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OBITER DICTA

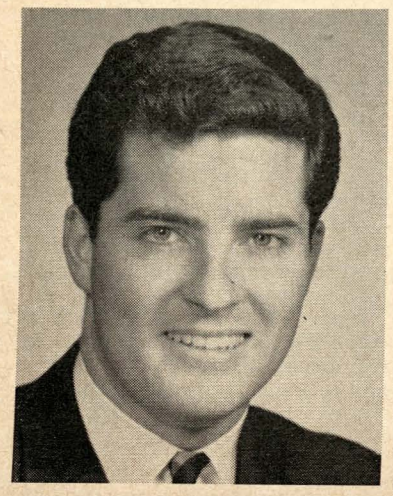
THE OSGOODE HALL NEWSPAPER FOR THE PROFESSION AT-LARGE

Vol. 4 — No. 7 April, 1966

"LEGAL AND LITERARY" OFFICES CONTESTED

CANDIDATES FOR PRESIDENT

DONALD CHAMPAGNE



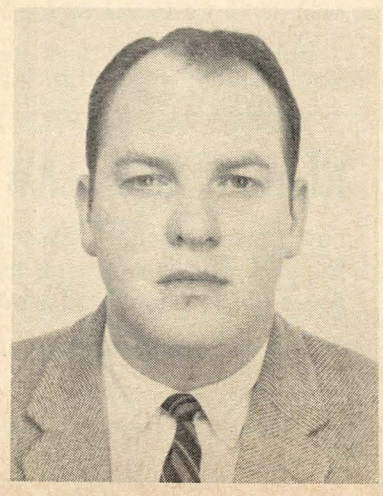
1966-67 will see a great many changes at Osgoode Hall both in curriculum and faculty. Next year's student executive ought to play a key role in determining the guidelines within which student activities will function at York University. However, the present extracurricular program must not be deemphasized but rather **strengthened and broadened in scope.**

Communications between the executive and the students have not been as broad as they could be, however, it is felt that although the president has traditional administrative and representative functions, the office is a creative one and given the proper dynamic leadership, the channels of communication will be **effectively increased.**

Presently, the second year lecture schedule has been arranged so that two afternoons per week are free. A continuation of this practice in all three years would be a valuable asset to present extracurricular activities, especially with regard to the legal aid program. **Infringement on class time has been a deterrent to participation** which must be removed.

Osgoode Hall has traditionally played a key role among the law schools in Ontario and indeed across Canada, and with your support, I shall use to the best of my ability my experience on the Legal and Literary Society this year, as well as participation in numerous extracurricular activities, to provide our school with strong and dynamic leadership.

HUGH PAISLEY



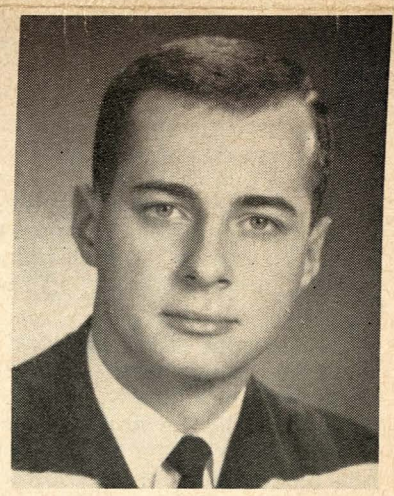
There are two important issues in the forthcoming elections to which candidates might address themselves. Firstly, the traditional responsibility of administering student affairs at Osgoode Hall. On this point I refer only to my experience as Secretary to The Legal and Literary Society this past year, and hasten to add that I do not feel my past achievements or conquests serve to distinguish me from any other student who has taken an enthusiastic interest in student affairs at his school.

Secondly, the executives of The Legal and Literary Society for the next two years will play a significant role on behalf of the students in the formation of the new Law faculty at York University. Such things as the student constitution, funds and scope of authority will have to mesh with the larger, more dominant body at York. While the keystone in this role will be cooperation, it is hoped that much of the professional dignities of Osgoode Hall will be maintained. This would be my objective, and for this reason I would solicit your support.

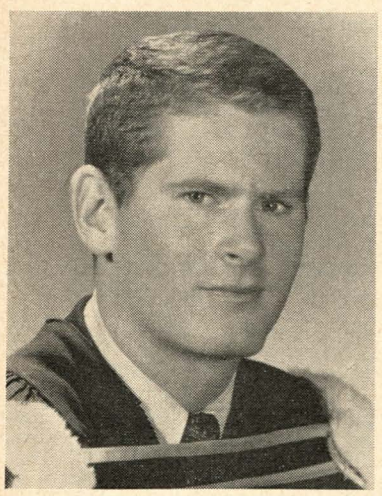
TED McDERMOTT

In the coming year the oldest law school in Ontario will be transposed into the newest. It will be a year of transition and the duties and responsibilities of The Legal and Literary Society will certainly be the heaviest that body has ever undertaken. In my opinion, it will be the task of the President to ensure that we go out with a flourish. We must not only continue with our programmes, but also endeavour to initiate fresh enterprises such as securing the cross-Canada debating championships for Osgoode Hall.

It must always be remembered that the primary function of a student government is to ascertain the wishes of the students and to exert every effort to see that they are implemented. In the past two years I have taken part in a great many activities promoted by The Legal and Literary Society and as first-year representative and luncheons chairman, I feel I have gained a working knowledge of the ways in which this body can be used to achieve these desired ends.



GEORGE ELLIOTT



The position of President of the Legal & Literary Society for the coming year will present a greater challenge and even greater difficulties than ever before.

The President will have to ensure that the high degree of enthusiasm that has been shown in the past will continue in the many various extra curricular activities that are the responsibility of the Society.

It is this characteristic of responsibility that is most important in the position as President. With the move to York the Legal & Literary Society will have many problems to ensure that all the benefits (ranging from Mock Trial, Moots, Advocacy to Luncheons) that Osgoode students uniquely enjoy are capable of being enjoyed at York. Next Year's executive must negotiate a favourable advantage for the law student at York.

Relying on past experience as Chairman of the John White Society and from participation in Moot Courts, Advocacy and Legal Aid, I would like to meet this challenge and responsibility as President of the Legal and Literary Society.

CANDIDATES FOR TREASURER

LOU MILROD

The office of treasurer demands a person with a keen sense of **administrative and financial responsibility,** a person who of necessity must possess an acute awareness of the extra-curricular activities which Osgoode offers, an awareness that can only be gained through actual participation. It is my belief that a fairly comprehensive knowledge in both areas of responsibility has been acquired by myself both during my undergraduate years and while at law school by such a "participation" which I would like to put to use as a member of the Legal and Literary.

No amount of campaigning nor the making of lavish promises can, I believe, express more to you the voters, than the sole promise to put forth an honest and sincere effort to work for the best interests of the school as a whole.

MONTY HYDE

How often have you heard the statement, "If I knew the Legal and Literary was financing a meet in Owen Sound, I would have tried out for the ski team." Or, "If I knew the Literary was sending two debaters to New Brunswick, I would have applied."

The Legal and Literary Society has a budget of $16,000 of which one half comes from student fees. It is the duty of the Society to see that all students have an equal chance to benefit from this money. In the past this has not been the case. Frequently events were over before interested students heard of them.

This is particularly true with first year students. These students neither know the programs of the various committees nor the chairmen to whom enquiries can be addressed.

To remedy this, I would as Treasurer publish a budget in a fall edition of the Obiter Dicta. This budget would specify the funds available to each committee and the programs on which these funds will be expended. The names and telephone numbers of committee chairmen would be listed in the first edition of the Obiter Dicta rather than in the Directory which does not appear until December.

OBITER DICTA

Toronto, Canada

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A publication of the Legal and Literary Society of Osgoode Hall Law School

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Founded in 1927

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Editors ..... Thomas J. Lockwood, C. Gaylord Watkins

Associate Editor ..... Keith J. F. Jobbitt

Treasurer ..... Jo Ann Miyagawa

Advertising ..... J. Ronald Smith, Terry L. Winchie

This edition of the Obiter Dicta is partially devoted to the views of Mr. Cyril J. Abbass on legal education. Mr. Abbass's motivation to write his lengthy article admittedly was not entirely the move to York, and the planning of the "ideal" law school. He has now been exposed to almost two years of Osgoode's approach to legal education, and that which disappointed him at the beginning, rankles him even more today. Around Osgoode, though, there is an opiate for the disappointment, and the boredom. Unfortunately, "laissez-faire" in a law school is neither necessary or fitting. It is, sad to say, a habit of life as easily cast off as smoking, and probably as fatal. However, now is the time when all students have a reason for expressing their opinions and complaints in how their dose of legal education has been administered. The planning of a new law school has created this opportunity. Mr. Abbass has made use of it. All students should, and can do the same. To express student thought is one of the major reasons for publishing the Obiter Dicta. Without the enthusiastic contribution of such thought, there might as well not be an Obiter Dicta at York University, but instead, a few pin ball machines, and several extra card tables in the common room.

In the next edition, thanks to the chairmen of the faculty Planning Committee for the new law school, the Obiter Dicta shall be examining the planning policy resolutions adopted recently by the faculty.

THE DEMOCRATIC PROCESS AT WORK

Ho-hum. Terse, very official looking notices have flowered forth in the past weeks on the notice boards of the school. As well, we've spotted sly, small, and select gatherings of students furtively discussing what might be a very serious issue, or so it seems from all the frowns. Some people have even started smiling at, talking to, and even telephoning, people whom before they didn't even glance at when jostled together in the crowd outside the cafeteria. Ho-hum. After consulting our man in Ottawa we know what it's all about. The Osgoode Hall student executive elections are on. Nominations are closed, and it's now a clenched-fisted, immensely keen, frantically frustrating (no campaigning, boys!) race to the wire.

The rules of the electoral game at Osgoode only result in the school not knowing who, standing for what, is running for which, or more clearly, what is going on. Of course, since that is traditionally the situation, we are only continuing in the good-old Osgoodian manner. But complete revelation to all citizens, one of the essential structural components of democracy, the government of the people, by the people through their elected representatives? Here at Osgoode, all the average student knows of the candidates is their ability to fence with hecklers. No doubt this is a great asset to budding politicians, but it hardly aids the electorate in knowing if other more important prerequisites of office such as maturity, responsibility, policy, and creative leadership, are present.

The voting arrangement, which can only be classified as ludicrous, does not even give the student time to consider the candidates after having witnessed their performance at the annual Osgoode Hall Variety and Audience Participation Animal Band Show.

Surely the new executive will change all this. Of course what will happen again is that the executive, heavily overweighted by members in third year, who won't ever be running in Osgoode elections again, will become lethargic, for really, shouldn't their successors have to go through the same initiation as they? — Rubbish!

A particularly disappointing aspect this year is that the office of secretary has been filled by acclamation. It appears that first year is not overly enthused with Osgoode, and that the communication between years has **not** improved, as much as the present second year hoped and planned it would, when they were first year students. Let us hope the new executive can find some method of bringing first year into the law school **before** they start believing completely all the myths about the study of law fed to them in the first months of law school.

What kind of executive does Osgoode need? — And here, allow us to wax poetic and idealistic . . .

Let all executive members be aware that students can, and do produce creative thoughts and they should not be burdened with those who function only in a routine administrative capacity.

The executive must be equipped not only to perform the administrative and social aspects of office, but also to produce a forum for all law students and their views on important topical issues.

The executive must be able to produce and implement new ideas, activities, and the solutions to current school problems without making compromise, self-interest, and conservatism the guidelines of office.

The executive must emerge as a strong force to ensure that all students in the new Osgoode Hall Law School have the benefit of our experience.

The executive must inform the student body in a frank manner of its actions, its problems, its plans; and of all opportunities available to the law student.

Let the members of the executive remember that the honour attached to holding an elected office is only placed on one who holds the office well.

It is the executive which can, better than anyone else, foster a spirit of pride and participation in law school activities as well as in all facets of the legal profession.

But please, don't give us tired generalities . . . there are enough of those in print already.

UNION OF O.L.S.A WITH C.B.A. PROGRESSES

By THOMAS BALDWIN

Editors: Mr. Baldwin, a student in first year at Osgoode, is the recently elected President of the O.L.S.A.

The Ontario Law Students' Association Executive met on March 22, 1966, with George S. P. Ferguson, Q.C., to discuss the proposed affiliation of the O.L.S.A. with the Canadian Bar Association. Mr. Ferguson is Vice-President of the Ontario Section of the C.B.A. Osgoode Hall was represented at the meeting by Tom Baldwin and Bob Cronish, O.L.S.A.'s new President and Secretary-Treasurer; and by Bill McKechnie, the immediate past-President.

The proposal which was drafted as a result of that meeting is currently being reviewed by the C.B.A., and will be submitted to the student council at each of the five law schools for approval sometime early in April.

It was concluded that the O.L.S.A. should remain an independent organization for the purposes of representing the five student bodies at a policy level and co-ordinating inter-scholastic programmes. The envisioned Student Subsection of the Bar Association will be composed of students who have subscribed to membership, and its executive will be that of the O.L.S.A.

Membership in the Subsection would absorb all those who are now Associate Members of the Bar Association, i.e.: those receiving the Bar Revue and Journal, and new subscribers would automatically receive those publications. In addition, the Subsection would open doors to student members for participation in Bar Association activities, sponsor academic programmes and competitions, and offer diverse other worthwhile programmes now being considered.

The Obiter has published policy statements by candidates for the major executive offices not for the benefit of the nominees; but to aid every student in deciding who is best qualified and fit to hold office on the Executive of the Legal and Literary Society of Osgoode Hall Law School.

The Legal and Literary Society: CANDIDATES FOR VICE-PRESIDENT

PAUL TEMELINI

The true measure of a person campaigning for a representative office are his words and deeds. The latter testifies as to the ability to perform the former. I do concede that there are no great differences in the deeds of the various candidates before you. Just as my opponents have demonstrated their capabilities through long histories of past achievement, I too, have done my part. Here, however, we commence to diverge as we put our "words" (future plans and ideas, if elected) before you.

My "words" may be expressed as a single idea — the need for cohesion. Osgoode Hall needs the spirit of the profession — the spirit of cooperation which exists between lawyers even though they may be on opposite sides as counsel. Our activities should stress this cohesion rather than the overaccentuated and all too prevalent individualism. Whether by great group competitions of bacchanalian indulgence at the local inn (females included) or by discussion groups on the legality of eroctics, the fostering of this spirit is imperative.

The idea is not new. It is, however, needed. My purpose in seeking the office of Vice-President is to put this idea, this spirit into effect, but, not without your help.

VIRGINIA MacLEAN

Mindful of last year's typical election, I am most grateful for opportunity (somewhat limited by space) to present myself as a candidate for Vice-President. I will, if given your support, tackle this predominately administrative office with diligence and integrity.

There are two fairly weighty matters which I definitely feel should be placed on next fall's agenda. Firstly, discussion between the administrative staff and the Legal and Lit. on the topic of printed notes is, I think, long overdue. The progentitures of these currently illegal foundlings are being unjustly enriched. Cannot some reasonable compromise be reached? Secondly (I state this fully aware of its probable effect), the office of Woman's Representative should be permanently discontinued. This position is both unfair in that a minority has double representation and is unnecessary. I feel that a more reasonable approach would be to have women elect a chairman, a kind of social con- on Council so that a satisfactory financial settlement will be guaranteed.

Space does not, unfortunately, permit further discussion. In conclusion, may I urge you to evaluate sincerely and then to vote for your choice on April 7.

ARCHIE CAMPBELL

Experience, Etc.,

1965-66 Social Committee Chairman. Single-handedly responsible for a record-breaking deficit. Considerable experience in Mooting, Impromptu and Formal Debates, etc. Participation in Advocacy and Legal Aid.

Personal Qualifications

General sartorial elegance (natty dresser). Athletic prowess (Captain Osgoode Hall Law School Ice-Fishing Team).

Main Platform Plank

Crush the legal writing programme.

Archie Campbell

Pre-Reformation Teaching Practices at Osgoode

By Cyril J. Abbass

The legal mind is often prone to equate length of time with proof of quality; a feature of legal thought which has its basis perhaps in first year land law, the idea of proving a good or better title by tracing its source as far back as possible. The particular name for such a doctrine I cannot recall, not having memorized it. In the first few weeks of law school one still retains a bit of common sense and common sense would require a realization that with so many books on the subject it would be quite easy to look up such a doctrine when its use was required.

This habit of the legal mind to place great importance on how long ago a thing was first said or done, is not in itself a completely foolish or illogical habit. But only to look at the length of time and not to understand what was said or done in the light of the times—is to be in error.

The method of legal training practiced in Canada today is the result of an improper understanding of its historical basis.

The idea of having a reader dictate the matter to a group of students has its roots in the fifteenth century, before the introduction of printing into England. This method was, at the time, based upon the scarcity of books. The aim was to enable a large number of students to learn from a single copy of a particular work, more than one copy not being available.

The legal training at this time was conducted by the members of the Inns of Court and Chancery. A member would be chosen who would read from a particular book or a prepared lecture. The prepared lecture again was the result of the scarcity of books, but had the possible added quality of personal viewpoint and experience.

The reader spoke at dictation speed to enable his listeners to write down what he said.

The readings were followed by moots or debates which ensured that the students had understood and memorized what they had heard. The moots had the added importance of enabling the Benchers to assess the abilities of the student and were used, instead of the present foolishness of written examinations, as a true test of learning.

This type of legal training (training it was and not education) with its monotonous repetition year in and year out, in order to build up the memory, as well as debates and recitations to make that memory flexible, was aimed at producing a man who could carry all his learning in his head and go through life confident in the accuracy of his memory. (Possibly this is the basis for the phrase which describes the lawyer as a man with a swelled head.)

Thus it can be seen that the scarcity of books affected the form and aim of legal training in the fifteenth century. This being the case, it would be expected that with the increased numbers of books the form and aim of such training would be in some was altered. It has been, however, my discovery that no substantial change was effected despite the large increase in books on the law available. (Between 1480-1550 over twenty - five different printers being at work printing law books alone.)

The result of this failure to adapt is quite interesting in its close similarity to the reactions of most modern law students to our present method of instruction.. The students of the sixteenth century realized that hours spent listening to the reader was pointless when all the knowledge the student sought was in the books. So on seeing the prospect of the attorneys in the adjoining chambers carrying on business, they were off to do likewise and to forgo the Bar. The authorities mistaking the effect for the cause, started to blame the presence of the attorneys in the Inns for the falling off in attendance at readings. Their remedy was compulsory attendance, possibly a novel idea then but to be still used today without a proper examination of its worth, quite shocking. The standard of instruction had not kept up with the times, and force was used in the place of reason to remedy the defect. Note the startling similarity to our present method of legal training.

Isn't it about time we realized that the printer is here to stay — that students can read for themselves — that to be learned in the law is not to be a trained parrot—that the place of the reader is gone and that the educator has taken his place —that the job of the educator is to draw out of the student the ability to think, to direct the students' feet, not to carry the student on his back?

Isn't it about time that we realized that there are other methods of learning the law?

Why not give the student an outline of the course with references to particular texts and case books? To say that no one book completely covers a particular course sounds like the old "scarcity of books" excuse. If there isn't one good book, refer the student to two or three or whatever it takes. I'm quite sure there must be some good thoughts among the learned writers. It will be much more beneficial to have the student find the shortcoming in the particular books for himself — for mere seeing is not insight and to point a thing out to a student isn't to make him understand it. If the amount of work required will be greater, so too will be the reward. If you say the courses are too long to allow this type of learning, then reduce the content—isn't it the method we are trying to learn and not a code of laws drawn up by a particular professor? The

(*Continued on page 4*)

PRE-REFORMATION TEACHING PRACTICES

(*Continued from page 3*)

printing press has proved itself and books do now exist. The student and the lawyer can look it up in the future when the need arises; that is if he at least realizes that the books exist. It must be a strange encounter when the student who has never had to study from anything but dictated notes is asked, after being admitted to the Bar, to contribute to the library fund.

If the outline method is not to your liking, then why not follow one particular author's text, its short-comings being pointed out? The student studies from the text and when and where he has difficulties, he can go to another text. The course could be taught on a come-when-you-have-problems basis — the bulk of the classes being taken up with discussion. The method appeals to the moderate reformers of the system—for me it still leaves something to be desired when used in a class of sixty.

How about the old idea of really using the moots as a form of legal examination? — much better than three and a half hours of forced recall. Why not a panel of students themselves being examined upon their ability to criticize the participants in the moot? Perhaps this is what the English scholar C. S. Lewis had in mind when he wrote these words on education.

"If we (teachers) are any good we must always be working towards the moment at which our pupils are fit to become our critics and rivals. We should be delightful when it arrives. . . ."

How about the old idea of having the student attached to a lawyer in the practice and only going to classes for general instruction for a few weeks and then back to the office for the real thing? Possibly a series of lectures as given in the present Bar Admission Course with the notes printed up and the course concentrated, the case research and reading being done in the library aid at the office.

Why not a school with more than one of the above types of legal education to accommodate the variety in student ability? The need to even suggest such a school is in itself a good indication that the law profession does not attract the proper calibre of student. The thinkers go into science, medicine or some other field where their mind is challenged. The law student is no more a thinker than an I.B.M. key punch operator. Yet when the law student becomes a lawyer upon the magical day when he is admitted to the Bar, he is looked to by the community for that original thought, that clear and logical reasoning which a true legal education is supposed to have developed within him. **I fear the lack of leadership and new ideas in Canada today is the result of the lack of thinkers in the field most related to society and its problems.**

The old phrase "a legal education is a great training" is really an example of the failure of those in high places to realize the distinction between education and training. Education draws one out, sets one free, develops the creature ability to respond in different ways — training holds one back, it moulds one's behaviour to a particular pattern, it stamps out all responses but one and makes the individual narrow and uncreative. Education is forward-looking, training is looking backward. Education broadens the mind, training narrows it. We must realize as E. M. Forster so aptly put it: "Spoon feeding in the long run teaches nothing but the shape of the spoon."

To completely write off the present legal educational program, without giving some recognition to its aims as expressed by law professors today, would be unfair. The present system states as its aim the development within the student of a method of reasoning, of thinking, of abstracting from the mass of facts and theory and incomplete ideas, the particular law which will best administer justice in the situation at hand. This aim, it would appear, is dictated by the large number of books, articles and other forms of printed words. The error, however, is that we are striving to achieve this aim by a method of training based on the completely opposite situation—a scarcity of books.

We no longer farm with the wooden plow, nor travel by horse-drawn carriage, nor sail only in sailing ships—why then do we teach with methods so antiquated and so unsuited to our educational aims?

—*Cyril J. Abbass*

INDIA CONFRONTS CHINA

In conjunction with the International Law Course, the John White Society presented recently an address by His Excellency Bejoy Krishna Acharya, Indian High Commissioner to Canada, on the India-China dispute. He outlined the history of relations between the two countries leading to the border dispute. There had never been a border dispute between India and China, the last mutual agreement being signed at Simla, Punjab in 1914, between the plenipotentiaries of China, Tibet and India. MacMohan represented India and as a result the frontier of about 2500 miles has been called the MacMohan line. Since then this traditional boundary line has been recognized and respected by both the countries, based on the records of hundreds of years.

After independence, India started to work under a popular democracy and unlike China, adopted democratic methods to achieve its various goals in economic, political and international fields. India successfully launched two five-year plans, and in this short time India's international reputation has risen greatly.

China did not like India's successes as a popular democracy, and since it overshadowed China's accomplishments. It did not like India to be the leader in Asia. In 1954 the Chinese Government published maps, etc., and laid claim to about 50,000 sq. miles, an area as big as England and double the size of Nova Scotia.

China's border dispute with India was practically invented in Peking to pick a quarrel with India in accordance with a chess-board-like Chinese strategy, with the following objectives in view:

1. Demonstrate to Asia and the world that China was the super-power to reckon with in Asia, and to weaken India's influence, prestige and to cripple the advancing economy of free India.
2. Show that India's non-alignment and peaceful co-existence theories were unsound and impractical in these times.
3. Topple the Nehru Government and eventually to establish in India one or more subservient or satellite states.

To achieve these goals China launched a full scale aggressive war against the democratic republic of India which was unprepared and had not the least idea of Chinese surprise attack. Any idea that the military strength of China is inadequate for its global ambitions or to make a military impression on the world, without the sophisticated military apparatus of the Soviet Union would be naive. China has the biggest land army in the world, 180 divisions, the third largest air force and a growing navy.

What is most frightening in China is the number of its militia which has increased from 12,000,000 in 1954 to 260,000,000. The bulk of this militia is normally employed in various agricultural and industrial activities, but at any time this mammoth body of well drilled men can be used for the purpose of the Chinese strategy of world domination.

Towards the end His Excellency Bejoy Krishna Acharya brought to the memories of the audience, Hitler's prediction in his famous book "Mein Kampf," which at that time no one believed could ever be true, but nevertheless Hitler was nearly able to achieve his goals, at the expense of millions of innocent human beings. In the same manner Mao Tse Tung in the name of China has already prepared his blue print for world domination.

We can only conclude after listening to the High Commissioner that the agressions by China against traditionally Indian territory, are completely unjustified. His Excellency said, "Let us join together and let no nation be deprived of its precious freedom."

—SEWA SINGH TIWANA

CONTINUED

THE STATE OF THE LAW IN THE "STATE" OF QUEBEC

By BRUCE CLEVEN,
B.A., B.C.I.

Mr. Cleven is a recent graduate of McGill University's Faculty of Law. The following is the last installment of a two-part article on the legal system of Quebec.

Although the name "Mortgage" does not exist in Quebec law, it is an often used term here. The corresponding institution is called a "hypothec" which is a real right upon an immoveable as security for an obligation. This right allows the creditor to force the sale of the property in the hands of any owner and rank in a preferred position on the proceeds. There are no chattel mortgages in Quebec except for the pledge of agricultural property and commercial pledge. Normally the Quebec type of pledge requires the creditor to retain possession of the thing given to him as security. It should be noted that section 88 of the Bank Act applies in the province notwithstanding the civil code to Bank loans, particularly in the areas of development of natural resources and manufacturing where the subjects of security remain in the hands of the borrower. The continuing efficacity of this rule may be questioned at a time when the needs of commerce are such that a more flexible system of security is required.

Book Three of the Code which deals with the Acquisition of Property includes the property regimes of marriage, successions, the general law of contracts and delicts, the civil law expression corresponding to tort, and the nominate or "special" contracts such as sale, lease and hire and suretyship among others.

One of the basic ideas in the Quebec law of contract is the emphasis on consentualism rather than formalism, an agreement being perfected by the consent alone of the contracting parties while the document affords evidence of the agreement. This freedom of contracting is limited only by the prohibitive rules of law governing the special contracts and the Quebec concept of Public Order and Good Morals which the code provides that no one can validly contravene by private agreement.

The concept of "fault" underlies the law of civil responsibility in Quebec. A person is at fault when he has breached a pre-existing obligation whether it is voluntarily assumed by contract or imposed upon him by the law. An obligation may be a specific one set out by statute or a general duty to take the care of a reasonable man which is set out in the Code. In certain situations which resemble contracts, the law imposes obligations independent of the will of the parties. These are called Quasi-Contracts and apply for example when someone has assumed the management of an affair as if he had a mandate, or when someone has received something which is not due to him.

While under the common law of torts an injury must fall within one of the categories of actionable wrongs, in delict the behavior of an individual may lead to his responsibility if there are the elements of fault, damage and causality. In this area the civil law appears to be more flexible than the rigid categories of tort. The Quebec rules are concisely stated in articles 1053 to 1056 of the Civil Code. These articles provide that all persons capable of discerning right from wrong are liable for damages caused to others by their fault; that they are also liable for damages caused by the fault of others over whom they have control, such as the father for acts of his minor child, and by things under their care as well as animals in their possession or by the ruin of buildings. Article 1056 C.C. is based on Lord Campbell's Act and provides that when a person injured in the commission of an offense dies without having obtained satisfaction of damages, his consort, ascendant and descendant relations have a right to recover within one year. This is a special right independent of that which they exercise as heirs of the deceased to recover personal damages.

The Quebec marriage covenant allows derogation from the general rules validating all kinds of agreements which would otherwise be void. If the consorts make no covenant or don't stipulate a form of separation of property they are presumed to be governed by a legal regime called community of property. In the other provinces all the property which the consorts possess at the time of marriage or acquire during its existence remains separate and each consort retains the ownership and management of his own portion. In Quebec, community may be thought of as a form of partnership of husband and wife under the exclusive management of the husband who alone administers community property which consists of the immoveables of each at the time of marriage and all property acquired afterwards. The wife shares equally in its assets and liabilities at dissolution of the community but during its lifetime the husband has almost complete control, being restricted in the disposal of property only recently by Bill 16 which makes the wife's concurrence necessary in certain cases. It is interesting to notice the recent Supreme Court decision in the Sura case in which the husband was held taxable upon all the income he brings into the community rather than his half as is done in certain American states.

The property relationship of the consorts is given a certain rigidity by our law due to the principle of the immutability of marriage contracts which takes effect from the moment of solemnization and lasts throughout. Article 1265 C.C. therefore prohibits donations intervivos between husband and wife except as is provided in the marriage contract and prevents a husband from assuring the future and well being of his wife and family by gift as his financial condition changes. The family is also vulnerable due to the English concept of freedom of willing expressed in our law which allows a husband to dispose of his share of property to the complete exclusion of his wife and family. In the case of a husband who has taken out insurance on his own life for the benefit of his wife and family the Husbands and Parents Life Insurance Act imposes restrictions upon the revocation of such benefits, thus preserving the rights of the wife and children.

Book IV of the Civil Code is entitled Commercial Law and deals with the contract of insurance, merchant shipping, and affreightment. These rules are of English origin, having been introduced with the early commercial practices of the English traders in New France. The Code articles on Bills of Exchange, originally part of the law, were superseded by the Federal Legislation. A basic distinction is made in our law for matters which are civil and those which are commercial. This distinction may be of considerable importance as different rules may apply to each in certain cases. For example a prescription of 5 years limits commercial actions instead of 30 years for civil actions, and in matters of evidence oral proof is available for commercial matters over fifty dollars. Whereas in civil matters the general rule is that proof must be made by writing.

IV—
THE ADMINISTRATION OF JUSTICE

The system of trial which is in force in Quebec is patterned upon the English adversary system rather than the inquisition system of France in which the judge plays a much greater role in the proceedings, although the power to make laws relating to the constitution and organization of courts is a matter within provincial jurisdiction.

In civil matters suits may be taken before the Magistrates Court as the court of original jurisdiction in matters such as contesting valuation rolls for municipal assessments and generally in cases under $500.00. Normally the Superior Court is the court of first instance from which an appeal lies to the Court of Queen's Bench (Appeal Side) which is the general court of appeal for the province. The final court of appeal is of course the Supreme Court of Canada. By virtue of section 50 of the Code of Civil Procedure the Superior Court has a general superintending power over all lower courts and quasi-judicial bodies within the Province. This section has remained an effective recourse through a direct action in nullity in spite of attempts to exclude its application through Privitive Clauses.

Stare Decisis:

The common law has been declared by decisions of the courts rather than having been set forth by legislation. Induction as opposed to deduction is perhaps its characteristic feature. Thus the doctrine of stare decisis which recognizes the binding effect of judicial decisions is an essential part of the common law method of litigation.

In Quebec the authority of decided cases is not as great as in Ontario on the other common law provinces. It has been said that we are governed by "the authority of reason rather than by reason of authority." In a civil law system it is the judge's function to extend the principles enunciated in the code to their logical conclusions. Mr. Justice Mignault of the Supreme Court has said:

> ". . . the distinctive merit of a code is its brevity and its purpose is not to provide for every possible contingency, but to lay down certain general rules whereby, and especially by their natural and logical development, the infinite variety of controversies may be decided conformably to legal principle. There is in a civil law country a vast field left for the constructive work of the courts leading to the creation of another source of law . . . judge made law."

For our courts what is binding is the Code as interpreted by judges of the Supreme Court and the Judicial Committee of the Privy Council. The code then cannot be disregarded and if a previous case ignores it, its authority may not prevail. While courts in Quebec do not feel themselves rigidly bound by precedent in practice decisions of the Court of Appeal are followed by the Superior Court.

One of the dangers facing the civil law today is the gradual encroachment of common law ideas. The common law judges often decide Quebec cases in reference to their own discipline rather than the civil law thus importing alien notions. For example in the case of O'Connor v. Wray it was stated that since no Quebec rule was cited to the contrary the English rule was to apply. This was an illogical mixture of two separate legal systems.

CONCLUSIONS

While the code has proven itself a fairly flexible instrument for judical development especially where broad general principles are provided such as in delicts, it still has many "lacunae" and ambiguous provisions. As well many new concepts have grown up outside the code and replaced the older principles, such as Workmen's Compensation providing indemnity for injuries to employees irrespective of fault. There are many suggestions today for removing automobile accidents as well from the operation of the general law and creating a fund for the indemnification of victims. Thus as in all systems of law changes are necessary. It is particularly fitting that a complete revision is now planned for the first time since codification in view of the general climate of change and development prevailing within Quebec and it is hoped that substantial modifications will be made to thoroughly modernize what has been on the whole a very effective system of private law.

—Bruce Cleven

LEGAL AID BRIEF TO THE YORK PLANNING COMMITTEE

All Osgoodians should take note of Mr. Robert Witterick's excellent brief which he prepared recently for the Building Committee of the Osgoode Hall Law School of York University.

The contemplated move of the Osgoode Hall Law School to the new campus at York University provides a "once-in-a-lifetime" opportunity for the reassessment of the many student activities at Osgoode, including, **inter alia,** the Law Journal, the Mooting and Advocacy programmes, and the Legal Aid Clinic. It is important at this stage to consider:

(1) what provisions, in terms of space and facilities, will be required at York;
(2) what changes in the activities themselves will be necessary to adapt them to the new York environment.

With this in mind, and at the request of Professor Linden, I have prepared this very short brief which addresses itself to some of the anticipated needs and problems of the future Legal Aid Clinic at York. The brief is motivated by two additional tenets of a philosophy somewhat peculiar to the author. **The first of these is that the students presently at Osgoode comprise the greatest untapped source of intelligent and informed opinion on these matters. The second is that the practical skills which distinguish a good barrister and solicitor should be fostered in the law school and that the law school has a responsibility in this area no less than in the academic.**

The consideration of the future needs of the Osgoode-York Legal Aid Clinic must involve some discussion of the purposes of the Clinic. Clearly, these are two:

(1) service to the community; and
(2) pedagogical tool for the student.

The debate as to which of these objectives should predominate is somewhat barren because they are both important and, furthermore, they can co-exist together.

As a pedagogical tool it is important that the programme be maintained at its present size, and be allowed to grow larger with an increased student enrolment, in order to provide every interested student with the opportunity of conducting at least one case in each of the principal lower courts: Family Court, Magistrates Court, and Division Court. In order that the student may experience both sides of a case — the research and the actual argument — it is suggested that the present practice be maintained. Presently one second year and one third year student are assigned to each case, with the second year student doing the research and the third year student doing the actual argument.

Some American law schools which have legal aid programmes, including Harvard, take their participants only from those students with a certain academic standing. Apart from the obvious objection that (at Osgoode at least) academic standing is only the crudest reflection of the student's ability as a lawyer or his competence in court, it is submitted also that such a criterion would not recognize the educative purpose of the clinic. My recommendation is therefore that the legal aid programme be encouraged to encompass as many senior students as possible.

I have stated the second purpose of the Clinic to be service to the community, and the first task in considering this objective is to delimit the area of the community to be served. At present, the great bulk of our cases involve appearances in courts situated in the core of the city, although we have had several appearances in Magistrates and Division Courts in Willowdale, Scarborough and Etobicoke.

To continue service of the downtown area, it will be necessary to maintain an office close to the heart of the city. Two possibilities immediately come to mind. The first, and most desirable, would be to put a bid in for one of the offices which will become available in Osgoode Hall when the Law School moves out; the second, would be to make some arrangement with the York County Legal Aid office, which will undoubtedly have expanded facilities with the new legal aid scheme.

If it should be decided to limit the "sphere of influence" of the Clinic to the Borough of North York, it will be necessary to make an arrangement regarding an office with the North York municipal council. I have written to Reeve James Service to solicit his views on the present need for legal aid services in North York.

However, it is anticipated that for a long time after the move to the new campus, it will be necessary for the Clinic to maintain close touch with the city core, wherein resides the greater proportion of those eligible for legal aid. Thus from both a pedagogical and a service to the community point of view, it is expected that our activities will continue to be concentrated in the core of the metropolitan area.

This may result in some difficulties of organization and transportation. While these difficulties, particularly of transportation, do not pose a real threat to the existence of the Clinic, they should be anticipated and provided for from the beginning.

The Clinic will also require certain facilities at the university itself. It is contemplated that, with a student enrolment of around 900, about 400 students could be involved in an energetic legal aid programme. This would result in a capacity to handle around 1,000 cases per year. (This year we will handle approximately 200 cases).

The Clinic has not in the past, nor will it at York, require a large budget. At present it has one of the smallest budgets ($400.00) of the Legal & Literary Society committees, though it has by far the largest number of participants (approximately 150 students). Most of our expenses include items of an incidental nature, such as disbursements for accident reports, transportation costs, conduct money for witnesses, etc. Our only major expense is the cost of republishing from year to year the legal aid manual.

It is respectfully submitted that the present time-table arrangement at Osgoode is not conducive to the operation of student activities like the Clinic (nor, incidentally, to effective and efficient study habits). Presently it is necessary to miss classes to attend court the day the case comes up. If at least one afternoon per week were free of scheduled lectures, it would be possible for students to have their cases remanded to that afternoon.

It is to be hoped that the staff at Osgoode Hall will play a greater role in legal aid in the future, particularly in advisory capacities.

Respectfully submitted,
ROBERT WITTERICK,
Director, Legal Aid Clinic

Please, Mrs. LeBourdais, I'd Rather Decide For Myself.

Isabel LeBourdais wrote a book entitled "The Trial of Stephen Truscott." It is obvious that she did not write it to lay the facts of the Truscott case before law students, presumably trained in objectivity and the ability to see all sides of an argument. They might determine for themselves that Stephen Truscott was wrongly convicted when Osgoodians read the book, but only after some suspicion as to the completeness of the facts set forth and the accuracy of the inferences drawn by Mrs. LeBourdais. For she has shown herself to be beyond the point of objectivity, having been completely convinced of the boy's innocence. Her arguments, though rational, are emotional, to some extent one-sided, and have the effect of putting on guard anyone attempting to view the Truscott case objectively. With such a manner of presentation one is hesitant to say that the charge to the jury was unfair or that the prosecutor was over-zealous in his job though Mrs. LeBourdais has ample argument from which to reach such conclusions.

Without saying it, Mrs. LeBourdais has criticized the defence counsel Mr. Donnelly severely. The book shows the jury gave great weight to the prosecution evidence but little weight to the defence evidence. This may have been because the jury had decided that Stephen was guilty before, or very early in the trial, but one cannot help feel it may also have been because of the ineffectiveness of the defence counsel. In all fairness to Mr. Donnelly, however, it must be realized that it is easy to determine counsel exercised poor judgment once one knows a conviction resulted.

The book will convince many that Stephen Truscott was wrongly convicted. But the real problem is if he was wrongly convicted how did it occur? Mrs. LeBourdais infers that the blame rests a great deal with the jury system itself. This jury was not educated enough to assess the technical evidence presented, and they were inflamed to the extent that the onus was on the defence to prove the boy innocent throughout the trial.

If the aim of her book was to bring attention to the Truscott case, it has been achieved. If her aim was to obtain independent decisions of her readers that Stephen Truscott was wrongly convicted Mrs. LeBourdais wasted a lot of paper putting in her own arguments which tended to add a suspicious colour to the book. If her aim was to determine why Stephen Truscott was wrongfully convicted it was not nearly enlightened enough.

—Marv Ellison