eighth edition by J. F. DONALDSON, B.A. (Cantab), and C. T. ELLIS, M.C. The Library of Shipping Law, Number 4. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xxxi, 600. ($19.00)

Making of the Modern French Mind. By HANS KOHN. Van Nostrand Anvil Books, No. 1. Under the general editorship of LOUIS L. SNYDER. Toronto, New York and London: D. Van Nostrand Company, Inc. N.D. Pp. 191. ($1.35)

Nathan's Equity Through the Cases. Third edition by O. R. MARSHALL, M.A. (Cantab), Ph.D. (Lond.). London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1955. Pp. lxvii, 584. ($8.00)

Natural Law and Natural Rights. By ALBERT C. OUTLER, THOMAS S. K. SCOTT-CRAIG, EDWIN W. PATTERSON, ARTHUR L. HARDING. Edited with an introduction by ARTHUR L. HARDING. Southern Methodist University Studies in Jurisprudence, II. Dallas: Southern Methodist University Press. 1955. Pp. ix, 99. ($3.00 U.S.)