home to two, and the number of years he can be committed to a training school to three. In criticizing these particular sections of the Act, Harold Greer, an editorialist for the Winnipeg Free Press, said:

> Perhaps [the Act's] greatest fault from a practical point of view, however, is that it appears to preclude the indefinite or indeterminate sentence, or at least makes it more difficult for provincial rehabilitative programs to work in those provinces which have such sentences . . . this [indefinite sentence] is essential for the effective operation of a rehabilitation program. It permits the release of a young person under care, training and treatment at the optimum time, not holding him beyond his point of maxium progress, not letting him go before he is ready.[32]

Mr. Greer's criticism would be valid if all the provinces had the facilities and staff required to determine optimum time for release. However, outside of British Columbia and Ontario, which have excellent facilities for dealing with young offenders, and Saskatchewan and Alberta, which have adequate facilities, the provincial welfare departments do not have the money, facilities, or personnel to properly administer an indefinite or indeterminate sentence program, and until they do, it is hypocritical to subject young offenders to this type of program.

Ultimately, the new Young Offenders Act fails. It fails because the Bill attacks the problem from a legal standpoint rather than from a welfare and education standpoint. The Bill goes to great lengths to guarantee civil rights and due process of law to the young offender (a commendable aim, but does so at the expense of welfare and rehabilitative progress, and, in the final analysis, ensures the young offender of neither. One hopes that Bill C-192 will be seriously overhauled before it becomes law, or else Parliament will again be guilty of proudly putting obsolete notions into our law.

MARTIN TADMAN*

JUDICIAL PROCESS IN THE LAW OF OBSCENITY

The year 1970 witnessed a disturbing development in the criminal law dealing with obscenity. On two occasions in 1970 the Manitoba Court of Appeal was confronted with cases involving section 150(1) of the Criminal Code under which the possession of obscene material for the purpose of publication, distribution or circulation, is made a criminal offence. The two cases *Regina* v. *Great West News et al.*[1] and *Regina* v. *Prairie Schooner News Ltd. and James Powers,*[2] raise difficult and interesting questions in the evidentiary area of judicial notice.

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32. Greer, H., A Retrogressive Bill, Winnipeg Free Press, December 23, 1970.

1. (1970) 72 W.W.R. 354 (Man. C.A.).

2. (1970) 75 W.W.R. 604 (Man. C.A.).

Prior to examining the cases as such, it is useful to state some of the most basic principles relating to judicial notice and evidence in general.

Judicial notice has been defined, as the acceptance by a tribunal of the truth of a fact without formal proof thereof, on the basis that the fact is within the tribunal's own knowledge. Lord Sumner in *Commonwealth Shipping Representatives v. P. and O. Branch Services*[3] stated that there are two situations in which judicial notice takes place:

> "Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from the general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."[4]

In explaining the first part of his statement Lord Sumner refers to facts of general knowledge. These are called notorious facts. For example, evidence would not be necessary to prove that September has thirty days, this being a notorious fact. This practice has been clearly endorsed, as seen in the case of *R.* v. *Holmes*[5] where Harvey, J. C., quoting Phipson on Evidence,[6] said:

> ". . . judges . . . may, in arriving at decisions, use their general information, and that knowledge of the common affairs of life which men of ordinary intelligence possess they may not, as might juries formerly, act on their own private knowledge or belief."[7]

Therefore as regards matters which are within the judge's own peculiar knowledge but which do not form part of the knowledge of men generally, these must be proved by ordinary evidentiary means.

An important question concerning judicial notice relates to its effect, i.e. whether or not it is conclusive. In *Duff Development Co.* v. *Kelantin Government*[8] judicial notice was held conclusive of the matter so noticed. This result, however, must be confined to the facts of the case. In this case the matter noticed related to the sovereignty of Kelantin and in order to determine the political status of the defendant an inquiry was made from the Secretary of State for the Colonies. The decision that his answer and the judicial noticed based on it were conclusive of the matter was largely guided by the public policy consideration that it would be most undesirable for the courts and the executive branch of government to conflict as to the status of a country's sovereignty. Therefore, it can not be said that this case provides a strong precedent for saying that judicial notice is conclusive in every case.

3. (1923) A.C. 191 (H.L.).
4. Ibid. at p. 212.
5. (1923) 1 W.W.R. 34.
6. 6th ed. at p. 19.
7. supra fn. 5 at p. 38.
8. [1924] A.C. 797 (H.L.).

The better view would be that judicial notice is not conclusive of the matter so noticed and it can be rebutted by sufficient evidence to the contrary:

> "Before leaving the subject, it may be as well to add that taking judicial notice does not import that the matter is indisputable. It is prima facie recognition of the fact or practice – the matter may still be open to refutation. Where the line between what may be noticed and what is not to be noticed is to be drawn is not easily definable. There is no general principle. It must rest in the discretion of the trial judge and if too loosely exercised it may be corrected by the Court of Appeal."[9]

To understand the process of judicial notice fully, it is necessary to appreciate the rational underlying it. Cross puts it this way:

> "Much time would be wasted if every fact which was not admitted had to be the subject of evidence which would in many instances, be costly and difficult to obtain. Secondly, the doctrine tends to produce uniformity of decision on matters of fact where a diversity of findings might distinctly be embarrassing."[10]

With this essential background as to the meaning of and rationale behind the use of judicial notice, we now turn our attention to the two cases.

In *Greast West News,* supra, the accused were charged with the possession of obscene material for the purposes of distribution contrary to section 150(1) of the Criminal Code. Until 1959 the test for obscenity was one developed by the common law but in that year obscenity was defined by statute with the addition to section 150 of sub-section 8, part of which reads:

> "any publication a dominant characteristic of which is the undue exploitation of sex . . . shall be deemed obscene.

This definition implies the necessary existence of four elements to sustain a charge under the section. There must be a characteristic; the characteristic must be dominant; the dominant characteristic must amount to an exploitation of sex; and the exploitation must be undue. In *Brodie* v. *R.*[11] Judson, J. made it clear that if any of these elements is missing the charge would fall.

The Supreme Court of Canada decided in the *Brodie* case that undueness is to be determined by reference to "the standards of the community." In the case of *Dominion News and Gifts Ltd.* v. *R.*[12] the Supreme Court adopted the dissenting judgment of Freedman, J.A. (now Freedman, (C.J.M.) to the effect that such community standards

9. **Schnell v. B.C. Electric Railway** (1910) 14 W.L.R. 586 (1910) 14 W.L.R. 586 (B.C.C.A. per Irving, J.A.).
10. Cross, R. **Evidence**, 3rd ed. (1967) at pp. 135, 136.
11. **Brodie, Dansky and Ruben v. R.** (1962) S.C.R. 681.
12. (1964) S.C.R. 251 revising (1963) 42 W.W.R. 65 (Man. C.A.).

of tolerance must be Canadian and:

> ". . . not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere or puritan taste and habit of mind. Something approaching an average of community thinking and feeling has to be discovered."[13]

Community thinking and feeling has to be discovered, to be sure; but how? There are two courses open, i.e. formal proof or judicial notice.

In *Reg.* v. *Great West News* the Court of Appeal had to face this choice of alternatives. The Crown in putting forth its case did not call any expert evidence to assist the court in determining contemporary community standards. Since it is an accepted principle that the Crown must prove all elements of the offence charged, the Court of Appeal had to decide whether the conviction should be sustained. The conviction was unanimously affirmed on appeal thereby implicitly accepting the legal propriety of judicially noticing community standards.

The use of judicial notice for this purpose, however, was accepted with no reference to the recognized principles of judicial notice or even the concept of judicial notice itself. If community standards of toleration could qualify as a notorious fact (i.e. as a matter of common knowledge) then there would be little problem. The fact of the matter is, however, that time and time again judges have referred to the difficulty of determining the community standard[14] and therefore, on principle it cannot qualify as a notorious fact.

This being so, perhaps there is some rationalization for an acceptance of this process of judicial notice of community standards. If we were convinced that the judge represented a microcosm of the community there would be little difficulty in accepting his decision based as it is on his own degree of common experience. But the judge represents at best only a limited segment of the population and his views cannot possibly be expected to epitamize the national concensus.

Judson, J. in the *Brodie Case* realized the alternatives open in applying the obscenity test. He said:

> "Either the judge instructs himself or the jury that undueness is to be measured by his or their own personal opinion – and even that must be subject to some influence from contemporary standards – or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two I think that the second is the better choice."[15]

To follow the second course is to objectivize the test, but to do so, it is submitted really precludes the use of judicial notice. According-

13. **Dominion News v. R.** (1963) 42 W.W.R. 65 at p. 86.
14. See Porter C.J.O. in **R. v. Coles** (1965) I.O.R. 577.
15. supra fn. 11 at p. 706.

ly, the only available alternative to determine community standards of tolerance is to require their proof in the ordinary way. It is submitted that by the use of judicial notice the first course mentioned by Judson, J. is the one that has in effect, been followed. The community standards test has meant merely an application by the judge of his personal opinions of what those standards are. However, as mentioned earlier personal opinions have no place in the accepted notions of judicial notice.[16]

The magazines in the *Great West News* case were of a pictorial nature and for this reason are in a slightly different category than book or words of art, which, to quote Dickson, J.A.:

> ". . . may be predominantly characterized by an appeal to sexual interests but also embody literary or sociological or other values."[17]

Justice Dickson goes as far as to say that where the material may have other redeeming value, "expert evidence to assist the court is . . . both admissable and desirable."[18]

Dickson, J.A. in supporting his decision quotes from many cases and concludes that no case in the Commonwealth has required that the Crown produce evidence bearing on community standards. He quotes with approval Ritchie, J. from the *Brodie* case (at p. 709) as follows:

> ". . . the burden of determining what is or is not 'undue' so as to offend community standards is placed upon the judge before whom the publication is brought, and while it is true that his decision in either case must be a subjective one and will of necessity be colored in some degree with his predisposition on such questions this is not a unique position for a judge under our system of law, under the Criminal Code it is he and he alone who must be satisfied that the publication is obscene."[19]

— and from Lord Goddard in *Reg.* v. *Reiter*[20] as follows:

> ". . . The book or picture itself provides the best evidence of its own indecency or obscenity or the absence of such qualities."[21]

An analysis of these two quotes will demonstrate the confusion of certain accepted principles of criminal justice.

Ritchie, J. says that it is the judge who alone must be satisfied that the publication is obscene. "Satisfied" must mean satisfied beyond a reasonable doubt because, clearly, that is the standard of proof required in all criminal cases; and it is the Crown which is fixed with discharging

16. **R. v. Holmes,** supra.
17. supra fn. 1 at p. 363.
18. Ibid.
19. supra fn. 1 at p. 362.
20. [1954] 1 A.E.R. 741 at 742 (C.C.A.).
21. supra fn. 1 at p. 35.

the legal burden of proof. In all other cases that degree of certainty (satisfaction beyond a reasonable doubt) is reached on the basis of evidence presented and received by the tribunal or fact-finder, but this is not so where judicial notice is used to determine community standards.

Let us suppose that the only evidence of obscenity produced by the Crown is the placing of the impugned material in evidence. According to Lord Goddard this is the best evidence of the alleged obscenity.

However, the material itself, says nothing about Canadian community standards of toleration nor are these sandards in any way derivable from a reading or perusal of the matter alleged to be obscene. Further, in quoting Lord Goddard with approval, Dickson, J.A., fails to make mention of the fact that the test for obscenity in England is different from that prevailing in Canada under section 150(8). In England the test enunciated in *R.* v. *Hicklin*,[22] (the tendency of the material to deprave or corrupt morals) is still used. Even if Lord Goddard's words are useful or relevant in the context of English law there is no reason to assume that they can be validly transposed into the Canadian legal context where the prevailing test is different.

To continue our example, let us suppose that the defence has presented some expert evidence bearing on the level of tolerance prevalent in Canada and the expert evidence is to the effect that the material does not exceed, that limit of tolerance. It is accepted that on recognized principles the judge may discount the expert evidence, but does it necessarily follow that he should then, on a purely subjective basis, find that the Crown has proved its case beyond a reasonable doubt?

The *Great West News* case may be a precedent for just such action by a judge. What then is the position of defence counsel who is, of course, unable to cross-examine the judge as to the standard he intends to accept? Ritchie, J. (quoted earlier) expresses the opinion that the decision is a subjective one and that this is not unique for a judge.

However, it should be noted that the subjectivity here may arise purely from a judge's predisposition, without any supporting evidence.

If the rationalization for such action is judicial notice then that process must be justifiable having regard to the principles of judicial notice. The judgments in the *Great West News* case are totally deficient in this regard.

The development of judicial notice in obscenity cases seems to have

22. (1868), L.R. 3 Q.B. 360.

derived its thrust from a judgment in Australia in the case of *Rex* v. *Close*.[23] In that case Fullager, J. said (at p. 465) and this was quoted by Dickson, J.A.:

> "There does exist in any community at all times – however, the standard may vary from time to time – a general instinctive sense of what is decent and what is indecent of what is clean and what is dirty . . ."[24]

There are three things which should be pointed out in reference to this passage.

First it is open to question that there is, in fact, one universal instinctive sense in the community of what is decent. There may be in each of us, what might be called an instinctive sense of what is decent, but it is really no more than a general awareness of our own views, which derive from our background education and experience. For this reason, it would be more accurate to say that there are thousands of different "instinctive senses" of what is clean and what is dirty. This is especially so where the "Community" involved is all of Canada.

Secondly, even if there is, in fact, such a community concensus of what is decent and what is indecent, I would submit that this is of little relevance to the criminal law of obscenity. The Criminal Code in section 150(8) recognizes that exploitation of sex is permissable, and, in that sense it does not proscribe that which might be termed "indecent." It is only when that indecency reaches an undue level that the criminal sanction is invoked. It is difficult to conceive that there is a general instinctive sense of that level.

Thirdly, the judgment in *Close*, supra, seems to refer to what people may instinctively know is "dirty" to the degree that they themselves might not read or peruse it. But that is not the standard the law is seeking. The standard the law seeks is based on the concept of toleration as is clear from Justice Dickson's judgment where he said:

> "The question was whether the magazines exceeded the contemporary standards of tolerance."[25]

A main point of interest in Justice Dickson's judgment is his reference to expert testimony. He said:

> "In some of the cases a book or work of art may be predominately characterized by an appeal to sexual interests but also embody literary, sociological or other values. Expert evidence to assist the court is, in such circumstances, both admissible and desirable."
>
> "Here there is no redeeming feature to consider. The question was whether the magazines exceeded contemporary standards of tolerance."[26]

23. (1948) V.L.R. 445 (Victoria, B.C.).
24. supra fn. 1 at p. 357.
25. supra fn. 1 at p. 363.
26. supra fn. 1 at p. 363.

Here the judge seems to have limited the scope of expert testimony to a consideration of the other benefits of the material and not to the matters revelant to contemporary community standards.

In concluding the discussion of the *Great West News* case there are two further main points I should like to mention.

First, in his judgment Dickson, J.A. draws an analogy between Canadian community standards and the reasonable man in negligence cases. He puts the argument as follows:

> "In negligence cases the judge must compare the conduct of the defendant with that of the reasonable man. It has never been said that the judge must hear expert evidence before deciding what a reasonable man would have done in the particular case."[27]

I submit that this analogy is erroneous. For example, let us think of a negligence case involving malpractice by a doctor. I think it is fair to say that the plaintiff would have little chance of discharging the onus of proof (which he bears), if he produced no expert evidence as to the standards of care to be expected from a reasonable doctor. That expert evidence would be central to the whole case. This example of expert evidence in a negligence case is equally applicable to other kinds of negligence cases. Expert evidence, therefore, may be necessary to succeed in a negligence case just as it should be necessary in an obscenity case in order to secure a conviction.

There are, it is true, negligence cases, such as auto accidents, where expert evidence is often not necessary. This, however, is due largely to the fact that every accident will probably also constitute or result from a breach of the Highway Traffic Act which, in effect, sets down the standard of conduct expected of drivers. Further driving is a matter of such common experience that expert evidence is often not required, and what the judge is taking judicial notice of is not matters of opinion but notorious facts as to the rules of the road whether contained in the Highway Traffic Act or not.

The second and last point, which bears mentioning, is the last line of Dickson, J's judgment where in referring to the community standards test he said:

> "The concept should not now be erected into something which would make it impossible to enforce obscenity legislation."[28]

This statement represents the underlying policy decision, which likely conditioned the opinions expressed in the case, regardless of the arguments presented.

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27. supra fn. 1 at p. 362.
28. supra fn. 1 at p. 365.

It is interesting to note that not once in the judgment does the term judicial notice appear. Justice Dickson's description of the process is neatly stated where he said:

> ". . . the judge must in the final analysis endeavour to apply what he in the light of his experience, regards as the standards of the Canadian community. In so doing he must be at pains to avoid having his decision simply reflect or project his notions of what is tolerable."[29]

The two sentences are clearly contradictory. How can the judge "apply what he . . . regards as the standards" and yet have the assessment not "reflect or project his notions of what is tolerable" unless such standards are notorious facts which, clearly, they are not.

In the *Prairie Schooner News* case the Manitoba Court of Appeal again had to consider the obscenity question. The court decided that expert testimony although admissable on the question of community standards, is not necessary to support a conviction.

Dickson, J.A., in his judgent in the *Prairie Schooner News* case, appears to have changed his opinion on expert evidence, as revealed when he said:

> ". . . It would seem to me that when it becomes necessary to determine the true nature of community opinion and to find a single normative standard, the Court should not be denied the benefit of evidence scientifically obtained in accordance with accepted sampling procedure by those who are expert in the field of opinion and research. Such evidence can properly be accorded the status of expert testimony. The state of mind or attitude of a community is as much a fact as the state of one's health; it would seem therefore proper to admit the opinion of experts on one subject as the other."[30]

Although he expressed this opinion, Dickson, J.A. was satisfied with the finding of Keith, C.C.J. based as it was on the fact that Keith, C.C.J. had perused the exhibit and was of the opinion that they went beyond the community standard of acceptance. Dickson, J.A. said:

> "The Judge applied the standard of acceptability, not any standard of personal taste."[31]

But there is in the judgment of Dickson, J.A. no indication that the standard of acceptability was anything other than the trial judge's own value judgment.

In this case the defence had tried to introduce a survey of public opinion. One of Keith, J.'s reasons for not admitting the survey was that it would not assist him in determining community standards. The rejection of the survey on this ground makes it clear that trial judge proceeded on the basis of personal opinion and was determined to

29. supra fn. 1 at p. 362.
30. supra fn. 2 at p. 599.
31. supra fn. 2 at p. 602, 603.

reach his decision, on a basis, devoid of any consideration of what Canadians in fact do tolerate.

Further evidence of the trial judge's persistance in relying on his own evaluation of contemporary standards is the fact that he refused to hear the defence witness Dr. Rich as an expert (Justice Dickson indicated in his judgment that the doctor was clearly an expert). However, Dr. Rich testified at length but was not permitted to offer an opinion whether the impugned material exceeded community standards.

In his judgment Dickson, J.A. repudiated the view that the court is bound to accept the uncontradicted views of an expert. He said:

> "A Judge is required to consider any expert testimony tendered and determine the weight to be given to it. But, if having conscientiously done so, he concludes he can not predicate any finding on the basis of that evidence, he is at liberty to reject the evidence in its entirety. The final decision to these matters must rest with the Court, no with the experts."[32]

It is true that a judge is free to accept or discount evidence or accord to it whatever probative weight he thinks it warrants. Dickson, J.A., however, has, I believe, lost sight of his statement one page earlier when he said that–

> "the onus throughout the trial is on the Crown."[33]

It is not necessary to the finding of innocence that the judge predicate, on the basis of the expert evidence, a finding favourable to the accused; but there still must remain a basis for the finding of guilt since the Crown bears the burden of proof. If that basis is judicial notice of community standards then there should be some justification offered for this.

Certain other comments of Dickson, J.A. bear analysis. In his judgment he refers to what is necessary for a study or opinion poll to be admissable. He points out that the community whose standards are being considered is all of Canada. He said:

> "the universe from which the 'sample' i.e. the individuals to be polled, is to be selected, must be representative of Canada and not drawn from a single city. If, and only if, the sample is correctly selected can it be said that the opinions found to exist in the sample are representative of the entire universe."[34]

This statement may well be a correct analysis of the legal requirements of a sample, but it is interesting to compare these requirements with the use of judicial notice.

The judge in noticing contemporary standards is supposed to be reflecting a national concensus. The survey must draw on a large group

32. supra fn. 2 at p. 604.
33. supra fn. 2 at p. 603.
34. supra fn. 2 at p. 599.

of people from various geographical regions, certainly not confined to one city. Why then should a judge consider that the opinion of one man, himself, in one location is preferable even to a small sample. Surely his opinion is no more representative than that of any other individual, and less representative of any group larger than one!

It is illogical, irrational and presumptious for a judge to pretend that his opinion mirrors contemporary standards. The very fact that the "universe" is all of Canada, defies the possibility of his evaluation being an amalgam of the thoughts of the Canadian people.

Dickson, J.A. referring to the testimony of Dr. Rich said:

> "In the absence of a poll of public opinion, there is no way in which the witness could express any authoritative opinion on the public reaction to the impugned material."[35]

And later he says:

> "In the absence of such a poll the full burden of determining what is undue falls on the judge."[36]

I submit, that in the absence of such a survey or poll, there is also little upon which a judge can base his opinion. How is he in any better position than an expert to judge authoratively the public reaction to the material?

In the case of *Regina* v. *Adams*[37] the Judge O'Hearn said that the knowledge concerning contemporary standards –

> "is part of the background of knowledge that every judge and jury is assumed to bring to the task of judging . . . All such knowledge is a compound of experience and introspection, induction and deduction, reading, conversation, discussion and intelligent intercourse in general."[38]

This is the kind of assumption that runs through both the *Great West News* and *Prairie Schooner News* cases. It is, however, an overly optimistic and erroneous assumption.

A brief reference should be made to the second part of Lord Sumner's statement as to when judicial notice is proper. Morgan in a book, *Some Problems of Proof Under the Anglo-American System of Litigation* explained the latter part of Sumner's statement[39] to refer to a matter which is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.

There is one common element to the cases encompassed by this situation and that is, to quote Phipson, that:

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35. supra fn. 2 at p. 603.
36. Ibid.
37. 1966 4 C.C.C., 42.
38. Ibid. at p. 65.
39. supra fn. 4.

> "one knows in a general way that a fact is a matter of common knowledge, although one does not know it oneself."[40]

If reference is had to outside sources "the result may well be that the authorities are so conflicting as to show that the matter is not one of common knowledge after all, so that the fact must be properly proved."[41]

In the case of judicial notice of contemporary standards, it is impossible to say that there is any source of indisputable accuracy such as to justify judicial notice after inquiry. The only proper way to determine the standard to be applied is to receive evidence on the matter.

In general, the concept of obscenity is evaluative and as such, cannot be the subject of definition. This being so the use of judicial notice cannot result in anything approaching objectivity. A judge cannot, by himself, distill a feeling of a Canadian concensus on obscenity. Such knowledge must derive from evidence.

United States Supreme Court Justice Jerome Frank once said:

> "Usually a person who talks of the 'opinion of the world at large' is really referring to the few people with whom he happens to converse."[42]

The comment has obvious application to judicial notice of contemporary standards since the judge may rest his decision on what he perceives to be the national standard of tolerance, when in effect he is only imposing his own standards. If this process of judicial notice in obsecenity cases continues, any liberalizing trend which occurs will be more a result of a liberally inclined judiciary than a liberally minded community. The result would be satisfactory but the method is not, as it lacks ony conformity with recognized legal principles.

In summation it should be noted that the use of judicial notice in obscenity cases conforms to one rationale for judicial notice but not the other. It certainly expedites the hearing of the case but in no way does it tend to produce uniformity.

This paper has not explored the nature and types of evidence which should be ncessary to support a conviction, but hopefully it has shown that the present practice is unacceptable. Some people say that it would be impossible to enforce the obscenity legislation if a greater evidential burden was placed on the Crown. If this is so, then it is up to Parliament to act,[43] but the courts, should not, in the guise of

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40. Phipson, **Manual on Evidence**, 9th ed. (1966) at p. 21.
41. Ibid.
42. **Repouille v. U.S.** (1947) 165 F2d 152 at p. 154.
43. Parliament could amend the Evidence Act to include contemporary community standards of tolerance, in those matters of which a judge can take judicial notice. Such an amendment although not a satisfactory solution, would at least render the current judicial practise, more consistent with accepted legal principles.

justice, undermine and disregard basic principles for the sake of expediency.

SIDNEY GOLD SORONOW †

THE ROLE OF THE LAW AND THE LAWYER IN DEVELOPING SOCIETIES *

In a sense every society, which is not developing, is disintegrating; but I am using the term 'developing' in the more specific context of societies, which have recently emerged from a period of colonialism and have just attained their independence, or are about to do so, and which are variously described as 'underdeveloped,' 'developing' or as part of the Third World. The Commonwealth Caribbean is a microcosm of this type of society and I shall use it to illustrate the submissions that I wish to make.

In 1956 Lord Denning expressed the view that the common law was not suitable for export without considerable adaptation. He said:

> "[The common law] has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications."[1]

However that may be, the fact is that there has been a considerable export trade in the common law and the Caribbean was an early port of call. The Honourable S. S. Ramphal, S.C., Attorney General and Minister of State for External Affairs of Guyana, put it very lucidly when he addressed the Inaugural Session of the Fourth Commonwealth Law Conference in New Delhi on January 6, 1971. He said: "It was in the Caribbean that the seed of the common law was first planted outside its English habitat. Before the plantations of North America, before the trading posts of India, before the pursuit of dominion in Africa – it was the islands of the Caribbean that provided that first nursery beyond the seas over three hundred years ago."

The Honourable Minister went on to depict the common law as having developed into a law of the Commonwealth by which he meant, "not merely that body of the common law which is now a part of each

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* An edited version of an address delivered at the annual banquet of the Association of Canadian Law Teachers in Newfoundland, June, 1971.

1. Nyali Ld v A.G. [1956] 1 Q.B. 1, at pp. 16-17.