Reviews and Notices

The Hearsay Rule. By R. W. BAKER. London: Sir Isaac Pitman & Sons, Ltd. Toronto: The Carswell Company, Limited. 1950. Pp. xxi, 180. ($7.75)

Un ouvrage récent, intitulé *The Hearsay Rule*, traite de cette partie si importante du droit de la preuve qu'est le ouï-dire. Ses 180 pages de texte, rédigées en un style clair et concis, se présentent sous la forme matérielle d'une typographie soignée, et s'accompagnent d'un index alphabétique complet et d'une table des décisions, lesquelles y sont commentées et expliquées. Ce travail est à l'origine une thèse que M. R. W. Baker a présentée à Oxford pour le titre universitaire de *Bachelor of Letters.* Son auteur est aujourd'hui professeur de droit à l'Université de Tasmanie; il est en même temps avocat près la Cour suprême de ce pays.

Avant d'aborder l'étude de ce livre, il convient de reproduire, dans le texte original, la partie essentielle de la préface écrite par l'auteur lui-même. Les problèmes juridiques, discutés dans l'ouvrage, s'éclaireront d'une lumière particulière, si on les rattache d'abord aux préoccupations intellectuelles qui ont animé l'auteur. Voici ce texte:

> "Nowhere else in English law has there been such an obstinate resistance to change and reform as in the law relating to Evidence, particularly in respect of that part of Evidence known as the Hearsay rule. It took Bentham and his disciples long years and much hard labour to put the law of competency on a realistic and sensible basis; no one has as yet succeeded in doing the same for the Hearsay rule so far as English case law is concerned.
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> "Apart from the half-hearted Evidence Act of 1938 and other minor statutory changes, the law with respect to this rule remains practically what it was when established during the eighteenth and the early years of the nineteenth centuries. Neither judge nor jurist has had the energy and the courage to try to abolish the abuses, establish consistency, undo some of the technicalities; in other words, to seek out reasoned principles and engineer form and symmetry. No claim is made that this has been achieved by the following pages, but it is at least hoped that by indicating where the rules are illogical and arbitrary, where distinctions are technical and unreal, it will be shown that there is a great need for reform and a large scope for improvement in this interesting field of study." [p. vii].

On le voit, ce juriste souligne avec énergie que le droit anglais a poussé trop loin le respect des traditions juridiques dans le domaine du droit de la preuve, en particulier au sujet de la preuve par ouï-dire. On n'y a pas donné droit de cité aux réformes que réclame cette partie du droit, vu les exigences

de la vie moderne et la tendance à assouplir les règles de la preuve dans les procès qu'instruit un juge seul. On conçoit que lorsque c'est le jury qui est appelé à décider des faits, il est nécessaire de n'autoriser la preuve que de ce qui est strictement pertinent au litige. Mais un juge, entraîné professionellement à n'admettre que les preuves légales, devrait bénéficier, du moins en matière civile, d'une plus grande latitude dans le choix des preuves, selon des normes préétablies.

Le droit québecois s'inspire indéniablement du droit anglais au sujet du ouï-dire, non seulement en droit pénal mais aussi dans les matières civiles et commerciales. La règle de la meilleure preuve, établie par l'art. 1204 C. civ. et à laquelle on rattache habituellement l'interdiction de prouver par ouï-dire,[1] n'a pas son équivalent dans le droit civil français. La source de cette disposition est la *common law*. "La preuve offerte doit être", dispose cet article, "la meilleure dont le cas, par sa nature, soit susceptible. Une preuve secondaire ou inférieure ne peut être reçue, à moins qu'au préalable il n'apparaisse que la preuve originaire ou la meilleure ne peut être fournie." Cette règle, à la prendre d'une façon absolue, équivaudrait cependant à admettre la preuve par ouï-dire, lorsqu'on n'en peut fournir de meilleure. Mais elle vise plutôt à l'interdiction générale de la preuve par ouï-dire selon des règles dégagées par les tribunaux. Il faut bien prendre garde, toutefois, qu'il n'y a preuve par ouï-dire que lorsque le plaideur tente d'établir la vérité des faits eux-mêmes que le témoin relate pour les avoir entendu dire. Ce n'est pas, manifestement, du ouï-dire que de faire rapporter par un témoin les déclarations d'une autre personne, lorsqu'il s'agit uniquement d'établir le fait que ces déclarations ont été faites, indépendamment de la vérité ou de la fausseté des faits ainsi relatés. Celà nous amène a reproduire la définition du ouï-dire que fournit l'auteur, et qui est substantiellement la même que celle que l'on retrouve dans les traités anglais sur la preuve:

> "Hearsay consists of out-of-court assertions of persons who are not called as witnesses offered as proof of the truth of the matters contained therein. As we shall see 'assertions' may be made either by word of mouth, or by writing, or by conduct." [p. 1]

Le ouï-dire est une preuve illégale, sauf lorsqu'il constitue en soi une preuve originale, directe, auquel cas il ne s'agit plus véritablement de ce genre de preuve. C'est ainsi que la preuve des *res gestae* ne rentre pas dans le cadre des exceptions à la prohibition de prouver par ouï-dire. La preuve des déclarations, orales ou écrites, ainsi que des agissements et de la conduite d'une personne, se rattachant à un fait pertinent au litige, est directement admissible comme formant partie des *res gestae*.

En France, il n'y a pas de texte restreignant l'usage des preuves testimoniales. La plus grande latitude est laissée au juge d'admettre ou de rejeter, en se servant de son pouvoir souverain d'appréciation, des preuves qui seraient exclues chez-nous comme étant du ouï-dire.

Le cadre des exceptions à la règle concerne les aveux et confessions, les déclarations faites, dans certains cas spéciaux, par des personnes décédées depuis et diverses autres exceptions, que l'auteur explique en détail en autant de chapitres distincts (chap. 5 à 7 inclusivement), après avoir étudié dans les premiers chapitres, la nature du ouï-dire, (ch. 1er), son histoire (ch. 2), le fondement de cette règle (ch. 3) et son aspect théorique (ch. 4),

[1] L'auteur soutient, de son côté, que la prohibition de la preuve par ouï-dire appartient plutôt au régime gouvernant la pertinence et l'admissibilité des preuves.

comportant spécialement l'étude des nombreuses raisons que l'on a émises pour expliquer la prohibition de cette preuve. Il serait trop long de rapporter, même en un résumé succinct, les vues de l'auteur sur ces différents problèmes, car ce ne serait pas là un bon moyen de rendre justice à l'ouvrage. On ne peut guère qu'encourager le lecteur à le lire, l'assurant à l'avance qu'il en retirera grand profit. En particulier, le dernier chapitre de l'ouvrage lui fera voir de façon tangible quelles réformes, plus substantielles encore que celles introduites en 1938 par *The Evidence Act* anglais, pourraient être apportées à la règle actuelle, en attendant,— et c'est là, suivant l'auteur, le but ultime à atteindre,— que la législature n'en vienne à renverser la règle telle qu'elle existe, établissant le principe que la preuve par ouï-dire est généralement admissible, sauf dans les cas où, expressément, la loi la défendrait.

Cette conclusion nous semble extrémiste. Il suffirait, selon nous, de maintenir la prohibition de prouver par ouï-dire, qui se justifie par les risques d'erreur que celle preuve entraîne, et qui tiennent à l'imperfection du témoignage humain et à l'impossibilité d'obtenir le serment de la personne dont on relate les dires et de soumettre la vérité de ses assertions à l'épreuve du contre-interrogatoire, quitte à étendre la portée des exceptions à la règle. En particulier, pourquoi ne pas accepter, comme le suggère l' auteur, la règle que toutes les déclarations, orales ou écrites, faites avant le début du procès par des personnes fiables décédées depuis, soient admissibles en preuve et, aussi, que le juge ait pleine discrétion d'admettre et d'apprécier la preuve par ouï-dire, lorsqu'elle ne se rapporte qu'à des détails accessoires de nature à éclairer la déposition du témoin? Ce serait là un bon moyen de mettre court à l'objection que l'on entend répétée sur tous les tons devant nos tribunaux: "Je m'oppose à cette preuve, parce que c'est du ouï-dire". Un élargissement et un assouplissement de la règle seraient de mise, de façon à éviter, dans certains cas, la perte de droits acquis, faute d'en pouvoir fournir la preuve légale.

L'excellence des arguments mis de l'avant par M. R. W. Baker est telle qu'on n'y peut manquer d'y voir la démonstration irréfutable du besoin d'une réforme en ce domaine. S'il est vrai que le droit progresse, non par heurts ni changements révolutionnaires, mais par son assujettissement aux exigences du temps, assurer sa plus grande conformité aux nécessités présentes de la vie sociale est un but à poursuivre.

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A Practical Manual of Standard Legal Citations: Rules, Rationale and Examples of Citations to Authority for Lawyers, Law Students, Teachers and Research Workers. By Miles O. Price, B.S., B.L.S., LL.B., Librarian of the Columbia University Law Library. New York: Oceana Publications. 1950. Pp. vi, 106. ($2.00)

The Canadian practitioner will find this manual the most convenient guide to American authorities and the American manner of citing them. Without going into the detail of Hicks' invaluable *Materials and Methods of Legal Research,* Mr. Price has given sufficient explanation of the history and scope

of statutory materials, case materials and loose-leaf services to make his suggestions on the form of citations understandable outside the United States. In this respect *A Practical Manual* has an advantage over the more compact *A Uniform System of Citation*, the joint production of the Columbia Law Review, Harvard Law Review, University of Pennsylvania Law Review and Yale Law Journal, now in its eighth edition, which has been the bible of most American law reviews.

A reviewer who has listened to judges complaining of the difficulty of tracking down the authorities referred to them, and who, in his editorial capacity, must strive for adequate, uniform and accurate citations in the material he publishes, could wish that every lawyer would digest the lesson of Mr. Price's manual. "A legal citation [he says] has only one purpose: to lead its reader to the work cited, and this without enforced recourse to any other source of information, for data which should have been given in the citation itself", and "I am convinced that the good citation, no matter what its form, possesses the following elements: an abbreviation of recognizable meaning, a date, the notation of the court deciding a cited case, if not evident on its face, and a parallel citation". I agree with Mr. Price in this and agree with him also when he says that "errors in citations are unbelievably frequent" and that "good form is important, as a workmanlike job is in any field" (a particular consideration in a law review).

There are signs in Canada of a growing interest in American authorities and no doubt they will be referred to increasingly before Canadian courts and in Canadian legal writing. Though this manual contains brief sections on Parliamentary Debates, English Statutes, Dominion Statutes, English Law Reports Citation and Foreign Law, it will probably be read here for the purely American material, and of course for its discussion of the rationale of citations generally. Our practice as to the form of citations — at least in the Canadian Bar Review — differs in minor respects from the American, for example in the placing of the date where the date is not an integral part of the case citation, but the differences are not basic.

The reference at the end of the preface to page 13, "pertaining to pagination", is presumably a slip for page 73. In the table of abbreviations, the puzzling item, "Revue de Barreau Rev. de Quebec", apparently refers to our distinguished contemporary, La Revue du Barreau de la Province de Québec, and "University of Toronto Law Review" should read "University of Toronto Law Journal", with the abbreviation "U. Toronto L. J." instead of "U. Toronto L. Rev." "Canadian Bar Review" is correctly abbreviated as "Can. Bar Rev." and not as the sometimes seen "C.B.R."— a form inconsistent with accepted methods of abbreviating the names of legal periodicals and likely to lead to confusion with the Canadian Bankruptcy Reports.

G. V. V. N.

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American Constitutional Decisions. By CHARLES FAIRMAN. New York: Henry Holt and Company. Toronto: Clarke Irwin & Company Limited. 1948. Pp. xiii, 454. ($3.00)

In 1922 the Hon. James M. Beck, then Solicitor-General of the United States, gave three lectures in the Hall of Gray's Inn on "The Constitution of the United States". He said in part:

> "To understand the Constitution of the United States you must not only read the text but the thousands of opinions rendered in the last 130 years by the Supreme Court in its great task of interpreting this wonderful document. Few documents have been the subject of more extended commentaries. The four thousand words have been meticulously examined through intellectual microscopes in judicial opinions, text-books, and other commentaries which are as 'thick as autumnal leaves that strow the brooks in Vallombrosa'." [pp. 148-149]

Mr. Beck would have welcomed this book. Although it is a collection of cases for students in courses in American government and deals in detail with only thirty-four cases, yet it is a workmanlike and intelligent aid in understanding the Constitution without the life-long course of reading opinions prescribed by Mr. Beck.

The book deals with the Supreme Court of the United States as much as with the Constitution. There is, first, an introductory essay on the Supreme Court and the judicial system, including Justice Stone's account of "How the Court Decides Cases". This last, reprinted from (1928), 14 A.B.A.J. 428, at p. 435, and (1929), 8 Ore. L. Rev. 248, at p. 266, is a comforting and illuminating picture of the order ruling that Court when *cur ad vult.* To digress: Are there similar disclosures of the system of deliberation in the Judicial Committee, the Supreme Court of Canada or the provincial courts of appeal? Are there similar systems of deliberation, or does each judge just step up to the target and fire?

To return—the decisions are grouped under seven heads: The Fundamental Law and the Judicial Function; The Three Branches of Government; Intergovernmental Relations; Powers of the National Government; Constitutional Limitations; and Citizenship and Suffrage.

The treatment of each decision can be illustrated by a case of Canadian interest, *Missouri* v. *Holland* (1920), 252 U.S. 416, where the constitutional validity of the Migratory Bird Treaty Act was in question. On December 8th, 1916, His Majesty the King and the President of the United States of America entered into a treaty, to be found in 7-8 Geo. V, c. 18, which concerned the affairs only of Canada and the United States. It was negotiated between the Canadian and U.S. governments and marked a step forward on the road to nationhood. Its validity was questioned and, in Canada, sustained in *Rex* v. *Stuart,* [1924] 3 W.W.R. 648 (C.A.).

In the American case the State of Missouri sought to prevent a federal game warden from attempting to enforce the treaty. The State argued, as did the successful provinces in Canada in 1937, that there was a limit to the federal treaty-making power. Mr. Justice Holmes delivered the opinion of the court, which is quoted in full, supporting the treaty and the act based upon it.

There follows in the book a "comment" directing us to re-read a passage of Holmes J. in his opinion:

> ". . . when we are dealing with words that are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to

prove that they created a nation. . . . We must consider what this country has become. . . .

The editor then compares Chief Justice Marshall and Justice Holmes: their language in the cases, their views of the Constitution and their affirmation in battle of their faith in the nation — Marshall at Valley Forge in 1777, Holmes in the Wilderness in the War between the States. Marshall in his autobiography recalled his youthful "devotion to the union and to a government competent to its preservation", his attachment to the maxim "united we stand divided we fall", writing:

> "I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army where I found myself associated with brave men from different states who were risking life and everything valuable in common cause believed by all to be most precious and where I was confirmed in the habit of considering America as my country and congress as my government."

As for Mr. Justice Holmes, when he died his executors found in his bedroom a carefully preserved, blood-stained uniform, a relic of one of his three wounds. Pilgrims to Washington will remember the stone at Arlington:

OLIVER WENDELL HOLMES
Captain and Brevet Colonel
20th Massachusetts Volunteer Infantry Civil War
Justice Supreme Court of the United States
March 1841 March 1935

That is the burden of the comment on *Missouri* v. *Holland* in this book. If it seems to any a far cry from the Migratory Birds Treaty, consider the shattered treaty-performing powers of Canada, cut into their several pieces by men who, by the nature of their selection, could not consider Canada as their country or its parliament as their government. Nor has it been until this year that the Supreme Court of Canada has assumed the responsibility so fearlessly undertaken at the beginning by the Supreme Court of the United States. Nor until recent years has it had a member able, if he choose, to preserve his blood-stained uniform in his bedroom. It has not lacked jurisprudence worthy of a nation in the past, but will have need of it in the future.

If Professor Fairman's comment on this case appears to have been too stimulating, it will be found that most of his editorial matter and the cases he studies are equally interesting to a Canadian reader. The problems faced by the United States Supreme Court, if not our problems yesterday, will be ours tomorrow.

The book is neat, small to the hand, clearly printed and illustrated with portraits of the old judges and group pictures of the modern courts. There are coherent references to over 450 cases. There is a table of succession of the judges, the text of the Constitution and a brief index. In a country bent on constitution making, there can be no better reading for its lawyers, and the price is less than the profession receives today for the discharge of a mortgage.

PETER WRIGHT

Toronto

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Judge Jeffreys. By H. MONTGOMERY HYDE, D. Lit. With a foreword by the RT. HON. SIR NORMAN BIRKETT, P.C. Second edition. Toronto: Butterworth and Co. (Canada), Ltd. 1948. Pp. 328. ($5.25)

Here the author in a most interesting fashion recounts the meteoric career of one who at forty was by far the youngest Lord Chancellor in English history. In the process, many misconceptions and inaccuracies are corrected.

Jeffreys was educated at Old St. Pauls and Westminster Schools and Trinity College, Cambridge. Notwithstanding his father's efforts to dissuade him from entering a profession, which his father apparently thought would by no means diminish his predisposition to intemperance, he became a student in the Inner Temple several years before the Plague and the Great Fire of London. Called to the Bar after the required five years as a student, Jeffreys apparently "never experienced the uneasy period of waiting for briefs", but quickly made his mark as a rising barrister with unusual skill at cross-examination. At the age of 25 he was elected Common Sergeant of the City of London, the second judicial office in the City. From that time the rapidity of his rise must be unparalleled.

Knighted and King's Counsel at 32, Recorder of London a year later (and earning not less than £5,000 a year, a very large income for the time), Sergeant-at-Law and Chief Justice of Chester at 35, Baronet at 36, Lord Chief Justice of the Court of King's Bench and Member of the Privy Council at 38, and Lord Chancellor at 40, is surely a record never yet, and probably never to be equalled.

The author makes it clear that Jeffreys' advancement was due only in part to his careful cultivation of influential persons, and to a large degree to capacity. He participated either as counsel or judge in almost every important State trial during the reigns of Charles II and James II, including the Popish Plot trials, the trial of Titus Oates and the so-called Bloody Assizes after the abortive Monmouth rebellion of 1685, and presided over the Court of Ecclesiastical Commission by which James II attempted, unsuccessfully, to coerce the Church of England.

Jeffreys was an able Crown counsel in criminal trials, with some not inconsiderable successes on the civil side. On the bench, though at times irascible and extremely partial, he appears to have been most capable. As Mr. Hyde says: "For all his browbeating and hectoring as Lord Chief Justice Jeffreys brought to bear in the King's Bench an abundance of common sense, characteristic humour and knowledge of human nature which must have been most refreshing to all save those who fell immediately beneath the lash of his tongue". The author makes it clear that Jeffreys' occasional extreme violence of temper, which increased with age, was due largely to a chronic stone in the kidney that for years caused him much suffering and finally killed him. His reputation for intemperance was by no means undeserved, but it is only fair to remember that he lived in a hard drinking age. Although Jeffreys' conduct during the Bloody Assizes (when almost 1,400 persons were found guilty of treason and sentenced to death, and some 200 were executed) cannot be completely justified, the author does set the record straight on many points. All those condemned appear to have been guilty of treason and the judges had no option but to impose a capital sentence.

Jeffreys' fall was as rapid as his rise, and within four years of his appointment as Lord Chancellor he died in the Tower a broken man, probably saved by natural death from a fate as grim as that of any of the persons he had sentenced while on the Bench.

Mr. Hyde gives us a complete account of both the public and private life of Jeffreys, set against a background of the political history of the reigns of Charles II and James II. This scholarly and eminently readable work is of interest not merely to members of the legal profession, but to anyone who enjoys a good story well told.

GEORGE S. CHALLIES

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Current Law Year Book 1948. General editor: JOHN BURKE. Year Book editor: CLIFFORD WALSH. London: Sweet & Maxwell Ltd. 1949. Pp. cxlviii, [22], and 3990 paragraphs unpaged. (£2, 2s.; free to subscribers of "Current Law")

Current Law Year Book 1949. General editor: JOHN BURKE. Year Book editor: CLIFFORD WALSH: London: Sweet & Maxwell Ltd. 1950. Pp. clii, [30], and 4277 paragraphs unpaged. (£2, 2s.; free to subscribers of "Current Law")

These are the second and third annual digests in a new series begun for the year 1947. (See review of first volume, 26 Can. Bar Rev. 1152.) The form has remained much the same as in the first digest — table of cases (digested, applied, overruled, etc.), tables of statutes and statutory instruments (as they are now called), digest under alphabetical subject headings in numbered paragraphs, and an index. But one important innovation has been made in 1949 — the table of statutes now includes (a) not merely a reference to the fact that regulations have been made under a particular section of a statute, but also the statutory instrument number, and (b) references to cases in which sections of the statute have been judicially considered. It should also be noted that the index for both volumes is cumulative back to and including the first volume. Both volumes omit the "Outline of the Law" for the year concerned contained in the 1947 volume. This is not a serious loss; the first had only been a fourteen-page outline of "highlights" of the legal year.

These digests are, of course, essentially practitioners' works. They make a handy source for reference to cases and English statutes. However, they cannot replace the *Index to Legal Periodicals* for periodical literature reference. While they purport to give (a) in the tables of cases, a notation to case comments in the periodical literature, and (b) in the digest body, a list of articles under each subject-heading, both efforts continue to be limited. The notations in the table of cases are, so far as this reviewer has found in all three digests, limited to only three periodicals — Law Quarterly Review, Modern Law Review, and Conveyancer and Property Lawyer (N.S.). The lists of articles in the digest are largely lists of "articles" appearing in five publications — Law Journal, Law Times Journal, Solicitors Journal, Justice of the Peace Journal, and Conveyancer and Property Lawyer (N.S.). Thus, out of 62 "articles" listed under the heading "Divorce and Matrimonial Causes" in 1948, 54 are from the first four of these journals and 3 from the

fifth. In the same year, half of the four articles under the heading "Conflict of Laws" are from the Law Journal, though things are better in 1949 where the scope is broader. This Review appears naturally a number of times under the headings "Criminal Law" and "Conflict of Laws" in 1949. Harvard Law Review appears in the heading "Jurisprudence". But while references to periodicals outside the practitioners' journals are few and far between, there are signs in England of an increasing interest in other periodical literature. This is difficult ground over which to make progress. We can report some. And we can, in other aspects, commend the digests for their thoroughness and for their efforts to bring together case law from the whole of the Commonwealth by including leading Dominion decisions.

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Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Aristotle's Constitution of Athens and Related Texts. Translated with an introduction and notes by KURT VON FRITZ and ERNST KAPP. Number 13, The Hafner Library of Classics. New York: Hafner Publishing Company. 1950. Pp. xi, 233. (Paper, $1.25; cloth, $2.50)

Constitutional Amendment in Canada. By PAUL GÉRIN-LAJOIE, LL.B., D.Phil. (Oxon.). Toronto: University of Toronto Press-Saunders. 1950. Pp. xliii, 340. ($5.50)

Trial of Alma Victoria Rattenbury and George Percy Stoner. Edited by F. TENNYSON JESSE. Second edition. Notable British Trials Series. London and Edinburgh: William Hodge & Company, Limited. 1950. Pp. 298. (15s. net)

Trial of Buck Ruxton. Second edition, edited by R. H. BLUNDELL and G. HASWELL WILSON. Notable British Trials Series. London, Edinburgh and Glasgow: William Hodge & Company Limited. 1950. Pp. lxxxvii, 457. (15s. net)

Trial of Jessie McLachlan. Third edition, edited by WILLIAM ROUGHEAD. Notable British Trials Series. Edinburgh and London: William Hodge & Company, Limited. 1950. Pp. xii, 402. (15s. net)

The Velpke Baby Home Trial. Edited by GEORGE BRAND, LL.B. With a foreword by PROFESSOR H. LAUTERPACHT, K.C., LL.D., F.B.A. Volume VII, War Crimes Trials. London, Edinburgh and Glasgow: William Hodge and Company, Limited. New York: The British Book Centre, Inc. 1950. Pp. liv, 356. ($4.25)