REVIEWS AND NOTICES

Law Training in Continental Europe. By ERIC F. SCHWEINBURG. New York: Russell Sage Foundation. 1945. Pp. 129. ($1.00)

Legal education in Canada represents little more than the technical training required for actual practice of the barrister or solicitor. We are not very far removed from the stage where a faculty of law was considered to have no place in the training of a lawyer. Indeed, in some places in Canada the apprentice system of office training is still viewed as the most important part of a legal education and, while the law school may be considered as capable of contributing something to a law training, there is, nevertheless, a constant urge to confine the efforts of such a school to the practical or professional training of lawyers as such. Full and free scope to a thorough and full-time academic treatment of the development of law as a phase of the larger problem of social control, and as a basis of study, not merely for those contemplating active practice of law, but for those who may be called upon to assume positions as administrators or civil servants, is practically unknown in this country. It goes without saying that opportunities for post-graduate work are almost entirely lacking. No matter how we may camouflage our efforts, or what lofty titles we may give to subjects of instruction in our curricula, the fact remains that very few seem particularly interested in the training in our universities or our law schools of anything but legal technicians. That such technical training is essential is beyond argument if the profession exists, as it does, to achieve results for the clients it serves. The question, however, is whether the profession does not also exist for serving the public in a broader sense than the promotion of individual clients' interests on the basis of an existing technique.

The emphasis in Canada on a training in the mechanics of professionalism is, perhaps, not surprising for two reasons. In the first place, control of legal education throughout Canada generally is in the hands of the profession itself. In addition to the inherent conservatism of the legal profession it is not surprising to find that the profession considers its sole task that of preparing recruits to its ranks; that the technical side of the day to day work of the lawyer should be stressed; and that the social implications of the administration of law, as a phase of the wider administration of justice by the State, should be lost sight of. In the second place, Canada is still a young, and in many ways, a pioneer country. It has been pointed out on many occasions of late that in such a country education on any broad scientific cultural basis—on any basis in short, other than immediate bread and butter results—receives little consideration and even less support.

One might have expected that preparatory to the reception of the large groups of returning men interested in acquiring a sound training in law, Canadian universities and Canadian legal scholars would have subjected the aims, objects and methods of legal education to close scrutiny with a view to building for that brave new world of which we talk so much and towards whose building we do so little.

There can be no question that society today does not form that homogeneous world in which the common law gained its ascendency. The clash of interests with which the traditional common law courts were able to

cope in a spirit of high individualism is being supplanted by group conflicts for which traditional professional technique fails to offer solutions; nor is the profession being trained to appreciate either the conflict or the implications inherent in the various possible solutions of the conflict. The rise of administrative tribunals goes on apace as government more and more enters realms which heretofore were either unpoliced or uncontrolled or were left to the independent initiative of the citizen who might, had he sufficient means, employ a lawyer to assert his claims in one of the "legal" or "professionalized" courts. Against this intrusion the existing profession inveighs mightily, and well it might. Such invasion is certainly an encroachment in a field in which the legal profession has for many a year had a monopoly. Whether that monopoly should continue; whether administrative boards are achieving more cheaply and efficiently a broad social purpose; whether what remains of the existing professional system of courts is still operating too cumbersomely or expensively; whether, in short, we are achieving a solution of the clash of interests in modern society without unnecessarily sacrificing some and entrenching others, are all questious which cannot be solved by a purely professional training in law. Does our existing system of legal education help to train administrators, statesmen, legislators, judges, or any of the dozens of other persons who must be relied upon to lay down rules for the adjustment of social problems or to participate in the adjudication and solution of the myriad problems which modern society throws up for control or adjustment by the State? It may be that the legal profession will say that many of these questions are not the immediate concern of the profession itself. One may sympathize with this attitude, but only after concluding that the perpetuation of the existing system of professional technique is of such overweening importance to the health of the body politic that students trained in that technique can, from such training, expect to take the part which lawyers fondly believe is their prerogative of leading the advance in solving the problems of the present day.

To immerse a student from the inception of his studies of law in the technicalities of the "law as is" and never to permit him an opportunity of examining how problems might be solved in different ways by different institutions and by different techniques is not merely to stultify an educational process, but will prevent such student from ever acquiring a broad or scientific outlook towards "law" and the "legal order", as opposed to particular "laws", which society is entitled to expect from persons who are entrusted with the administration of justice by law. And if a student does not acquire this broader outlook in his studies, how can we expect the legal profession to escape the derision and jibes of the public, which has always been too prone in any event to consider lawyers as existing for their own advancement rather than for the benefit of the public? Furthermore, and much more important, where under a purely professional training can our Canadian students who are interested in learning about "law" in the broadest sense, turn for instruction? The professional schools do not pretend to be other than trade "schools", and it is a matter of regret that even where universities have developed faculties of law they are more or less—or at least feel that they are—under the necessity of making their instruction practical and technical.

In light of these random comments regarding Canadian legal education, the present study by Dr. Schweinburg of legal training in Europe, takes

on new significance. The university and the university faculty, existing without any attempt to rear practising lawyers and with no proximate object other than "the scientific presentation of the totality of legal science", are encouraged and supported by the governments as a prime requisite for all training and work connected with law. The law faculty, as the writer points out, is *the* "graduate school" *par excellence* of most of Europe. Such faculty is not expected to load a student with knowledge of "what the law is". The faculties, in other words, are in no sense "schools" for the training of any particular branch of legal administration. Graduation from such faculties, however, is made a requisite for admission, not only to the practising profession, but to appointments to the judiciary, as public administrators, and civil servants of the most diverse kinds. This is not to say the apprentice system is ignored on the Continent: on the contrary. A Canadian lawyer, who glibly expects to have a properly educated lawyer produced within three years of combined office practice and academic work, may experience some surprise, if not a shock, to learn that in Austria four years theoretical study in a law faculty are required as a preliminary to entering any branch of the profession, and that following these four years comes an apprentice training of three to seven years. During the four years academic work, three sets of examinations must be taken under State supervision. A more difficult set of examinations, conducted by the university itself, is required for the doctorate in law, and no person can become a practising attorney or a university professor without having such doctorate. The doctorate is not required for judicial appointment or any of the public administrative jobs. Following the four years university work, an apprentice training of what may seem to be of extreme length is entered upon. For practising attorneys it is an apprenticeship of seven years, six of which must be served in private law offices or the state's law office, and one of which must be spent in different civil and criminal courts. It is apparent that the emphasis on the academic training in addition to the work in a court and in various law offices should inevitably produce a greater consciousness of social obligation and participation in public administration than the apprentice system to which we are accustomed in this country, which may be nothing more than the handling of one particular type of client's work to the exclusion of all others. The bar examination in Austria, which can only be taken after the doctorate is obtained, is conducted by a commission of five, composed of judges, university professors and lawyers. Persons intending to enter a magisterial career are only required to spend an apprentice service of three to four years, which time is devoted to work in the various courts and part time in a law office.

With modifications much the same system prevails in France and, prior to its disorganization by the Nazi regime, in Germany as well.

The training of lawyers in the Soviet Union departs radically from this "two-pronged" method of legal education, and as the writer points out is closer to the American pattern. The author indicates that this is due to the fact that both the Russian and the United States method of education is the creation of a pioneer society. While the bench in Russia is purely non-professional, the standard of training in a Juridical Institute in Russia seems to be high although perhaps directed more to professional training than are the universities in other parts of Europe. It is difficult to make a strict comparison, however, because there are many other re-

search institutes in Russia which indirectly influence legal education, such as the All-Union Institute of Juridical Science, Institute of Public Law of the Academy of Sciences, Institute of Criminology and Expert Evidence in Minsk, and many others. Admission to the Juridical Institutes is, of course, on a competitive basis and results of the work in an Institute largely determine the type of job the graduate will enjoy. Further, students are maintained by stipend supplied by the government.

Despite what would appear to be definite advantages in the general European scheme, it is significant that the problem of properly integrating such subjects as political economy, sociology and finance in a proper law training has still not been solved. That the problem is recognized as one calling for solution is in itself significant. There is much more likelihood of it being solved under the European set-up because of the non-professional character of university education. Such education is designed to lay a solid foundation based on the view that law is not just another trade, and the faculties are not concerned, nor are the students during their term of study, with the jingling of dollars and cents. At the same time the European system of apprentice training built on this foundation "not only liberates the law faculties for concentration on a science-minded presentation of law and political subjects", as the author states, but supplement this study by a type of training that can hardly be excelled.

The present book should be read seriously by any one interested in improving legal education in Canada. It is, of course, obvious that we cannot transplant to this country a system wholly foreign to our whole course of development. Nor would we advocate such a translation if it were possible. There are many drawbacks to the European system. We believe, however, that the time has come when we should cease deluding ourselves by the naive belief, expressed on every conceivable public occasion, that the training which a lawyer gets in Canada equips him for any larger sphere of influence in shaping policies pertaining to the administration of justice than any other group of persons. A rigid training in the details of practice and pleading, or in the mumbo-jumbo of present-day laws of evidence, does not, to our mind, produce qualifications which are likely to make for a good adjudicator or a good administrator. Somehow and somewhere, however, we must train learned lawyers. If the profession is not willing to assume this task, then the public have the right to demand that it be undertaken as a public duty. A proper training in law is as much a governmental function today as it is a professional one, and it may be that unless legal training in the broader sense indicated is undertaken by either the profession or the universities, the time may well come when, as in Europe, the government takes an active part in seeing that such education is available. Since law has ceased to be the monopoly of court sand the legal profession, and is as broad as all governmental activity concerned with the regulation of social conduct, the interest of the public in training persons for all aspects of such regulation is as great as in public health or general education. The older European civilizations have realized this. As yet there are few signs that we have benefited from their experience.

Dr. Schweinburg concludes his book with the following paragraphs which, if applicable to the European situation, may be considered as doubly or triply applicable to the situation in Canada:

> If lawyers are proud of the accomplishments of many of their brethren as politicians, legislators, administrators, statesmen, spiritual

leaders, they grossly forget that the contribution that has been made to the work of those men by their law training was only technical, and hence subservient. In spite of their pride in outstanding colleagues, lawyers do nothing to liberate law training from its technical and narrow spirit, so that it will form a vital factor in the achievements of talented individuals and offer them a stronger incentive to strive for such [*sic*] than mere discipline of the mind can ever give. . . .

Modern law training can no longer remain lost in self-adulation. Little does it matter whether it be the self-adulation of scientists or of professional clans. Any self-centred isolation in legal education necessarily produces guilds of either legal scholars or legal technicians, however the emphasis is otherwise shifted. The primary aim of law training must be the rearing of *men*—men who have profound knowledge of and full contact with the world around them, and a passionate desire to help their fellow-beings by means of law and social construction. The province for that help and construction is large; its confines are those of human life.

CECIL A. WRIGHT

Osgoode Hall Law School

* * *

Principles of the Law of Contracts. By the late SIR JOHN SALMOND and JAMES WILLIAMS. Second Edition. 1945. London: Sweet & Maxwell, Ltd. Pp. xxxvi, 640. (£1. 15s.)

This is in part the second edition of an uncompleted work on contract by the late Sir John Salmond, first published after the death of Sir John by Dr. P. H. Winfield under the same title. In the first edition the contributions of Dr. Winfield were marked off in square brackets so that the original text of Sir John Salmond was preserved for the reader.

The editor of the present edition states in the preface that "the unfinished condition of the original text seemed to demand and excuse the use of a free hand in revision". Particularly is this so since the original text is preserved in the Winfield edition. However, the influence of Sir John Salmond will be evident to those who have read his other writings on legal subjects; much of his style remains and the material of that great student of the law is the foundation of the new edition.

The form and style of the work make it easy to read and follow. The various divisions and headings direct the reader's attention at once to the root of the matter under consideration. And while the work is small and restricted when compared with the great work by Williston, it contains much excellent material and should prove most useful to the law student and the general practitioner.

W. J. WEST

Fredericton

* * *

Latey's Law and Practice in Divorce and Matrimonial Causes. Thirteenth Edition by WILLIAM LATEY AND D. PERRONET REES. London: Sweet & Maxwell, Limited and Stevens & Sons, Limited. 1945. Pp. xcvi, 1275. (£3. 7s. 6d.)

When one appraises the thirteenth edition of Latey on Divorce as a text-book on the Law and Practice in Divorce and Matrimonial Causes it

is wiser to refrain from reflections on the comparative perfection, from a sociological viewpoint, of the English law of divorce, judicial separation, nullity of marriage, etc. as contrasted with the Canadian law on the same topics. Those are questions on which opinions may well differ. Furthermore, the Canadian practitioner resorts to Latey and to other English texts on divorce, not for their arguments for or against alterations in the substantive law of divorce, but as potential texts on the Canadian law and practice as it exists, for better or for worse, from time to time.

The authors of the present edition had already published one edition—the twelfth, which appeared in 1940—after the enactment of the Matrimonial Causes Act, 1937. Apart from the Matrimonial Causes (War Marriages) Act, 1944, there has been no outstanding change in the English statute law since 1940. Consequently the particular value of the present edition lies mainly in its presentation of the cases decided in the five-year period that has intervened between the two editions.

The preface contains a list of nineteen recent cases which in the opinion of the authors call for especial mention. Some of these cases are of value only in England, but several of them are of interest in Canada.

Easterbrook v. *Easterbrook*[1] and *Hutter* v. *Hutter*[2] deal with the basis of the jurisdiction over the parties in actions for nullity; they were considered by the British Columbia Court of Appeal in *Shaw* v. *Shaw*[3], which contains a very careful review of all the English decisions on the point. *Sim* v. *Sim*[4] deals with the basis of the jurisdiction over the parties in an action for judicial separation.

Henderson v. *Henderson*[5] is an authority on the question of what amounts to condonation of adultery, with particular reference to the problem of contingent condonation in a case where a husband forgives his erring wife on the condition that she entirely break off all acquaintance with her paramour. *Higgins* v. *Higgins*,[6] *Ainley* v. *Ainley*[7] and *Beard* v. *Beard*[8] discuss the degree of matrimonial misconduct necessary to revive condoned adultery.

In the field of connivance, *Churchman* v. *Churchman*[9] is the case mentioned in the preface. We cannot resist the temptation to suggest that *Pearl* v. *Pearl*[10] be read at the same time; in that case the husband was held to be guilty of "passive connivance" because, although he was hiding in the clothes cupboard of the partly lighted bedroom on the occasion of the adultery, he stood by and watched the act of adulterous intercourse and refrained from taking any steps whatever to prevent it; if the husband wishes to act as his own watchdog he must be prepared either to bite or bark.

Frampton v. *Frampton*[11] is mentioned because the wife's admission that the co-respondent and not her husband was the father of her child was

[1] [1944] P. 10.
[2] [1944] P. 95.
[3] [1945] 3 W.W.R. 577.
[4] [1944] P. 87.
[5] [1944] A.C. 49.
[6] [1943] P. 58.
[7] [1945] P. 27.
[8] (1945), 61 T.L.R. 555.
[9] (1945), 61 T.L.R. 464.
[10] [1943] O.R. 720.
[11] [1941] P. 24.

admitted as evidence of adultery in spite of the rule in *Russell* v. *Russell*;[12] the case is useful because the admission was in a form that is encountered fairly frequently. It is interesting to note that at the present session of the Saskatchewan Legislature the Government has introduced Bill No. 81, which provides that:

> . . . . .a husband or wife may, in an action, matter or other proceeding in any court, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time, or within any period of time, before or during the marriage.

Similar bills have also been introduced in a number of other provinces.

If this amendment is held to be within the competence of the legislature and to have the effect that it is ostensibly intended to have, it should complete the emasculation of *Russell* v. *Russell*. After witnessing so many attempts at the partial sterilization of the principle that denies the admissibility of certain types of evidence as to access or nonaccess—some successful, as in *Frampton* v. *Frampton* and others unsuccessful as in *Ettenfield* v. *Ettenfield*[13]—many would rejoice to hear that a legislature has at last performed a final and completely successful operation.

One's mind passes on quite logically to *Cowen* v. *Cowen*,[14] in which the Court of Appeal held that there had been a "wilful refusal of the respondent to consummate the marriage" where the husband, contrary to his wife's wishes, had insisted on the use of contraceptives during marital intercourse. Can this decision be combined with Bill 81 of the Saskatchewan Legislature in such a way as to enable the husband to depose that although he had indulged in partial intercourse with his wife, yet he had made such a skilful use of contraceptives that he could not be the father of her child, thereby leading to the inference that she must have been guilty of adultery?

Another case that might well have been added to the list of leading cases is *Blunt* v. *Blunt*,[15] a decision of the House of Lords describing the nature of the discretion given to the court in cases where the plaintiff has been guilty of adultery, the circumstances which should be considered when that discretion is being exercised and the attitude that should be adopted by an appellate court when it is asked to reverse the decision of the trial judge.

One illuminating feature of the book is the comparative lengths of its three main divisions. Apart from the Table of Cases, Index, etc., it contains 1147 pages. Part 2, which consists of almost 500 pages, covers the Practice in Matrimonial Suits. Part 1, which contains only 429 pages, is the only portion expressly devoted to the Principles of the Law of Divorce and Matrimonial Causes, and, of that Part, some 50 pages discuss Evidence, Res Judicata and Points on Procedure; topics more closely akin to practice than to substantive law. The third large division—the appendices—contains 224 pages of Statutes and Rules of Court.

This brief excursion into statistics indicates the prominent part played by adjectival law in the field of Matrimonial Causes and serves to emphasize the truth of the cynical, but trite, statement that success in divorce litiga-

[12] [1924] A.C. 687.
[13] [1940] P. 96.
[14] (1945), 61 T.L.R. 525.
[15] [1943] A.C. 517.

tion depends at least as much on the ability to prove the existence of merits by the use of irreproachable procedure and of persuasive and admissible evidence as it does on the actual possession of merits.

Much of the material in the division dealing with Practice is of no direct application in this country, but it contains many forms and suggests numerous devices which can be modified to suit the procedure in the various Canadian provinces; it certainly leaves the Canadian barrister with a firm impression of the atmosphere of completeness and thoroughness that pervades the English law and practice relating to divorce and kindred matters.

To the reader who turns to Latey on Divorce for the purpose of making his first acquaintance with the general tenor of the fundamentals of Matrimonial Law and Practice some of the chapters on substantive law may seem to commence abruptly and to lack cohesion, and some of the comments on practice may seem to be prolix and repetitious, but the book will be of great value to the practitioner who is familiar with the basic elements and who is seeking for authorities and detailed guidance on points of procedure.

E.F.W.

* * *

Le Problème du Droit International Américain: Etudié Spécialement à la Lumière des Conventions Panaméricaines de la Havane. By M. M. L. SAVELBERG. The Hague: A. A. M. Stols. 1946, Pp. xix, 361.

It might be thought that the question whether there exists an American international law differing essentially from general or universal international law is one of those highly theoretical questions the discussion of which might well be postponed until solutions have been found for more pressing problems. But anyone who has studied the history of the Pan American movement knows that the myth of an American international law was an important factor in the continental isolationism that characterized that movement before the war. Mr. Savelberg's study therefore has practical as well as theoretical value.

In a first chapter, he develops the thesis that there is nothing in the nature of international law itself which provides any answer to the question whether there exists an American international law. This chapter is really an essay on legal theory and will be fully understood only by trained legal philosophers. In it the author discusses not only the legal theories of such writers as Kelsen, Verdross, Jellinek, Triepel, Krabbe, Gény, Duguit and Scelle, but also the Neo-Kantian theory of knowledge. Mr. Savelberg is greatly attracted by Duguit's system of social solidarity; but it is on Scelle's elaboration of Duguit's theory that he bases his conclusion:

> Puisque le véritable fondement de la norme de droit international se trouve ainsi dans les nécessités biologiques de la société intéressée et que ces nécessités sont essentiellement variables d'après l'époque et le milieu dans lesquels lesdites sociétés évoluent, il est naturel que la conformité et l'unité de ces nécessités biologiques et dès lors des règles internationales se produira plutôt entre ces états liés par des rapports étroits d'ordre économique ou culturel qu'entre des états se composants d'individus qui ne sont liés entre eux ni par une similitude de culture ni par des relations économiques de quelque importance.

> Cette conclusion implique d'une part que les divergences entre le droit international en vigueur dans les relations internationales américaines sont sans doute possibles et même probables, mais que d'autre part leur existence n'est pas prouvée par la nature même du droit international, puisque tout dépend ici des circonstances de fait et qu'il sera notamment nécessaire d'examiner si les différences entre les règles de droit en vigueur entre les états de la société oecuménique et celles qui président aux relations internationales américaines sont assez importantes pour qu'on puisse les qualifier d'un véritable complexe de normes spéciales ou de principes distincts applicables aux relations interétatiques auxquelles participent les états américains.

Mr. Savelberg then proceeds to examine the various codifying conventions that were adopted at the Havana Conference of 1928 for the purpose of ascertaining whether, as a matter of fact, these reveal derogations from general international law important enough to warrant the conclusion that there does exist an American international law. The major part of the book is devoted to this analysis. This is a detailed examination, article by article, of seven Pan American conventions on the status of aliens, treaties, diplomatic agents, consular agents, maritime neutrality, asylum, and the rights and duties of States in the event of civil strife. It is the best and most original part of the book and will be useful not only to students who are interested in the theoretical problem with which Mr. Savelberg is primarily concerned but also to international lawyers who have to interpret the conventions. Having completed this analysis, the writer feels that he is in a position to offer an answer to the question whether there exists an American international law "dans le sens d'un complexe de règles juridiques qui diffèrent essentiallement de celles qui sont en vigueur dans les relations interétatiques en géneral". This answer is a formal "no" (p. 306).

The book terminates with a series of draft conventions which the author offers as a basis for a universal codification of international law on the subjects covered by the Havana conventions. One of them is a draft convention on maritime neutrality. It is surprising that in this, one of the first books on international law to come out of Europe since World War II, the author should still be concerned with the codification of the law of neutrality. Apart from the fact that the United Nations Charter revives the concept of the unjust war with all its consequences, Mr. Savelberg, as a Dutchman, should know that neutrality in the conditions of modern war means nothing.

JOHN P. HUMPHREY

McGill University