Reviews and Notices

History and Sources of the Common Law: Tort and Contract. By C. H. S. Fifoot, M.A., of the Middle Temple, Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law. London: Stevens & Sons Limited. 1949. Pp. xvii, 446. ($11.50)

When Mr. Fifoot began the preparation of this book, his main purpose was to produce an anthology of documents, mostly cases, illustrating the historical development of those branches of the law that to-day are called Tort and Contract. His book was to have been a rich depository of source material collected from "the literature of the law from Glanvil to Blackstone" and also from "the reports, with especial emphasis upon the Year Books". His concern was to present the evidence upon which legal historians base their knowledge of the history of Tort and Contract. The commentary that was to have accompanied the documents was to have been as short as possible; and the reader would have been left to draw his own conclusions from the evidence. However, he did not adhere to this original plan of publishing without much comment a selection of materials from ancient manuscripts; instead he has written a full narrative, filling nearly half of the book, to introduce the material on each subject. Accordingly, not only are the source materials set out as first intended, so that the reader may study them and reach independent conclusions if he is so inclined, but the conclusions and opinions of the learned author are also made available to readers. The addition of these narratives is a feature that greatly enhances the value of this book. It is now a work of profound scholarship and not merely a useful and easily accessible collection of raw material upon which scholarly minds may feed.

The book is divided into two equal parts. Part I deals with Tort. It contains nine chapters, each being devoted to one particular form of action that in former times gave relief for what to-day is characterised as a tortious wrong. Thus, there are chapters on nuisance, detinue, trespass, the development of actions on the case, action on the case for nuisance, trover and conversion, defamation, negligence, and trespass and case. Part II, dealing with Contract, contains seven chapters, namely debt, covenant, account, developments outside the common law before the sixteenth century, the evolution of assumpsit, the subsequent development of assumpsit, and consideration. Each chapter begins with a narrative setting forth and discussing the views of scholars on the history of the particular subject dealt with in it; and it ends with the reproduction of the source material that has been used as a basis for recreating this history. There are numerous footnotes where

reference is made to all the relevant authorities. In particular the periodical literature has been thoroughly canvassed. There is also an adequate index.

Of course, Mr. Fifoot has already established his reputation as a legal historian in earlier publications. However, even if that were unknown, one did not have to read far into this book to realize that it is the work of a mind deeply learned in the history of the common law. It is evident too that much time has been spent in reflection on the problems about which historians differ, and that the answers suggested are the product of a mature and balanced judgment. To support this opinion with an illustration, I should like to refer to chapter 4 where there is an excellent treatment of the difficult and uncertain question of the origin of action on the case. Did it originate in the Statute of Westminister II and receive its name from the word *casu* in the phrase *in consimili casu,* as Ames, Jenks and Mr. Sutton thought? Or had the Statutes nothing to do with its origin, as Plucknett and Miss Dix have contended? Or did it exist before the Statute, but "its development and ultimate transmutation into Trespass on the Case" become possible only because of the powers that c. 24 of the Statute conferred upon the Chancery clerks, as Mr. Landon with support from such men as Coke, Blackstone and Maitland has suggested? Each theory has been critically and fairly examined by Mr. Fifoot. Finally he adopted the view of Plucknett and Miss Dix; and, although it is clear that he relied heavily on their researches, he has bolstered up their work by his own careful examination of sources and by his acute criticisms of other views. Chapter 9, on the relationship between trespass and case and their respective limits, is another good example of the merit of this book. It contains an interesting discussion of the basis of liability in the law of Tort. The conclusion is reached that there never was in fact a strict liability in the common law at any time, which is the view previously held by Professor Winfield; to-day there is, generally speaking, no liability without fault.

Here then we have without doubt an excellent source of learning for the advanced student who has not only already mastered elementary legal history and is, therefore, familiar with the history of the courts, their procedure, the writ system and so on, but also has some considerable knowledge of Tort and Contract. The detailed study of the origin and growth of these two branches of our law is indeed a task for the advanced student; and so we cannot quarrel with the author for dealing with his subject in such a way that it will be unintelligible to those who are beginning legal studies. Technical expressions and words are used without definition and the uninitiated will have difficulty with them.

By way of general criticism, it may be said that even the advanced student may be disappointed when he reads this book. Firstly, most of it will leave him with the feeling that he has previously read it all elsewhere: for the narrative portion is essentially a synthesis of the learning of many scholars. Secondly, it does not bring to light any new source material; the author confesses in his preface that he has not explored the manuscripts, but has confined himself to materials already printed. Thirdly, and this perhaps is the most serious criticism, not much attempt has been made to show *why* rules of law developed as they did. Very little attention has been paid to the "reaction upon the law of political and economic environment". There is slight consideration of the relationship between the problems raised by the various periods of social development and the growth of legal rules.

Consequently, while I am conscious of the high scholarship in this work, I nonetheless think that it would have been better and more interesting if the subject had been approached with the inter-dependence of law, politics and economics in mind.

These remarks do not detract from the usefulness of this latest publication of Mr. Fifoot. Reading legal history, especially when one can read the old cases as reported in the Year Books, is a wonderful experience in jurisprudence. It provides the fascination of watching judges building up the common law bit by bit; it makes apparent the defects of the common law system of *stare decisis* (see pp. 133 and 151); but it is the best way of capturing the great spirit of the common law.

C. B. BOURNE

College of Law,
University of Saskatchewan

* * *

Minimum Standards of Judicial Administration. Edited by ARTHUR T. Vanderbilt. New York: The Law Center of New York University, for The National Conference of Judicial Councils. 1949. Pp. xxxii, 752. (No price given)

The Canadian judge and lawyer will find this a provocative work. Although it is really a statistical survey of the progress made in the United States towards the betterment of the business administration of the courts, it does induce speculation whether the time is not ripe for similar activities here in Canada. Briefly, the situation that evidently obtained in the United States during the early nineteen thirties called for remedial measures on the procedural business side of the administration of justice and a reform programme was initiated through the American Bar Association on a State-wide basis, which resulted in the establishemnt of State Judicial Councils. Although the business side of the administration of justice seems less open to criticism in Canada than in the United States, nevertheless each of our various courts operates on a completely independent basis without regard to the integration of the administration of justice as a whole, either federally or provincially.

As Chief Justice Vanderbilt points out in the work under review, the legal profession appears to be singularly indifferent to the delays, technicalities and anachronisms in procedural law, while the general public, and particularly alert businessmen, are impatient with the law's delay and procedural obstacles. Businessmen are more conscious than lawyers of the truth that a legal right is worthless if it cannot be enforced, and consequently that procedural law is just as important as substantive law. "A comparison between the methods of operation of almost all other institutions in these modern days and the operation of the courts indicates a fairly substantial failure to keep up with changing times and conditions", says Vanderbilt, and I must confess that in good measure I agree with him.

The legal profession of course enjoys a monopoly of the administration of justice in the courts, although not to the same extent in the administrative tribunals. Naturally, if there is housecleaning to be done, we have a heavy obligation to do it, and one cannot help but agree with the Chief

Justice that it is preferable for us as a profession to take the initiative rather than wait for governments to do it for us. Once Chief Justice Vanderbilt's basic thesis is admitted, the problem of the administration of justice becomes one worthy of the attention of the Canadian Bar Association.

Just over a year ago Mr. Harry D. Nims of New York discussed in the Canadian Bar Review the operation of four outstanding judicial councils, but the principle back of judicial councils is still little known in Canada and for that reason alone *Minimum Standards of Judicial Administration* is worth reading. Usually in the United States the judicial council is composed of the chief justice of the State with additional members of the judiciary and representatives of the practising bar and lawyer members in the employ of government, often in the legislative field. It is charged with the supervision of the work of the courts and administrative agencies and tribunals. The composition of the councils is by no means uniform, although the principle has been adopted in some thirty of the American States and has been instituted in the federal courts through what is known as the Administrative Branch. In the State of New Jersey, the business of administering justice at all court levels is the responsibility of the Chief Justice, the editor of the book under review.

Here in Canada, when the business of a particular court becomes clogged, we seem to be content merely to ask for the appointment of new judges. There is room for the intelligent allocation and distribution of the work of the courts at all levels and this can only be accomplished through some body created by the profession itself, whose business it becomes. Naturally, there are a large number of particular activities towards which judicial councils direct their attention in trying to make the work of the courts more efficient. I shall not go into detail. The organization of the courts in Canada is interlocking. It does seem strange that no responsible body exists to see to their proper co-ordination at least on a provincial basis. One cannot refrain from thinking that a proper system of business administration would tend to bring a greater degree of uniformity to many phases of judicial activity and remove much of the public's criticism of the work of the courts.

Administrative agencies and tribunals have grown tremendously in importance during the last few years. They have now assumed almost equal importance with the ordinary courts, and all without any overall supervision or regulation of procedure. There is much work to be done in this field if the profession is to retain its traditional place in the administration of justice. Here perhaps is another opportunity for the judicial council.

Some of the other activities of judicial councils in the United States, for example in encouraging the use of pre-trial procedure, are perhaps not applicable under our system, which gives greater opportunity and latitude for discovery and production than in the United States. But if the principle of the judicial council were adopted here, the councils would quickly find ways to improve rules of practice and other procedural matters, which are so much in need of improvement in these changing times.

Minimum Standards of Judicial Administration is recommended to the thoughtful practitioner who is not worried about encountering a fairly large mass of purely statistical information.

CHARLES P. MCTAGUE

Toronto

* * *

Annuaire suisse de droit international. Publié par la Société suisse de droit international. Volume V (1948). Zurich: Editions Polygraphiques S.A. Pp. 286. (Relié toile, frs. ss. 20).

Le cinquième volume de l'Annuaire de la Société suisse de droit international offre au lecteur une partie doctrinale et une partie documentaire écrites tantôt en allemand, tantôt en français. Les sujets traités dans la partie doctrinale présentent tous un intérêt d'actualité: une étude de la neutralité perpétuelle de la Suisse soutenue par sa politique, étude en langue allemande de M. Marc Huber; un exposé de M. Plinio Bolla sur l'économie générale des accords destinés à régler la liberté de l'information; une étude par M. Werner Niedrer du problème des relations entre le droit international privé et le droit international public soutenant la conception internationaliste du droit international privé; un commentaire de M. Charles Knapp sur la jurisprudence du tribunal fédéral suisse tendant à faire disparaître le régime bi-juridique des contrats internationaux; une description par M. Mac Hagemann de la situation de la Suisse devant l'article 94 de la Charte des Nations Unies.

La partie documentaire contient une revue de la bibliographie et de la jurisprudence dans les domaines suivants: droit des gens, conflit des lois, procédure internationale, paiements internationaux et protection industrielle, pour l'année 1948. Signalons aux lecteurs de langue française l'analyse dans le décor politique des travaux de la conférence de Genève sur la liberté de l'information et des trois projets de convention auxquels cette conférence a abouti; une étude fort intéressante critiquant la jurisprudence suisse au sujet de la *lex loci contractus* en droit international privé où M. Charles Knapp distingue la *lex loci conclusionis* et la *lex e libera voluntate.* Notons aussi la critique d'un arrêt du tribunal fédéral suisse refusant d'appliquer comme contraire à l'ordre public la législation du Reich national-socialiste sur la dénationalisation des juifs allemands.

ANTONIO LANGLAIS

Québec

* * *

An Introduction to Legal Reasoning: By EDWARD H. LEVI. Chicago: The University of Chicago Press. 1949. Pp. 74. ($2.00)

The publishers of this book quote Thurman Arnold as having said that "it is the greatest piece of jurisprudential writing that has ever come to my attention". Whether all readers will be equally impressed remains to be seen. It is a small book and was originally published as an article in the University of Chicago Law Review.

"The basic pattern of legal reasoning", says Professor Levi, "is reasoning by example" (p. 1). It consists of three steps: similarity is seen between cases, then the rule of law inherent in the first case is announced and then the rule of law is made applicable to the second case. It is because legal reasoning is of this nature that the law is flexible. Change occurs "because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key

step in the legal process" (p. 2). The rules change as the rules are applied. The public has confidence in the judicial system, and thus we have a body of law changing to meet the times and yet capable of inducing obedience. "Legal reasoning has a logic of its own. . . . Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities" (pp. 73, 74).

Most of the book is devoted to illustrations of how legal reasoning works in practice. The development of the line of cases leading eventually to *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, and to *Donoghue* v. *Stevenson*, [1932] A.C. 562, is traced to show how changing classifications changed the rules in a field involving only judicial precedents. Canadian readers will be particularly interested in the parallel development of English and American law in the field of tortious liability for dangerous things. The interpretation of the Mann Act by the federal courts in the United States is used to illustrate how legal reasoning operates in statutory interpretation. Less freedom is allowed the court to change the classifications, once the course of the statute has been set by judicial decision, than in a purely case law field. The fate of the Mann Act in the courts is both enlightening and humorous. The interpretation of the "commerce clause" of the United States Constitution by the Supreme Court is used to illustrate the wide discretion allowed the court by a written constitution. Many of Canada's constitutional problems could be solved were our own Supreme Court to take advantage of the discretion open to it in interpreting the British North America Act.

Despite Professor Levi's gift of expression and his brilliant analysis of legal developments, the book falls short of being a real contribution to jurisprudence. The writer shows how legal reasoning works to provide simultaneously for certainty and change, but he fails to take the final step of analyzing the factors which control legal reasoning and make the law predictable. The law is often ambiguous and unpredictable. But it is less so than might appear if legal reasoning were "reasoning by example" and little more. The factors which condition the court and narrow the choices open to it are the factors which made "law" a science. Most legal problems have one solution. Some have two or three. It is because there is often a choice that the law is able to grow. An introduction to legal reasoning which fails to consider the restricting elements which reduce the number of possible solutions to a given legal problem has failed in a material respect.

Apart from this criticism Professor Levi's book has much to offer. The law student should profit immensely from reading it. Practitioners will discover, if they have not already done so, that jurisprudence is a practical science whose study will be amply rewarded in terms of better briefs, better advocacy and better counselling.

GILBERT R. SCHMITT

College of Law,
University of Saskatchewan

* * *

Internationales Zivilprozessrecht und prozessuales Fremdenrecht. By Erwin Riezler. Tübingen: J. C. B. Mohr (Paul Siebeck). 1949. Pp. viii, 710. (No price given)

Professor Erwin Riezler's book on the law of conflicts of law in civil procedure is one of the first post-war studies published by the German Institute

for Foreign and International Private Law, known as the *Kaiser-Wilhelm Institut fuer Auslaendisches und Internationales Privatrecht.* Before the Nazi "revolution" the Institute, then at Berlin, was renowned as one of the outstanding European centers for comparative law studies. The quality of its scientific work at that time later induced at least two major American law schools to appoint to their staffs members of the Institute who had become expendable under the Nazi rule. The founder and first director of the Institute, Professor Ernst Rabel, is now with the Michigan Law School where he has begun the publication of his monumental *Conflicts of Law: A Comparative Study.* His right-hand man at Berlin, Professor Max Rheinstein, contributes to the fame of the Chicago Law School and is widely known on this continent for his many articles in American law journals.

After Rabel's removal by the Nazis, the Institute came under the direction of Ernst Wahl and, during the war, was transferred to Tübingen. Here it has resumed its activities, still under its old name, the director being Professor Hans Doelle. Its post-war publications prove that its work is again directed towards the scientific study of foreign law and problems of comparative law. Dr. Murad Ferid has published an important work on the status of the naturalized person in international private law (*Der Neubuerger im internationalen Privatrecht*). Dr. Ernst Wolff, President of the Supreme Court in the British Zone of Occupation, has edited in German his remarkable study on pre-war contracts in peace treaties (*Vorkriegsvertraege in Friedensvertraegen*), first published in England. The Institute's periodical, the *Zeitschrift fuer auslaendisches und internationales Privatrecht,* founded by Rabel, is again appearing regularly.

Professor Riezler's treatise is the outcome of patient and painstaking research started long before the war at his own institute of comparative law at Munich. Practising lawyers as well as scientists will be grateful for the careful scholarship and the new insight it brings to its subject. His book, indeed, fills an important gap in the literature on the law of the conflicts of law. The last comprehensive study of conflicts in the field of civil procedure, *Das internationale Zivilprozessrecht auf Grund der Theorie, Gesetzgebung und Praxis,* by J. Meili was published in Zurich in 1906 and is now completely out of date. The work by Lehmann and Kraus, who published a first volume under the title *Internationales Zivilprozessrecht* in 1933, has never been completed.

There is little doubt that conflict problems in civil procedure will rapidly assume a more prominent place in legal study and practice. For one thing, the growth of international trade and commerce can only result in an increase in the number of lawsuits arising out of contracts between persons of different nationality or domicile. A whole new set of problems has come to the fore with the increase in naturalizations, the result of the political persecutions of the last thirty years. The Convention on the Death of Missing Persons, recently adopted by a special conference of twenty-five Member States of the United Nations (March 15th to April 6th, 1950), is the latest indication of the type of jurisdictional conflicts likely to arise in this brave new world.

As well as an important work on conflicts, Professor Riezler's book is a great contribution to comparative law. So comprehensive a comparative analysis of civil procedure has not yet been attempted by anyone anywhere. It is not limited to a bare analysis of the statute and case law of the various

countries covered; in addition, it undertakes, on the basis of that analysis, to crystallize the general principles that are common to modern laws on civil procedure.

The scope of the book is limited generally to the laws of the principal civil-law countries (Austria, France, Germany, Italy and Switzerland) and, of the common-law countries, to the law of England. To complete the picture on essential features, references are made to the American Restatement of the Law of Conflicts of Law and to the proposals made in various international conventions, particularly among American States. On pages 31 to 42 the international treaties on the subject matter are listed and summarized; pages 17 to 22 comprise a list of the laws on civil procedure in force in eleven European states; and pages 45 to 50 list the relevant books and major periodical articles dealing with conflicts of law, primarily in civil procedure; extensive footnotes complete the bibliography for each major problem discussed.

A highly learned and very stimulating introduction, discussing the concept and history of the law of international conflicts in civil procedure, opens the treatise. The rest of the 700-page book is divided into eleven parts, of unequal length: "Rattachement" (six chapters); Jurisdiction of Courts (twenty-two chapters); Procedural Status of the Foreigner (three chapters); the Question of *Litis Pendente* (one chapter); Evidence (one chapter); Proof of Foreign Law (one chapter); Judicial Control by the Supreme Court (one chapter); Recognition and Execution of Foreign Judgments (fifteen chapters); Arbitration and Arbitral Awards (six chapters); Forced Execution of Judgments, and Injunctions (three chapters); and Assistance to and by Foreign Courts (one chapter).

It is quite impossible within the limits of a book review to give even a rough idea of the enormous wealth of information provided by this scholarly book. I can think of no question arising out of conflicts of law in civil procedure that Professor Riezler has not attempted to analyse and digest on the basis of all available material, be it statute or case law, doctrine or international treaties. Certainly it would be useless, if not presumptious, for me to take sides on disputed questions that even the learned author does not try to answer categorically, or to criticize the conclusions offered by him.

Because of the steady expansion of international trade and the resulting law suits against foreigners or in foreign courts, perhaps the chapter of Professor Riezler's book of most immediate practical use is the one dealing with the recognition and execution of foreign judgments. A claimant has not advanced very far by having his claim adjudicated in his own country when the execution of the judgment in the homeland of the defendant is hampered by time-consuming procedures amounting practically to a new trial. As Professor Riezler shows, courts do not always recognize foreign judgments until they have reviewed the merits of the case, sometimes with a bias in favour of their own nationals. In this respect the practices of the courts in different countries are by no means uniform and Professor Riezler has performed a signal service by giving a detailed account of the case law and dominant doctrines.

The varying attitudes of courts to the recognition and execution of foreign judgments have so far stultified any attempt to secure an international convention on the subject. Moreover, drafters of conventions for the unification of law have not always been in a position to do intensive research

in comparative law, to sort out the similarities and the dissimilarities, and so to get a clear picture of what is practically possible and what is not. In Professor Riezler's book they will find that much of their work has now been done for them.

His book may also help the advocates of a "world law" to realize that there are other difficulties in the path of its achievement besides differences in rules of law. One of the major difficulties stems from the fact that apparently equivalent terms in different languages do not always mean precisely the same thing, even in countries with the same general system of law. Professor Riezler devotes an entire chapter to showing that one of the key words in the law of civil procedure, *Zustaendigkeit* (jurisdiction), cannot always be accurately translated into other languages. Everything he has to say about "jurisdiction" is equally true of the word "domicile", which so often misleads because of its different connotations in the Common Law and the Civil Law. The lack of uniformity in legal vocabulary is indeed one of the most serious obstacles to the unification of private law.

Another major problem in the field covered by this book is the characterization of the question before the court. A given legal problem, such as the proof of negligence, may be considered by one national law as a question of substantive law and by another as a procedural matter. This distinction between substantive and procedural law becomes all-important when a court must apply to the case before it the substantive law of a foreign country and its own procedural law. Take the case of an automobile accident in a foreign country, to which as a general rule the substantive law of the country where the accident occurred applies. Is the doctrine of *res ipsa loquitur* — or, as the case may be, its foreign counterparts, such as *théorie du risque* or *Gefaehrdungshaftung* — part of the substantive law of torts going to the root of the claim, or is it only a procedural device developed by the courts to ease the burden of proof weighing on the claimant?

The problem is still further complicated by the fact that the law of the court and the law where the accident happened may differ as to the characterization of the rule. The doctrine of *res ipsa loquitur* may be regarded in the country of the accident as a mere procedural rule of evidence, while the law of the *forum litis* may treat it as part of the substantive law on tortious liability. Which view will be adopted by the court in deciding the case? Will it d part from the general rule that the substantive law of the country where the accident occurred is controlling and apply its own substantive law, so that the claimant may have the benefit of *res ipsa loquitur?* Or will it apply the foreign substantive law and ignore the doctrine of *res ipsa loquitur*, because the foreign law considers the doctrine to be procedural?

The recognition of foreign judgments and characterization are but two of the problems arising out of conflicts of law in civil procedure. One comes from Professor Riezler's analysis with the realization that often there are as many opinions as there are conceivable solutions.

These are but some of the difficulties to be faced if there is to be an international convention for the unification of the rules governing conflicts of law in civil procedure. But even if agreement on them could be reached there would still remain all the conflicting and contradictory "jurisprudence" arising out of differences in substantive legal rules and out of the characterization of the rule to be applied. Suppose that agreement could be

reached that the *lex loci contractus* should apply to the international sale of goods. There would still be differences over the question where the contract was completed, if the parties had not met and then and there concluded the bargain. Was the contract perfected at the domicile of the seller or at the domicile of the buyer, at the place where the offer was made or at the place where it was finally accepted? And, anyway, what is domicile?

In these circumstances the lawyer need not be surprised that the businessman, here as in other branches of law, seeks to develop his own practices and customs to meet his needs. Business cannot wait for an international convention to get the certainty of law that is essential to commercial transactions. Thus, it establishes its own methods of settling disputes through the commercial arbitration facilities of such bodies as the International Chamber of Commerce and the American Arbitration Association. But what of the poor man who as he strolls through his native village is run over by the car of a foreign tourist?

R. H. MANKIEWICZ

Montreal

Minimum Mandatory Sentences

Believing that the courts should be given complete independence in regard to the length of sentence which is to be imposed, the Division unanimously wishes to recommend abolition of the minimum mandatory sentence. We are particularly concerned with its application to convictions for drunken driving, car theft, theft from the mails, and sentences for offences under the Canada Shipping Act and the Opium and Narcotic Drug Act. We are of the opinion that the presiding magistrate or judge should not be hampered by prescribed minimums in his effort, which should be re-enforced by pre-sentence reports, to determine what length of sentence is required to secure the most effective reformation of the offender. We also believe that where jury trial is elected, there is strong reluctance on the part of the juries to find an accused guilty when there is a heavy minimum mandatory sentence. An example of this problem was aired in the House of Commons during the debate on the amendment to the Criminal Code relating to the prohibition of crime comics, in which it was shown that with a two-year minimum mandatory sentence for offences in connection with obscene literature, there had been few convictions, except in one province. During the debate, it was freely admitted that the law of diminishing returns applied in cases of this kind and that the heavier the minimum mandatory sentence, the fewer the convictions. (Excerpt from a brief submitted by the Delinquency and Crime Division of the Canadian Welfare Council on June 17th, 1950, to the Minister of Justice)