Reviews and Notices

La Responsabilité civile délictuelle et quasi-délictuelle. Par ANDRÉ NADEAU, avocat au Barreau de Montréal et Diplômé de la Faculté de Droit de Paris. Tome 8, Traité de Droit Civil du Québec. Montréal: Wilson et Lafleur (limitée). 1949. Pp. xxxix, 664. ($14.00)

This is a good book, practical and scholarly. And if anyone asks what is intended by "scholarly" in this context, I add — thorough, accurate, clearly expressed and balanced in judgment.

Although Mr. Nadeau has had in mind particularly the needs of the practising lawyer, his book is much more than an organized digest of jurisprudence. True, all the aids to ready use are here, a detailed table of contents, bibliography, list of abbreviations, table of cases and index. About 2,500 cases are cited, including all judgments of the Privy Council and the Supreme Court of Canada reported to the end of 1948, all reported judgments of the Court of King's Bench (Appeal Side) for the last fifteen or twenty years with the more important of its earlier judgments, and all judgments of the Superior Court that the author considers significant. But the cases are presented against their historical and doctrinal background and the author never hesitates to express his restrained dissent when he considers that a decision of the courts is inequitable or runs counter to the broad stream of the law. His usual method is to begin a topic with a reference to the applicable text, from code or statute; a discussion of the history and principle of the provision follows, and then its detailed application to particular cases. He has taken account of such case notes as have appeared in Canadian legal periodicals and, a rather unusual feature, in the French *Revue trimestrielle de droit civil.* Adequate recognition is given the views of his predecessors in Canada and France who have worked in the field.

Common lawyers are apt to criticise the civil law, with its codes, as an over-rigid, inflexible system, poorly equipped to meet special cases or changing social needs. As a generalization on the civil law the criticism is of doubtful validity, and it is still more doubtful when directed against the law of offences and quasi-offences. For the basic law of civil responsibility is to be found in the Quebec Civil Code, and the six articles of the Code on offences and quasi-offences, 1053 to 1056b, and the incidental other articles that are relevant, do little more than state general principles, define an approach to the subject. This approach, as Mr. Nadeau makes clear, is an individualistic and subjective one — a Christian one if you wish — finding clearest expression in the rule of article 1053 that everyone capable of discerning right from wrong is responsible for the damage caused

by his fault to another. The Quebec law of civil responsibility is largely uncodified, leaving the broadest discretion to the courts in the decision of particular cases. For this reason Mr. Nadeau is right when he says in his preface that the jurisprudence has played a preponderant rôle in the domain of offences and quasi-offences, and right in the emphasis he places throughout his book on the decisions of the courts. When one adds to the rôle of the jurisprudence that the doctrine of *stare decisis*, in its strict sense, is not recognized in Quebec, one is tempted to suggest that the common lawyers are wrong, at least for this subject, and that in reality the civil law of offences and quasi-offences is more flexible than the common law of torts. Which may be good or bad, but that is another question.

It is true of course that certain practically important branches of the law of delictual responsibility have been removed from under the tent of the Civil Code and are now governed by special statutes. In the result the arrangement of topics in a book on delictual responsibility raises some problems. The traditional statement of the conditions for responsibility in the civil law is fault, damage and a causal connection between the fault and the damage; and the author is following the expected order when, after an introductory chapter, he begins in chapter 2 his discussion of fault and the responsibility prescribed by article 1053 C.C. for one's own fault. Particular categories of fault, among other things, are discussed in immediately succeeding chapters, for example, fault of public carriers, in railway accidents, assault, seduction, unfair competition, abuse of rights (such as the misuse of judicial process and defamation) and the professional responsibility of medical men, veterinaries, dentists, notaries, advocates and banks. With chapter 8 he reaches the cases where fault is presumed under the Civil Code, the responsibility under article 1054 for the fault of persons under one's control. Chapter 9 concerns the responsibility for the damage caused by things under one's care, where also under article 1054 fault is presumed. In chapters 10 and 11 he discusses article 1055, the responsibility for animals and for the ruin of buildings, respectively. Article 1056, which concerns the cases where a person injured by an offence or quasi-offence dies as a result without being indemnified, is dealt with in chapter 13 and the general subject of damages in chapter 14; causal connection is relegated to a section of chapter 16.

I should not wish to appear to be attaching too much importance to this matter of arrangement. For the practising lawyer it is not of first importance if he is given adequate cross-references, tables of contents and indexes, as he is here. But as I read the book consecutively from beginning to end it was a little unexpected to find the author electing to deal early on with the special situations created, for example, by the Motor Vehicles Act and the Workmen's Compensation Act, where fault is presumed or not in issue at all, the Motor Vehicles Act in chapter 3 and the Workmen's Compensation Act in chapter 7. He may be right in doing so, but his chosen arrangement does force him to anticipate some fundamental questions which are not discussed at length until later, for example, damages and causal connection, to which too little attention has been given by Quebec judges and jurists.

Writing primarily for practitioners as he is, Mr. Nadeau's main concern is naturally with the law as it is rather than as it should be, though he is careful to note any suggestions for improvement that have been offered

by others. For example, I still adhere to the opinion expressed elsewhere that article 1056 might well be repealed. No one has been able to explain satisfactorily why it was inserted in the official version of the Civil Code when it was not mentioned in the draft prepared by the Commissioners or in the amendments to the draft made by the Legislature. As Mr. Nadeau says, it appears to have been derived from chapter 78 of the Consolidated Statutes of Canada, 1859, which in turn is a reproduction of an 1847 statute of the Province of Canada, which in turn is based on the British statute of the previous year known as Lord Campbell's Act. Article 1056 introduces an alien element into the Civil Code, the practical effect of which is to limit the cases where otherwise a damage action could be taken after the death of the immediate victim, not to extend them as had been the purpose of Lord Campbell's Act. Mr. Nadeau may be right in thinking that the purpose of the statute of 1847 was to make uniform the law of Quebec and Ontario, but the peculiar desire for uniformity in this small branch of the law can hardly be explained, as he tentatively suggests at page 490, on the ground that "à cette époque les accidents mortels de chemin de fer, sur les lignes reliant l'Ontario au Québec, étaient fréquents et qu'on ait voulu en disposer de façon semblable dans les deux provinces pour éviter les conflits de juridiction". Reviewers should resist, I know, the temptation to show how clever they are by fastening on minor and isolated errors, but I am going to succumb this once and say that there were no railways joining Quebec and Ontario for several years after 1847. Let us get rid of article 1056.

Quebec lawyers have been heard to lament the scarcity of legal writing in the province. Though no doubt it is possible to improve even a good thing, one could make an argument for the proposition that there is a more general awareness of the importance of legal scholarship in Quebec than in any other province and that more writing is being done on legal subjects in Quebec than in all the rest of Canada combined. Two monthly journals, *La Revue du Barreau* and *La Revue du Notariat*, are supported by the two branches of the province's legal profession. The book under review is itself but one volume in a planned series covering the whole range of the Quebec civil law, of which four volumes had appeared previously: Volumes 1 and 2 (1942) by Mr. Gérard Trudel, K.C., on persons; Volume 3 (1945) by Mr. André Montpetit, K.C., and Mr. Gaston Taillefer, on property; and Volume 7 (1946), again by Mr. Trudel, on contracts. For this activity, and other examples could be given, there is probably a variety of reasons, the strongest being that both French- and English-speaking lawyers in the province accord, in the tradition of civil-law countries, a significant rôle to juristic writing in the practical administration of justice.

Be that as it may, Mr. Nadeau's volume belongs among the best of the many estimable books that Quebec lawyers have written for the benefit of their confrères and he will have the thanks of the profession for the four years or so that he gave to its preparation.

G.V.V.N.

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Five Lectures on Corporate Organization and Finance. Montreal: Faculty of Law, McGill University, 1020 Pine Avenue West. 1949. Pp. 104. ($2.50)

This publication contains a transcript of five lectures arranged by the Faculty of Law of McGill University in connection with the celebration of its centenary and delivered to students of the faculty and practising members of the Bar in the Province of Quebec. The interest manifested by both students and practitioners in these well-attended lectures and in the question periods that followed shows the effectiveness of the approach to the complex problems of a highly specialized branch of law and its suitability for what Dean LeMesurier in his introduction calls "the continuing education of the Bar".

The project marks a step forward in legal education in Canada. For law schools in other provinces, it furnishes an example of co-operation between distinguished members of the Bar and professional educators in a law faculty. Legal education is meaningless if practice and theory are not combined. The means chosen by McGill to acquaint students with various aspects of corporate practice is the beginning of what may be termed a "clinical" system. The multitude of matters covered in these short lectures indicates admirably the advantages of this type of practical education in specialized subjects when compared with the piecemeal type of experience obtainable in law offices.

The McGill Law Faculty was fortunate in having as lecturers men eminent in their respective fields and familiar with both the theoretical and practical aspects of company law, finance and taxation, who, in the introductory words of the Dean, were willing "to share their experiences with younger men and with those who have not had the same opportunity of specializing in the particular field". Condensation of the subject of corporate organization and finance into five lectures inevitably resulted in many generalities, but the transcripts both of the lectures and the question periods constitute a convenient and valuable discussion of fundamental principles.

The first lecture in the series is by W. P. J. O'Meara, K.C., Assistant Under Secretary of State and officer in charge of the Companies Branch in Ottawa. He deals with "Incorporation and Procedure under the Dominion Companies' Act", and gives valuable advice on practical problems that have arisen in his day-to-day dealings with the legal profession. In discussing the main features of incorporation and the selection of corporate names, he offers useful hints on the drafting of petitions for incorporation and points out methods of avoiding pitfalls which often result in delays in obtaining a charter. Mr. O'Meara concludes by indicating the duties owed, and the services to be performed by corporate bodies if corporate free enterprise is to be preserved.

The mysteries of "Corporate Financing" are laid bare by Aubrey Elder, K.C., in a well-digested, analytical lecture. The address deals with unavoidable technical intricacies but clarifies briefly and effectively the main problems encountered in the subject. His treatment of the policies underlying corporate borrowings is especially interesting and valuable to both student and practitioner.

The subject of "Corporate Reorganization" is admirably covered by

Wilbert H. Howard, C.B.E., K.C., who expertly deals with the whole range of questions likely to arise in any compromise or arrangement. Although Mr. Howard refers to the many types of reorganizations that may be encountered and the impracticability of generalizing about them, yet in dealing with one type (designed to eliminate arrears of preferred dividends) he has given what will undoubtedly be regarded by practitioners in the field as the most useful and authoritative treatment the subject has yet received. Mr. Howard modestly states that his lecture is designed primarily for lawyers and students who have had little experience with reorganizations, but his material is so well chosen and presented as to be invaluable to the most practised members of the profession.

The history, principles and philosophy underlying securities legislation of various types are outlined in the lecture on "Public Securities Issues" delivered by the Honourable C. P. McTague, K.C. Concisely, the fundamental problems involved in such legislation are raised and explained, and a convincing case emerges in favour of legislation designed merely to ensure that there be "full, plain and true disclosure of all facts relating to the issue", as distinguished from the creation of an agency with complete discretion to permit or refuse the sale of securities. Securities legislation is now an accepted ingredient of our economy. A distinct contribution to an understanding of its background, so essential to the lawyer, has been made in this paper.

The last lecture of the series was given by H. H. Stikeman on the subject of "Corporate Taxation". In characteristic fashion Mr. Stikeman has prepared a useful and lucid treatise on the fundamental questions: (1) When is a company taxable? (2) Upon what is it taxable? and (3) When is its income realized? The new Income Tax Act is outlined by the expert's deft hand and a thoughtful and scholarly approach made to problems likely to be encountered in corporate taxation. His treatment of dividends paid by personal corporations out of capital surplus, and his rebuttal of suggestions that capital gains fall within the ambit of the taxing Act, are particularly valuable. The lecture concludes with an attack on section 126 of the new Act, which is designed to prevent "improper tax evasion". The basic point is made that this section allows taxation without representation. It is to be hoped that the attack so ably initiated will be pressed with continued vigour to the end that a section so contrary to fundamental taxing principles will eventually be repealed.

The corporate form of doing business is increasingly prevalent in the modern economic world. Specialized knowledge of its intricacies is ever more necessary and the publication under review is an important contribution to this branch of the law. The Faculty of Law at McGill is to be complimented for laying an educational cornerstone, and the lecturers for taking time from busy lives to give to students and fellow practitioners the benefit of their experience.

J. S. D. TORY

Toronto

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Dr Johnson and the Law. By SIR ARNOLD MCNAIR, K.C., C.B.E., L.L.D., F.B.A. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada Limited. 1948. Pp. xi, 115. ($2.25)

> "Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants."

This is one of the striking remarks made by Dr. Johnson about law and lawyers to be found in Sir Arnold McNair's interesting book. It was said to a retired "solicitor in Chancery". Other things he said lead one to believe that the great man had a poor opinion of attorneys as a class, but, the reader is informed, the reputation of a solicitor in Johnson's day stood much higher than that of an attorney.

Sir Arnold is well known to Canadians, among other things as the author of *Legal Effects of War* (1948) and as a judge of the International Court of Justice. The references to Dr. Johnson's discussions of things legal occupy seven pleasant-reading chapter, through which flits the engaging figure of Boswell, his staunch and admiring friend, who had been admitted as an advocate in Scotland. "We have all been reading your travels, Mr. Boswell", Lord Mansfield said at one of his celebrated Sunday evening conversations; to which Boswell replied with characteristic loyalty, "I was but the humble attendant of Dr. Johnson".

Legal friends and contemporaries are the subject of the first chapter. Hardwicke (1690-1764), Mansfield (1705-1793) and Blackstone (1723-1780) pass on the stage before us. It does not appear that Johnson (1709-1784) ever met Hardwicke or Mansfield, but the author is led to assume that he must have been influenced to some extent by their pre-eminence. Thurlow (1731-1806), Stowell (1745-1836) and Sir Robert Chambers (1737-1803; he went to India as a judge in 1774) seem to have been direct legal influences. Boswell (1740-1795), whom Johnson first met in 1763, cannot have been without some effect on his legal thinking. There is little, if anything, to indicate that Johnson was influenced by Lord Camden (1713-1793), whom Thomas Erskine May described as the great constitutional lawyer of the age. Although on terms of friendship with Lord Stowell, it is said that Johnson disliked the latter's brother, Lord Eldon (1751-1838). Reference is made also to his association with many less notable lawyers.

Chapter two describes Johnson's legal library and reading. The list is imposing; it includes Grotius, whom he greatly revered, and Suarez. Although he had never trained as a lawyer he maintained an interest in law as a body of principles. Legal conceptions and institutions as the expression of the needs or traditions of a society aroused his mind to a degree that precise rules and their application did not. Chapter three contains his views on professional ethics, habits and prospects. Chapters four and five relate his arguments and other legal activities in Scots and English law respectively. Boswell not infrequently sought his opinion in matters upon which he was engaged before the Scottish courts. In some English matters Johnson appears to have acted as an intermediary between lay clients and counsel. He seems also to have been consulted in the preparation of law lectures, litigation and briefs, and on legal and moral arguments in questions involving public policy.

Particularly revealing are Johnson's comments on a variety of legal questions in chapter six. The author implies in a footnote that Johnson's argument for the absence of a check upon the Executive, and perhaps also the tenor of his answer to the resolutions and address of the American Congress, were influenced by the obligation he felt his pension imposed upon him to defend the Government of King George III. In those subjects one cannot help wishing that his penetrating mind had then been in harmony with the more enlightened views of the elder Pitt and Lord Camden. Although attracted to John Dunning (1731-1783), later first Lord Ashburton, one of the leading counsel of the day, there is nothing to indicate that he was in sympathy with the famous resolution Dunning carried in the House of Commons in 1780, that "the influence of the Crown has increased, is increasing, and ought to be diminished".

The sub-heading to this chapter, "Crimes and Criminals", intrigues the reader's interest. Johnson was connected with one murder trial, that of his friend Baretti (1719-1789), the Italian writer. The latter, set upon by three "bullies", stabbed two of them in self-defence, and one died. Johnson was one of the brilliant company of Burke, Garrick, Goldsmith, Joshua Reynolds and Beauclerk to give character evidence for Baretti, who was acquitted. Readers wishing for more of Johnson's views on crime and punishment are given references to his "Letters" and "Life". He attended the Westminister Police Magistrate during one winter to hear the examinations of accused persons. This Magistrate was Saunders Welch, who had succeeded the celebrated Henry Fielding (1707-1754).

In chapter seven we are told that Johnson regretted the lack of means (he had but one year at Oxford) that prevented him qualifying to practise law, for which he had an undoubted liking and more than considerable talent. He had gone to London with Garrick in 1737 to seek his fortune. The Dictionary was not published until 1755. The author indulges in pleasant speculation upon what success Johnson might have achieved at the Bar. This encourages conjectures of what he might have been if he had been favoured with the more cosmopolitan education of a Mansfield or a Brougham; or, if he had lived in our day, whether his mental endowments would not have fitted him to be the outstanding editor of a great metropolitan newspaper. In 1765 Trinity College, Dublin, made him an honorary doctor *in utroque jure* and Oxford, from which he had received the degree of Master of Arts in 1755, conferred on him the degree of Doctor in Civil Law in 1775.

Dr. Johnson was a unique figure in his own day, fortunate in that the times in which he lived provided an outlet for his peculiar talents. We in turn are fortunate that he had in Boswell a discerning recorder of his shrewd pronouncements upon life and people, who often combined literary artistry with a quality of timelessness in his writing that ought to ensure his continued popularity with readers for a long time to come.

Sir Arnold ends with a tribute that ought to be mentioned here. It is that Johnson did much for letters what Reynolds did for painting, and Garrick to a lesser degree did for the stage, in obtaining social equality and recognition for those who had something to contribute to art, literature and current thought; and this upon their merits, regardless of birth, rank, office, wealth or lack of wealth. Had he done nothing else, his niche in history should be secure.

This readable book is not one for lawyers only. It is written in a way to interest everyone in Dr. Johnson's stimulating and often robust sayings, and in Boswell's delightful word pictures of a man he so greatly admired.

C. H. O'HALLORAN

Victoria

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The Law and Custom of the Sea. By H. A. SMITH, D.C.L. (Oxon), Professor Emeritus of International Law in the University of London. Published under the auspices of the London Institute of World Affairs. London: Stevens & Sons Limited. 1948. Pp. x, 193. ($3.75)

The purpose of the author in this book is to give practical guidance to ships officers at sea. Its publication in 1948 is itself evidence of the continuing importance of the law and custom of the sea in an age of long-range aircraft and atomic bombs. Air transport is still in a comparatively early stage of development and shows no signs of replacing the lower cost transportation by water.

The lawyer will not be too surprised to learn that in practice no nation has adhered to any detailed and universally accepted body of rules. The conduct of ships at sea has been governed for centuries, writes the author, "by a body of rules, the main principles of which have been generally accepted by civilized mankind, though on many particular points, sometimes of great practical importance, the application of these principles is still controversial". It must be a little confusing to a practical ships officer to read at page 15, for example, that the law of nations has not yet achieved an indisputable rule on the width of the territorial belt and that he should only act on the views held by his own government. When recently a Canadian government patrol boat seized an American fishing schooner inside Canadian territorial waters, instructions were taken from the Department of External Affairs, not from the law books. "The clue to a solution", says the author at pages 17–18, "lies in the fact, which is admitted on all sides, that under modern conditions the three mile limit is not wide enough to afford protection for all the legitimate interests of the shore state."

If nations continue to insist on a principle of national sovereignty which precludes common interpretation and enforcement of law, diplomacy, despite its unimpressive record, may be a more effective method of solving international disputes than law. On the other side, it is clear that the unwritten law of the sea has been of great assistance in settling particular disputes, for example, the fishing controversies with which historically minded Canadians and Americans are familiar. Furthermore, the acceptance of these rules by the major powers can undoubtedly, as the author argues convincingly in chapter 12, mitigate the severity and duration of a minor war and minimize its impact on neutrals. In the case of total war, past experience suggests that the development of scientific methods of destruction leave little, if any, room for law.

The fact that the present book leaves many questions unanswered is a reflection of the law it describes. But the author makes his points clearly

and the book will enable a seagoing officer to make practical and independent decisions in many difficult situations. In addition we have here a valuable introductory book for the potential lawyer of the sea.

W. T. COOK

Toronto

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Précis de Droit international privé commercial. By P. ARMINJON, Professeur honoraire aux Universités de Genève et de Lausanne, Associé de l'Institut de Droit international, Docteur *honoris causa* de la Columbia University, New York. Paris: Librairie Dalloz. 1948. Pp. 623. (900 francs)

This is Professor Arminjon's long maturing and long awaited treatise on conflicts of law in commercial matters, as a separate and special department of the general subject.

His method and results have been but little anticipated by others, so that on the whole he remains a pioneer in a very wide field of practical and speculative law. One knows of the *Trattato di diritto internazionale commerciale* of Diena which appeared almost fifty years ago; of the *Diritto internazionale commerciale* of Cavaglieri; the *International Commercial Law* of Travers, of which we have only the volumes dealing with bankruptcy and international conventions on transport by land and by air. Chapters in various general works, monographs on the international law of the air, and on labour laws, with articles here and there in reviews, about complete the roster. But it is a pleasure and a duty to add here, because they are not mentioned, the series of scholarly articles on bankruptcy and insolvency, compositions, reorganizations and arrangements in the conflict of laws, written by Professor Kurt H. Nadelmann of the University of Pennsylvania, which have appeared in the Pennsylvania Law Review and the Harvard Law Review. However, the book is the work of a lawyer thinking largely in terms of European conflict problems as studied and discussed by continental authors.

For those familiar with the general subject, it is a sufficient suggestion of Professor Arminjon's method of treatment to say that it is both analytical and pragmatic — a method for which he must be given full credit as being the first to found upon it all his writing and teaching. In brief: that, as Justice Holmes used to say, deprecating formalism — the law should be tested by results — "the life of the law has not been logic: it has been experience". The method seeks in the analysis of the facts and of the law a solution valid and useful — possibly more valid and useful than the existing law, or applicable when, in the jurisdiction where the question arises, a law relevant to the issue is equivocal or does not exist.

But it goes further. To a great extent, accepted principles of conflict of laws flow from certain abstract assumptions of law and sovereignty, such that, *grosso modo* and with many exceptions, we refer status, capacity, successions, rights of property, to the more or less accidental fact of nationality or of domicile — a reference of little use, and a straining of logic, in the involved contracts of carriage by land, sea and air, of international brokerage, banking and negotiable instruments. And as for the *autonomie*

de la volonté, the will or intention of parties, as a guide to the law applicable to the essential elements of a contract (apart from capacity of parties), to its effects and execution — the principle has its obvious place; but in many incidents of purely commercial international contracts it may produce results not only unfortunate but doing violence to principle.

These many doubts, *lacunae* and contradictions Professor Arminjon essays to resolve and provide for. Actually, his thinking is in a degree in advance of his times, but designed to speed and smooth the world's commercial operations on the international plane. And anyone with the slightest knowledge of the subject knows how complicated and unpredictable, from country to country, are the means of assuring under law security, performance and payment in respect of those operations.

It is beyond the range of this brief notice to consider in detail the subjects discussed; particularly as these cover in effect the whole field of commercial law: trade and traders, partnerships and companies, negotiable instruments, commercial contracts — sale, banking, brokerage, mandate, suretyship, carriage by land, sea and air — and bankruptcy and insolvency. The list of international trade agreements will be found useful. A full analytical table of contents and an adequate general index afford ready reference to the subject matter of this masterly work.

WALTER S. JOHNSON

Montreal

A Funeral Expense Account

Berbonie Jannarie the 6 1736 years. An account of the founral charges of the Deceast William Cuningham son to the Deceast James Cuningham in berbonie

The Malt there was six pecks at	09	00	00
more 3 pints of brandie	03	12	00
more for flour and baking & other materials	02	16	00
more for horses charges at Dumfrize	00	12	00
more for 2 pecks of meal baken in bread	02	08	00
more for a stone of cheese	02	00	00
more for linine for sheet and shurt and other necessaries — to dres the corps 6 els & a half	03	11	06
more for the coffine	05	08	00
more for mort cloath & graff	01	10	00
more for 10 dozen & a half of pyps	01	01	00
more for a pound & a half of tobacco	01	01	00
more for one stick of wax	00	02	00
more for paper	00	06	00
more for candle used at that time	00	12	00
more for half a pound of sheouger	00	04	00
more for one sheep used at the burial	03	00	00
more for corn to horses at and about yt time	01	10	00
more for Doctor hepbron	02	14	
more for hops to the ale	01	04	00

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