

Reviews and Notices

The Canadian Law and Practice Relating to Letters Patent for Invention. By HAROLD G. FOX, M.A., Ph.D., Litt.D. Third edition in two volumes. Toronto: The Carswell Company, Limited. 1948. Vol. I: pp. xcvi, 736. Vol. II: pp. xiii, 737-1632. (\$35.00)

The publication of a work by Harold G. Fox, K.C., on the law of industrial property is always an event of importance to practitioners in the field. This is the third edition of his well-known book on patents. It has been revised and expanded to such an extent that it constitutes a new and more complete approach to the subject. All phases of patent law have been analyzed, including a number of closely related branches.

One of the outstanding features of this edition is the narrative form in which it is written. Dr. Fox's easy style will be particularly helpful to laymen who are commencing their study of the patent law through this book. On the other hand, for those who must explore the deeper mysteries of the subject, there is a complete index of cases, with excellent footnotes throughout the text, which will be of great assistance in preparing detailed briefs.

The chapters on "Subject Matter" and "Invention" are worthy of special mention. I have never read a clearer exposition of these important aspects of patent law. One of the greatest difficulties in determining whether an idea is patentable is to distinguish various forms of inventions from discoveries and other ideas which do not constitute an invention. These chapters contain a clear analysis of the problems and the author also explains the differences between various forms of industrial property rights, such as patents, copyrights, industrial designs and trade marks.

In addition to the substantive law of patents, discussed in the first part of the work, the author has dealt with various matters that have to be considered in connection with the filing and prosecution of patent applications. This part will be of particular use to patent agents who are primarily concerned with the preparation and prosecution of applications in the Patent Office.

All important forms of court proceedings in which patents may be involved are fully covered, much more completely than in either of the two previous editions. This section includes appropriate forms of pleadings, and other court documents have been carefully selected from leading cases which have come before the Canadian courts.

For the first time in any Canadian textbook of which I am aware, a complete record has been incorporated of all the orders in council and other regulations affecting industrial property rights that were enacted during the late war. Judging from the patent problems created by the first world war and those that have already arisen out of the second, this collection

of orders and regulations should prove extremely useful for several years to come.

Other important items to be found in the appendix are the International Convention for the protection of industrial property, certain proposals made by a departmental committee in Great Britain dealing with patents, and the Atomic Energy Control Act together with the regulations issued under it.

I have made a careful study of all the books that have been published by Dr. Fox and have had the pleasure of reviewing some of them. Not always have I shared his views on what the law *should be* but, as stated in the preface of this edition, Dr. Fox has endeavoured to state what the law *is*; in this purpose he has been eminently successful. This is by far the greatest contribution he has made to legal writing and anyone interested in the subject of Canadian patent law will find it a most valuable work.

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Inner Temple Papers. By SIR FRANK DOUGLAS MACKINNON.

London: Stevens & Sons Limited. 1948. Pp. vii, 236. (\$6.25)

Over the years I have taken such pleasure out of the writings of Sir Frank MacKinnon, his two books *The Murder in the Temple, and Other Holiday Tasks* and *On Circuit*, and his contributions to *The Times* and *The Law Quarterly Review*, that I opened his latest and posthumously published work with much anticipation. I must confess I was at first somewhat disappointed. No less than three of the articles in the *Papers* had already appeared in *The Murder in the Temple*: "Sir Christopher Hatton, K.C.", "Readers and Their Coats of Arms" and "Sir Edward Coke". Here were some thirty pages which I should rather have had filled with something new to enjoy. It seemed to me, too, that some repetition in the other articles might have been eliminated by judicious editing.

But my disappointment did not lead to resentment, and soon passed away. The last article, "The Ravages of War 1939-1945", illustrated by eleven photographic plates and a plan, gives a vivid description of a destruction that was seen and heard of with a rage and a horror that flame anew each time we think of it. To me the almost complete destruction of the Temple Church was, perhaps, the most heart-breaking of all. Construction of that most beautiful building was begun by the Knights Templars in 1130 and it was dedicated to St. Mary five years later by Heraclius, Patriarch of Jerusalem, in the presence of Henry II, to whom the Patriarch had offered the Crown of Jerusalem, and all his court. It had to wait until 1941 before it fell before a barbarism more hateful than any a world well used to barbarism had ever seen. But Hitler is gone and a Temple Church will rise again to the greater Glory of God and as a testimony to the fact that the Spirit in man will always in the end prevail.

I like MacKinnon's books and essays because he was a lawyer who loved the law and the profession of the law, and who laboured to set out and help to perpetuate traditions that we must never permit to be lost. We of the profession owe him a great debt of gratitude. He was a Janeite, I read *Pride and Prejudice* often; he was a Pickwickian, who can help loving Mr. Pick-

wick and the two Wellers, "Samivel" and his remarkable father; and he was a spiritual friend of Charles Lamb, the Gentle Elia.

In 1927 MacKinnon published an annotated edition of Lamb's most famous essay, "The Old Benchers of the Inner Temple". The annotation, revised in the light of much later-found material, is here printed with the essay and forms nearly half the book. I would cherish this volume for this alone and I know it will give great pleasure to countless readers.

In his essay Lamb lamented that the sun dials and the fountains were vanishing and, speaking of the disappearance of the fountain from the square of Lincoln's Inn, he said: "The fashion, they tell me, is gone by, and these things are esteemed childish, Why not, then, gratify children, by letting them stand? Lawyers, I suppose, were children once." The sun dials came back and Master Bruce Williamson recorded in his monumental and fascinating work on The Temple that, in 1924, the Middle Temple had six sun dials. After mentioning this MacKinnon adds:

"... Sir Francis Kyffin Taylor, as Master of the Garden, in 1928 caused a fountain to be made in the Inner Temple garden, towards the south of its great lawn. In 1930 this was completed by the erection near the edge of its brick basin of a leaden statue, the work of Miss Margaret Wrightson. The figure is that of a beautiful young boy. He holds an open book at his knee, but his head is raised, and he gazes across the lawn at the front of No. 2 Crown Office Row, and at the tablet upon it that records Lamb's birthplace. Upon the page of the book is inscribed 'Lawyers were children once'. This was my suggestion, and I am not modest enough to deny myself the pleasure of taking that credit."

Here I think we see the real Frank MacKinnon for the kindly and understanding soul he was. We must remember this when we read some of his criticisms, which at times sound almost harsh and often too impatient. He is, I think, too hard on poor Daines Barrington, one of the "Old Benchers". Barrington was not a profound lawyer, but in his day he was an antiquarian of some note, a fact that should have won the tolerance of our author. In the year 1779 he reported that he had found and talked with an old Cornish woman, Doll Pentreath, the last person to speak Cornish as a living language. This excited the sarcastic mirth of Horace Walpole, "the most eccentric, the most artificial, the most fastidious, the most capricious of men" as Macaulay calls him, whose remarks MacKinnon quotes. He also quotes some verse and a somewhat vulgar note by Peter Pindar, a name which disguises the Rev. John Walcot, the rather coarse, but undoubtedly clever "Pachydermatous" parson. But these are not good witnesses. The modern authorities agree that Cornish ceased to be spoken by the people of Cornwall by the end of the eighteenth century and, by them, Barrington is justified.

MacKinnon says, not quite accurately I suggest:

"Whatever was the fame, or the achievement, of these 'Old Benchers' they are remembered now only because of Charles Lamb, and from his description of them. In the pages which follow I have collected and set down some details of their lives. To rescue these from oblivion may be worth while if Charles Lamb honoured them by his essay."

To Canadians, Francis Masères is of course the most interesting of all the Old Benchers. Although we may agree with MacKinnon that "he was not a success as Attorney-General of Quebec", an appointment he held from 1766 to 1769, and that his strong Huguenot prejudices were the cause

of his failure, he was a man of much more than ordinary ability. His writings on many subjects, legal and scientific, were voluminous and showed remarkable talents. Masères, who became a Cursitor Baron of the Exchequer, would probably be satisfied with the view of him that Jeremy Bentham expressed and which MacKinnon faithfully records with much other comment, mostly unfavourable. He says:

"Jeremy Bentham speaks of 'the late Baron Masares (sic), the public-spirited constitutionalist,' and one of the most honest lawyers England ever saw'. And elsewhere he says 'Baron Masares was an honest fellow, who resisted Lord Mansfield's projects for establishing despotism in Canada. He occupied himself in mathematical calculations to pay the national debt, and a good deal about Canadian affairs. There was a sort of simplicity about him which I once quizzed and then repented.'"

To this I might add a sentence or two from Professor A. M. Lower's recent book *Colony to Nation*:

"Masères himself recommended in place of these very indeterminate 'laws of Canada' a code, based on usage and on English principle. If his code had been adopted much confusion would have been saved."

There is an interesting story told by Jekyll (1753-1837), another of the Old Benchers, recorded by Lord Campbell in his *Lives of the Chancellors* and repeated by MacKinnon:

"A strange solicitor came up to him in Westminster Hall, and begged him to step into the Court of Chancery to make a motion of course. On Jekyll's showing some surprise his new client said to him, 'I thought you had a sort of right, Sir, to this motion, for the bill was drawn by Sir Joseph Jekyll, your great uncle, in the reign of Queen Anne'."

It is impossible to do justice to this book in a short review. It should be on the library shelves of every lawyer interested in his profession. It is a source-book of information and contains much that is useful and more that is fascinating to any one who desires to feel himself a real member of the ancient brotherhood of the law. As a source-book it should have an index; the absence of one is its only real defect. It is a well printed and attractively bound volume which the publishers have presented to us. I gladly place it beside its forerunners and only hope that some day all the other random writings of Sir Frank MacKinnon will be collected into another volume to add to the three I now possess.

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Palmer's Company Guide: A Manual of Everyday Law and Practice. 36th edition by J. CHARLESWORTH, LL.D. London: Stevens and Sons Limited. 1948. Pp. x, 296. (6s. 6d. net)

Dr. Charlesworth's works on company law and other subjects have long been regarded as authorities in Canada. Within the last few months we have had from his pen new editions of his *Principles of Company Law* and *Palmer's Private Companies*, as well as of the book now under review; he was one of several editors of the latest editions of *Clerk and Lindsell on the Law of Torts* and *Chitty's Treatise on the Law of Contracts*, already reviewed

in this journal. The present, and thirty-sixth, edition of *Palmer's Company Guide* was made necessary by the passing in England of a new Companies Act in 1948.

This edition follows closely the style set by its predecessors. Its purpose, as set out in the preface, is "to supply shareholders, directors, secretaries and others with information upon the many legal and practical questions which are constantly arising in connection with companies". In this aim the editor is eminently successful. The book begins with an examination of a company's legal position and the reasons that induce people carrying on business to form companies. This is followed by a discussion of methods of incorporation and indeed of almost every phase of corporate law — shares, powers of directors, prospectuses, procedure at meetings, to name a few.

The outstanding feature of this book is the clarity and systematic order in which corporate functions are set out and explained. Written in concise, readable language, it avoids technical terms and befogging legal embroilments. For these reasons, the layman seeking an introduction to the intricacies of company law should find it invaluable. The comprehensive index will enable him to refer to any topic treated in the text quickly and with a minimum of effort.

Though the book is written primarily for those outside the legal profession, lawyers will also find it helpful, particularly for the wealth of forms and precedents contained in the appendix. The student of law, also, will derive benefit from its concise and accurate treatment of fundamental concepts of company law and practice. Indeed, the book well merits the title given it by an English reviewer, "Company Law Without Tears".

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A Concise History of the Common Law. By THEODORE F. T. PLUCKNETT. Fourth edition revised and enlarged. Toronto: Butterworth & Co. (Canada) Ltd. 1948. Pp. xxxiii, 707, 60. (\$8.25)

An Historical Introduction to English Law and Its Institutions. By HAROLD POTTER. Third edition. London: Sweet & Maxwell, Limited. 1948. Pp. xxiv, 650. (£1. 17s. 6d.)

The Common Law of England. By A King's Counsel. Toronto: McClelland & Stewart Limited. 1948. Pp. 36. (\$0.75)

Why should a law student or lawyer in 1949 be required to know what remedy lay to an unpaid seller who had delivered goods to a purchaser in 1549? What difference does it make if he knows that the name "Star Chamber" may have been derived from *starra*, Jewish contracts deposited in the chamber, or from the stars in the ceiling of the chamber? Is the student likely to be a better lawyer if he knows that in Anglo-Saxon times one's hope of salvation was regarded as sufficiently material to be a "pledge of faith"? In short, why bother with the history of law?

The answer is that legal history has a threefold utility. First and foremost a student must learn that the law is constantly changing and developing and when he attempts to predict what a court today will do with a "new" problem he must be able to sift the relevant from the obsolete in past decisions. The doctrine of *stare decisis*, which gives what little certainty there is to the common law, is meaningless unless the old decisions are examined in their historical setting.

Secondly, legal history is vitally necessary in analysing modern problems of legislation and legal and social reform, problems for which the citizen-lawyer must take primary responsibility. Consequently legal history must not merely record changes; it must also show why the changes were made. This involves some knowledge of the social conditions that created or tolerated the doctrines or institutions. "Roman law was all very well at Rome; medieval law in the middle ages. But the modern man in a toga, or a coat of mail, or a chasuble, is not only uncomfortable but unlovely."¹

Thirdly, legal history opens up centuries of the romance of law. Quaint customs take on new meaning and sense. This use of legal history has perhaps little appeal to a lawyer whose chief concern is service and its reward, but even he may enjoy the romance of the law in his leisure moments.

It is sufficient praise to say of Professor Plucknett that he has produced in his *Concise History of the Common Law* a vast amount of useful historical and legal data enlightened throughout with his brilliant interpretation. No single volume of legal history so completely answers the needs of a student or lawyer who seeks the threefold utility of the subject. The task of the reviewer of a new edition of a standard work is usually a simple one. He need merely note the additions and corrections that have supposedly justified this latest assault on the lawyer's purse. This has been well enough done by the author himself in his short preface. He says, "Besides these additions [of some new materials] (which are distributed fairly evenly through the book), there have been numerous revisions, occasionally rearrangements, and sometimes a more ample explanation of difficult points. . . . All this has entailed a slight increase in the size of the book, although no new topics have been introduced." In this review, however, it may be desirable to say more, because this excellent text, now in its fourth edition, has not been reviewed in the pages of this journal before and will probably come to many readers as a "case of first impression".

A *Concise History of the Common Law* is little more than its title indicates. It is concise. The late Sir William Holdsworth undertook a full length history, which runs to a dozen volumes. But the student may be forgiven if he attempts something less forbidding in his initial research into history. With the needs of the student particularly in mind Professor Plucknett, who is now a professor of legal history at London and who was onetime assistant professor of legal history at Harvard, has written an admirable short treatise. Despite its brevity it retains a high degree of accuracy and it is both carefully documented and fully indexed. If it is open to criticism it is that it is too concise; the author has put too much in so little space. Undoubtedly the reader will have to think over some of the material carefully to get its full import.

The book is divided into two parts: a general survey of legal history and a series of short introductions to the history of certain branches of the law.

¹ Maitland, *Collected Papers*, Vol. III, p. 487. Quoted by Plucknett in the work under review at p. 617.

The general survey is institutional: it deals with The Crown and The State, The Courts and The Profession, and Some Special Factors in Legal History (which include civil and canon law, custom, legislation and precedent). In book two, no new topics have been introduced and, as in the third edition which added the title Succession, there are now the titles, Procedure, Crime and Tort, Real Property, Contract, Equity and Succession. Of these I should select the chapters on custom, legislation, precedent and contract, topics with which I may claim some familiarity, as the most valuable in comparable literature.

Professor Potter's *Historical Introduction to English Law and Its Institutions* is in its third edition and its reappearance only six years after the second edition² is testimony to its popularity. In his preface the author defends himself against criticism for the amount of detail which the book contains: "without the detail the undergraduate has no material with which to master the *reason* of the first principles". I should be the last to dispute that observation, but I think Professor Potter could have added more interpretation of those details for the benefit of students who, at all costs, must be saved from the notion that details are important if they shed no light on causes. Professor Potter has written a valuable text, although it suffers by comparison with Professor Plucknett's, which makes a distinctly more helpful contribution to the interpretation of English legal history. I should add that students have told me they find Professor Potter more readable than Professor Plucknett, which I can well believe, but I think the extra effort in reading *A Concise History of the Common Law* is rewarding. A comparison of the authors' treatment of the Court of Star Chamber illustrates their different attitudes. Both authors write of the origin of the court, the authority of its jurisdiction, its decline and ultimate abolition. In addition Professor Plucknett emphasizes that the Court served a necessary purpose in enforcing the statute law, before it indulged in the excesses that led to the eventual decline.

It is unfortunate that two branches of modern law which are badly in need of good historical analysis receive so little attention from either author. The legal concept of the corporation is vital in modern economic development and anyone who studies the history of that concept during the nineteenth century may well wonder at its distortions today as an instrument of income tax avoidance. And no branch of modern law suffers more from an inaccurate appraisal of history than administrative law with its illegitimate parents, the rule of law and the separation of powers. The history of the concept of the corporation is almost totally ignored by both authors and very little space is given to administrative law by either. Professor Plucknett has valuable material on administrative law throughout his book but nowhere has he correlated it in an extensive analysis under that heading. (Cf. the brief summary on pages 185-187.) Perhaps we may hope to have this subject added in the next edition. If Professor Plucknett brings his unusual powers to bear the results cannot fail to be helpful as a study of this book and his *Statutes and Their Interpretation in the Fourteenth Century* will quickly show. Professor Potter has a topical heading "Administrative Law" in which he discusses administrative tribunals along with conciliar courts, the Star Chamber, the Chancery and the Privy Council. This is a fair enough classification, although the author seems to expect severe criticism from

² Reviewed in (1943), 21 Can. Bar Rev. 333. The first edition was noted by the editor in (1933), 8 Can. Bar Rev. 579.

"enthusiasts for Administrative Law". But my criticism is not of the classification but of the failure to discuss the reasons for the growth of modern tribunals. Perhaps it is too recent history to attract antiquarians but neither author can be called an antiquarian by any means.

The Common Law of England is the text of three broadcast talks: The History of the Inns of Court, The Substance of the Common Law and The Practice of the Common Law. In a foreword Lord Chancellor Jowitt describes the anonymous author as "well versed in the history of our law . . . he has a feeling, almost of veneration, for its origin and structure". The author's very brevity compels him to generalization and he succeeds only in making a rather uncritical appraisal of the common law which he evidently considers to be the embodiment of everything that's excellent with no kind of fault or flaw. For statute law he has no such respect and one cannot but admire the optimism of the courageous tory who attacks the supremacy of Parliament at this late date. "When the Parliamentarians claim that their power is transcendent and absolute and cannot be confined within any bounds; and that, if you please, they may at their discretion make a law which is unjust and contrary to the principles of sound government, a common lawyer is dumb. Is Parliament not bound by the rules of Justice?" Comment seems hardly necessary. The wonder of it is that a supposedly socialist Lord Chancellor has endorsed the publication. Of course, the supposedly socialist Lord Chancellor embodies the law. The common law, that is.

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Part of the Law of England

Now followeth the Second Part, De Legibus, wherein these parts were considered: first that the ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the Law of England: thirdly, that the law of nature was before any judicial or municipal law: fourthly, that the law of nature is immutable.

The Law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world. (Calvin's Case, 7 Coke's Reports 1a)