Reviews and Notices

The Law of Torts: A Treatise on the Law of Civil Wrongs. By S. RAMASWAMY IYER, B.A., B.L. Fourth edition. Calcutta: Eastern Law House, Ltd. 1950. Pp. lxvii, 704. ($4.00)

The first edition of Mr. Ramaswamy Iyer's treatise on the Law of Torts appeared in 1932. The reviewer admits with shame that until this year he had not seen a copy of this extremely valuable and important book. Such adjectives are no mere gesture of politeness since I am convinced that this book is the equal of, and in many ways better than, some of the leading English texts in the same field. Unfortunately, we have become so accustomed to taking our lead in legal materials generally from the country in which the common law originated that it may seem strange to a Canadian lawyer to think of a colleague in India producing a book which should be prescribed reading for Canadian students of law. There is no reason for surprise and, definitely, Canadian students can derive great assistance from this treatise.

The author is well-versed, indeed steeped, in the history and tradition of the English law of torts. Indeed, one of the criticisms of the present book might be that he has not departed sufficiently from the English pattern of text-writing in the law of torts. That general pattern was discussed by this reviewer in 1938 in a review of Professor Winfield's text (16 Can. Bar Rev. 237). Freed, however, from the necessity of catering to the ultra-conservative tendencies of the English profession, the author has been able to introduce criticism, and frequently downright disapproval, of much that is being done by English courts, both of which are too frequently lacking in English texts. There is much for Canadian lawyers to learn in this respect since there is now no necessity for Canadian courts to consider themselves bound by English precedent. The author takes for granted that Indian courts will openly recognize a like freedom. This permits him to point the way in which the Indian law of torts should develop in the future by accepting what is good in the English law and rejecting historical anomalies and decisions based on the philosophy of an earlier era. The decision of an Irish court in *Exham* v. *Beamish,* [1939] I.R. 336, in refusing to recognize as part of the Irish common law that nonsensical part of the English Rule against Perpetuities which has been styled the doctrine of the "fertile octogenarian", was an earlier instance of what can be done by courts freed by constitutional development from the necessity of accepting everything the English cases have decided.

Many instances of this new approach can be found in the pages of the present book. For example, after considering *Mayor of Bradford* v. *Pickles,* [1895] A.C. 587, and noting that it was a departure from Roman law, and had not been uniformly followed in the United States, France or Germany, the author merely says that "the decision cannot, therefore, be treated in

India as beyond controversy" (p. 203). This manifestation of an intent to re-examine common law rules in the light of jurisprudential thinking and from a comparative law approach is a healthy by-product of the new status of India. On page 224 the author discusses *Malone* v. *Laskey*, [1907] 2 K.B. 141, which was recently resurrected by the English Court of Appeal in *Ball* v. *London County Council*, [1949] 2 K.B. 159. It had long been the reviewer's opinion (in this case shared by many English writers) that *Malone* v. *Laskey* could be considered dead and buried after the judgment of the House of Lords in *Donoghue* v. *Stevenson*, [1932] A.C. 562. Not only did the English Court of Appeal revivify that decision but, further, it went out of its way to re-introduce the dismal category of "noxious and dangerous things" which does not, in England, apparently include a boiler without a safety valve. Mr. Ramaswamy Iyer at page 225 is able to state, apparently without qualms, that these decisions "no longer have any validity after the decision of the House of Lords in *Donoghue* v. *Stevenson*". Unfortunately, they have considerable validity in England and it is greatly to be feared that Canadian courts would be prone to accept the recent decision of the English Court of Appeal rather than boldly declare, as the author does, that the decisions "can not be regarded as authority, at any rate, in this country" (see also pp. 445-446). It is noteworthy that for sweeping statements of this kind the author does not feel compelled to cite any Indian judicial decision. From this we might infer that Indian courts may be expected to take their lead on issues of this kind from the academic writers. Such practice, well-known in ancient and modern civil law countries (and on the increase in the United States) would certainly be a reversal of the English and Canadian (apart from Quebec) practice. In these countries, for some strange reason, writers are usually not expected to express an opinion — certainly not in a "bound book". If one is brash enough to doubt or challenge decisions in journals such as this Review, he runs the danger of being labelled as either "academic", "disrespectful" or — worse still — completely ignored. Are we to be doomed forever to legal writing which is nothing but a glorified digest of judicial utterances?

While the author is capable of rejecting what many common lawyers might regard as pillars of the legal temple, in reality he is merely pointing out that many of the conclusions which English courts have reached were not inevitable, and that another choice could have been made more consonant with the ends to be attained by the law of torts as it had developed on a broader scale. This is nowhere better done than in his discussion of the negligent misrepresentation cases and the stubborn refusal of the English courts to extend liability in negligence for damage caused by a careless use of words. He quite rightly points out that where a negligent misrepresentation is likely to cause physical injury to a person or tangible property damage, many English courts simply ignore the misrepresentation element. This, indeed, lies at the basis of such a decision as *Donoghue* v. *Stevenson*, where liability was imposed on a manufacturer for having caused a consumer to rely to his detriment on a representation carelessly made, that a bottle of ginger beer he was putting out for consumption by the public was safe enough to be consumed without the necessity of a detailed examination. Having considered the English cases, the author does not hesitate to say that the development of the law of negligence has been arrested in England by decisions such as *LeLievre* v. *Gould*, [1893] 1 Q.B. 491, and he merely points out

that "these decisions need not be accepted as conclusive in India" (p. 341). As he says, they have not been accepted in the United States and have been expressly rejected by the American Law Restatement which, incidentally, he quotes much more freely than one is accustomed to find in a book essentially English in background. The reviewer is of the opinion that these English cases should not, and need not, be followed in this country. The very position which Mr. Ramaswamy Iyer takes with regard to damages for negligent use of words was actually adopted and developed by Denning L. J. in the recent case of *Candler* v. *Crane Christmas and Company*, [1951] 1 All E.R. 426 — unfortunately as a dissenting judgment. The fact that a member of the English Court of Appeal did not find it inevitable to follow a line of decisions which are universally condemned affords hope for the progress of law by judicial interpretation in courts in India and, indeed, Canada. Is there any reason why the minority judgment in the *Candler* case should not become a majority judgment of the Supreme Court of Canada?

Many instances similar to the foregoing could be given and, from the point of view of a student, Mr. Ramaswamy Iyer's book provides more elaborate and outspoken criticism and discussion of doubtful cases than he can obtain in the current English texts. Undoubtedly he has been strongly influenced by American development. The present reviewer has long urged a wider study in comparative common law and it is remarkable that American influence in the law of torts has been much stronger in England and in Australia than in this country. It now appears likely to exert a rationalizing and clarifying influence in India. While the author challenges many of the existing statements to be found in English authorities, it is doubtful whether he ever advances anything which can not be justified by principles of the English law of tort, provided one is willing to seek principles, which should be consistent, at the expense of individual rules, which frequently are not. The recent treatment by the House of Lords in *Jacobs* v. *London County Council*, [1950] 1 All E.R. 737, of their former observations in *Fairman* v. *Perpetual Building Society*, [1923] A.C. 74, may serve to point the issue. In affirming that a visitor to an office building or flat who makes use of a common staircase or elevator in the possession of a landlord must be treated as a licensee of the landlord, the reviewer believes that the House of Lords, under the guise of inevitability, adopted a course completely contrary to basic assumptions of tort law, totally opposed to the law in the United States and, so far as can be discovered, one which runs counter to the conclusions reached in the Canadian decisions. What the Supreme Court of Canada will now do in light of the fact that in 1950 the House of Lords has purported merely to explain — or interpret — an earlier 1923 decision will certainly provide the profession in Canada with a clear indication of the extent to which Canada is willing to build its own Canadian jurisprudence. Mr. Ramaswamy Iyer is not so dogmatic in sweeping away this later House of Lords judgment as in some other cases, although he does (p. 422) indicate that the law is not satisfactory; that the American Restatement differs and that the English decisions are not consistent — the latter undoubtedly being a point with which the House of Lords would disagree. Members of the profession who are inclined to resent what they feel to be the intrusion of law "as it ought to be" rather than the law as "it is" may be shocked by his treatment of a landlord's liability in tort for defective premises. To say that he has no sympathy with the doctrine, which has run amuck in the English

cases, that there is no law against a landlord leasing a tumbledown house (p. 443) is an understatement. *Cavalier* v. *Pope*, [1906] A.C. 428, is criticized in relation to other English case law and the conclusion reached that, as it was influenced "by an obsolete doctrine", it cannot "conclude the matter for Indian courts". If this be true of the position in India, we can only look wistfully in that direction, for I am quite sure that *Cavalier* v. *Pope* is now ingrained in our body of precedent and no one, with power to do anything about it, seems interested even in limiting its scope to the narrowest of confines.

The present treatise covers the wide gamut of topics customary in the English texts. Thus, for example, there is included a considerable amount of material on conversion, possession of real property and other matters which to the reviewer might perhaps have been left to specialized texts on property. This was one of the things I had in mind when I indicated that the author was perhaps too much under the influence of the English tradition. Moreover, the author has included consideration of some of the fundamental rights conferred by the Indian Constitution (pp. 391 ff. and pp. 55 ff.). The whole question of preventive detention, the powers of the executive, and the fundamental constitutional liberties of the subject furnish in themselves material for another book that has perhaps more connection with public law than the problem of shifting loss from a plaintiff to a defendant, which is basically the subject of the law of torts. I do not necessarily disagree with the author's inclusion of these subjects; indeed, some of them must be considered in connection with the various imprisonment cases. The emphasis on fundamental rights, however, furnishes the basis of a serious criticism of the present volume.

The author, indicating at the outset that he intended to depart from the arrangement of subject matter found in English textbooks, puts forward his own system, which can not be considered entirely satisfactory. His plan is based on the assumption that the law of torts exists for the protection of certain "rights". He then avowedly purports to examine "the rights of a person which the law protects from injury". This discussion occupies the first thirteen chapters, or 398 pages of a book of around 700 pages. It is not until chapter XIV that we find chapters dealing with the defendant's conduct. That chapter is concerned with "Intentional Wrong-doing". The following two chapters, XV and XVI, are concerned with negligence and the most unsatisfactory chapter in the book, in this reviewer's opinion, chapter XVII entitled "Causation", is not encountered until page 484. When one considers that chapter II is concerned with "Injury to the Person" and includes, inter alia, the so-called nervous shock cases, it seems difficult to understand how that specific and complicated instance of negligence, plus remoteness, plus causation, plus the whole technique of negligence, can possibly be considered before the function and purpose of these concepts is fully developed. This same difficulty crops up in various parts of the book. It is a difficulty which every expositor of the law of torts has felt.

It seems awkward to consider personal injuries apart from the type of conduct which occasions it. A man's interest in physical security may be protected against intentional conduct; it may be protected against negligent conduct; or it may be protected against conduct which is neither negligent nor intentional. The moment we say that his physical security is protected against negligence we open up the whole vista of the extent to which it is pro-

tected. This involves a consideration of the philosophy of negligence, the contending, and unresolved, arguments on which are clearly set forward in the judgments of the New York Court of Appeals in *Palsgraf* v. *Long Island Railroad Co.* (1928), 248 N.Y. 339. It also involves the necessity of an examination of the doctrines of "remoteness" which are, despite the learned author's statements to the contrary, definitely not questions of fact but questions of law in the truest sense of determining what harms are to be included within the risk of harm unreasonably created by a negligent defendant. It may be doubted whether this basic problem of the modern law of torts is considered adequately in this treatise. Inasmuch as Mr. Ramaswamy Iyer has done an excellent job in rationalizing the English law for adoption in India, the reviewer would suggest that an examination of the American text, *Prosser on Torts* — which, peculiarly enough, is not listed in the table of books referred to — would pay rich dividends in a new edition and ultimately, I believe, in the advancement of the principles and objectives which the author clearly had before him in writing the present book.

Frankly, I cannot understand how "rights" can be considered apart from the conduct infringing them — that is, apart from a consideration of the correlative "duty". This presupposes a system of "absolute rights" which the author himself questions. ("All rights under the law are in one sense not absolute"— p. 405.) The attempt to segregate "rights" from types of conduct leads the author (p. 399), in opening a discussion of intentional wrongdoing, to speak of "a person [who] commits a tort with a mental condition of this kind". With respect, this does not seem to make sense. A court will describe certain conduct producing certain results as a tort. Before that conclusion is reached, there is merely damage on the one hand and certain conduct on the other. Neither one without the other is capable of making a "tort" and what the lawyer wants to know is what type of conduct producing what type of harm the law considers to be actionable.

"Nuisance", as the author recognizes, is a fairly slippery word covering a multitude of different situations which should be clarified by an exposition of intentional wrong-doing, negligence or strict liability. To contrast an action for nuisance with an action for negligence as the author does on page 234 is, in this reviewer's opinion, to contrast a type of conduct with a result. Interference with enjoyment of land should not be styled a "nuisance"— or a tort — unless we know what conduct caused it; although we must admit that many courts, as well as Mr. Ramaswamy Iyer, do so. Some interferences with the enjoyment of property are actionable because the defendant intentionally threw smoke, smells and noises on another's property. Other interferences are actionable if the defendant has failed to take reasonable care to prevent the escape of things from his property to another's land. There is still a third category in which a defendant will be liable although he never intentionally or negligently allowed the escape of the thing. Clarification of thought is not produced by saying (some 300 pages before the topic of strict liability is considered in detail) that "the case of *Rylands* v. *Fletcher* is an instance of injury to property due to a nuisance". The water in the reservoir was perfectly innocuous so long as it remained there. What the House of Lords says, as subsequently interpreted, is that if one person stores a large quantity of water on his own premises and it escapes, the person obtaining the special benefit must bear the risk.

The learned author obviously does not approve of the rule in *Rylands* v.

Fletcher, and in particular he objects to its lack of "precision and clearness with special reference to extraordinary use" (p. 551). It may be doubted whether any "rule" in the law of torts can have precision or clearness. What is important is the principle or end to be sought and the guiding philosophy behind the principle itself. The spread of strict liability can be considered as according with an economic doctrine which requires a person introducing some thing or some activity into a community for his own individual benefit (and which is not one of the things or activities commonly found in that community) to bear the risk of his enterprise. Some years ago Professor Bohlen argued that the doctrine of *Rylands* v. *Fletcher* could thus be extended by judicial decision to cover damage by aircraft. It is true that England has passed a statute on the question. Canada has not, and it will be interesting to see whether a Canadian court will adopt the strict liability principle or the negligence doctrine. The House of Lords recently stated that the general principle of liability in English law is negligence. I have always wondered where this general principle came from. In light of the extension of vicarious liability, workmen's compensation and liability for motor vehicles, it is difficult to state any general principle of fault or no fault — particularly without examining what we mean by "fault".

None of the criticisms expressed here can detract from the general excellence of this text. They were made with the desire to assist in the preparation of future editions, which are inevitable. This review will end as it began. We earnestly hope that prejudice against texts written elsewhere than in England will not prevent this book from attaining its well-deserved position as a leading authority on the exposition and criticism of the English law of torts. It stands mid-way between the orthodox English book, which insists on the perpetuation of historical anachronisms, and the American texts, which have, as some people think, too thoroughly rationalized the law. As such, it represents and incorporates certain characteristics of the British Commonwealth which should make it as valuable in Canada as we know it must be in India.

CECIL A. WRIGHT*

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Law of the Air: Cases and Materials. By CLARENCE E. MANION, Dean of Law, University of Notre Dame. Indianapolis: The Bobbs-Merrill Company, Inc. 1950. Pp. xi, 689. ($7.50 U.S.)

To the lengthy list of American casebooks on almost every subject Dean Manion has added one on aviation, radio and television. Not every author gives such an extended treatment to the law of the air. Two British textbooks, *The Law of the Air* by McNair and *Air Law* by Shawcross and Beaumont, deal only with the law of aviation. However, there is a well established precedent in American legal circles for the broad treatment of the subject. The Air Law Review, which ceased publication in the early days of the last decade, dealt with both aviation and radio.

The author states his case by saying that "[air] law embraces both radio and aeronautical law for the reason that both radio and aeronautical navigation use the air as a medium for ultra-rapid communication and trans-

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portation". Since the principles of aviation law are fairly well settled and will not be subject to change in any greater degree than any other field of law, this phase of the law of the air is given detailed consideration in the work under review. By way of contrast, only the fundamental principles of radio and television law are mentioned because experimentation is still under way in all phases of radio and television.

The aviation cases and materials are well suited to show the development of the principles of aviation law as laid down by the judge and legislator in the United States. The following topics are covered: rights and liabilities in the use of airspace; airports; land damage by aircraft; application of the rules of admiralty to aviation; construction and application of civil and criminal statutes; contracts for air transportation; powers of the Civil Aeronautics Board in the United States; the Civil Aeronautics Act of 1938; and requirements for the display of identification marks on aircraft.

One of the results of the work in aviation law on the international level is the standardization of certain parts of national aviation statutes and regulations. It is therefore rather surprising to find a somewhat cursory mention of the work carried on by States in the development of international standards for the safety, efficiency and regularity of international air navigation. Thus, the Convention on International Civil Aviation, signed at Chicago in 1944, which is part of the law of the land in the United States, is referred to only by implication, and yet it lays down some of the most fundamental principles of aviation law. The apparent harshness of this complaint is tempered by the realization that the compiler of a casebook is severely restricted by the limitations of space; the author of a textbook can mention many cases and statutes since each can be digested in the space of a few lines; the same material would take up many pages in a casebook. When a casebook contains text notes, however, there might be an argument for lengthening these notes at the expense of some of the less important decisions and legislative texts.

A rather novel note (pages 72-75) is concerned with the use of aircraft in rainmaking. Dean Manion suggests that the plaintiffs might recover compensation from defendant rainmakers on the bases of trespass, liability without fault and liability under existing statutes or other torts. He states somewhat whimsically that rainmaking efforts will undoubtedly have to be controlled, thus:

> "Panels might be set up to prevent umbrella and rubber manufacturers from hiring rainmakers to help business along at the expense of the farmers who needed the business".

The part of the book concerned with radio and television will arouse the interest of the Canadian lawyer because of the scarcity of precedents in this country. Subjects mentioned here include the regulation of broadcasting stations; common carriers; general provisions relating to radio; financial responsibility as a qualification for a station licence; assignment and transfer of station licences; procedure for the determination of the right to intervene in a hearing on the application of a competing broadcaster; defamation; licences; financing of radio broadcasting; contracts; and the Communications Act of 1934. Although the television precedents are not very numerous, nevertheless those which exist will afford a useful guide to lawyers who wish to advise clients on television matters. This field of law is still in the stage of active development; several cases involving a conflict between exclusive

rights to televise sports events and exclusive rights to take and show motion pictures of the same sports events are now before the courts in the United States.

Many problems will come up for solution in Canada with the advent of television. For example, what Canadian authorities will have the power to censor motion picture films intended to be broadcast on a national network? Will the answer be found in American decisions? In *Allen B. Dumont Laboratories Inc. et al.* v. *Carroll* (1949), 83 Fed. Supp. 813 (Penn.), it was held that a regulation of the Pennsylvania State Board of Censors, which requires that all motion picture films intended to be broadcast by television in Pennsylvania be submitted to the board for censorship purposes, was invalid because Congress had pre-empted the field and because it was an undue and unreasonable burden upon interstate commerce.

The book contains a useful index, a table of contents and a table of cases reported and cited. Provision has been made for the incorporation of a pocket supplement, in order to allow for changes and expansions at minimum cost. Students of the law of the air, whether they are in the classroom or office, will be grateful to Dean Manion for his enterprise in making such a book available.

GERALD F. FITZGERALD*

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Five Jewish Lawyers of the Common Law. By ARTHUR L. GOODHART, K.B.E., K.C., Professor of Jurisprudence in the University of Oxford. Toronto: Oxford University Press. 1949. Pp. 66. ($1.25)

Courtroom. By QUENTIN REYNOLDS. New York: Farrar, Straus & Co. Inc. 1950. Pp. xiv, 419. ($5.25)

A Segment of My Times. By JOSEPH M. PROSKAUER. New York: Farrar, Straus & Co. Inc. 1950. Pp. ix, 264. ($3.00)

Max D. Steuer: Trial Lawyer. By ARON STEUER. New York: Random House Inc. 1950. Pp. 301. ($4.50)

In his Lucien Wolf Memorial Lecture to the Jewish Historical Society of England, Professor A. L. Goodhart pointed out that the Jewish people have always been known as the People of the Law; and, as Sir Edward Coke suggested, the early books of the Bible show that Moses might not improperly be called the first law reporter. In his lecture Professor Goodhart tried to evaluate the contribution made to legal thought by men of his faith in the short space of about a century since Jews were first admitted to the universities and the bar. He did so by choosing five men who, either in England or the United States, played major rôles in the history of the common law: Judah P. Benjamin, Sir George Jessel, Louis D. Brandeis, Rufus Isaacs (first Marquess of Reading) and Benjamin Nathan Cardozo.

Fortunately, the audience for this lecture was to be widely increased when Professor Goodhart was persuaded to expand and publish his text. As

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a result we have this charming little volume of some sixty pages containing the biographies in miniature of five world-famous lawyers. Although the facts of their lives are pretty well known — notable biographies had been written already about most of them — the presentation in this form recalls delightful cameos whose vivid traits stand out in relief, conveying at a glance the essence of their subjects. And, in conclusion, the author gives us his summing up of the qualities his five choices had in common, their fundamental liberalism, clarity of thought, scholarly disposition and intellectual courage.

As we leave these legal giants of the past, we find that the public continues to be interested in the biographies of judges and lawyers. Only time can tell what the eventual place of our contemporaries will be in the hall of legal fame, but, even for us, the story of their lives and activities provides material for good reading and, sometimes, for best sellers. These reflections of mine are prompted chiefly by the appearance in recent months of three biographies of men who have practised law in the United States: *Court Room*, by Quentin Reynolds; *A Segment of My Times*, by Joseph M. Proskauer; and *Max D. Steuer: Trial Lawyer*, by his son, Aron Steuer.

In the case of *Court Room*, there is little doubt that it is the combination of an interesting personality and a series of highly dramatic trials that has resulted in the high place the book had, for a considerable period, on the list of best sellers. For here we are given the highlights in the career of Samuel S. Leibowitz as a criminal lawyer — a career that led him, at the age of forty-seven, to a seat on the Bench of Kings County Court in Brooklyn, one of the busiest criminal courts in America. Every large city has its outstanding criminal lawyer to whom the most difficult cases naturally gravitate. In the vast maelstrom of human activity which is New York, it is not surprising that cases of unusual dramatic interest came to Leibowitz. He defended one hundred and thirty-nine persons accused on capital charges and only one went to the electric chair — and in that case he had been refused permission to withdraw when he found that he had been intentionally deceived by his client on the central issue. A review of the dozen or so cases discussed in the book recalls some of the outstanding American trials of our times, the long legal battle in defence of the Scottsboro boys, for example, and the Lindbergh kidnapping case. Mr. Reynolds has not been satisfied merely to recount the highlights that appear in the public record of the trials; he has dug into a considerable amount of background material, which adds to the human interest of each case.

But the appeal of the work is not only because of the dramatic trials it discusses: it is full of wise observations by Leibowitz upon the administration of the criminal law, the ethics of the men who practise it, and the skills and techniques that bring success in the courtroom. He considers, too, improvements that should be made to ensure a fair trial for each accused, as well as to make certain that the innocent will be freed and the guilty punished without jeopardizing human rights in the process. For example, he urges strongly the appointment by the state of a public defender, so that an accused will not have to pit his own resources, often meagre, against all the law enforcement machinery of modern government. He recommends also that law students, especially those who intend to practise before the criminal courts, be given additional training, through legal clinics, in the investigation of facts and their presentation in court.

In the preface of his book, Mr. Reynolds quotes Leibowitz to the effect

that the public is generally uninformed about the civil courts because of their lack of human interest as compared with the more highly dramatized criminal courts. The next book before me, however, *A Segment of My Times* by Joseph M. Proskauer, shows that the story of the life of a mere civilian lawyer has its justification too. To be sure, Judge Proskauer modestly affirms that his life does not intrinsically merit an autobiography. His purpose is rather to disclose the background of a segment of the last seven decades or so, as one man saw it, in the hope that their problems and spiritual heritage might be more understandable. His justification for the attempt is stated with somewhat whimsical restraint in the following paragraph:

> "There are lives like mine that have touched closely upon great events, yet have fallen short of highest command. Often, from the experiences of such adjutants, one may gain a picture of the times more veracious, in many respects, than that which is drawn from the life story of the generals themselves. The adjutants, though participating in history, necessarily are more objective in their view than the prime movers."

And so we start out with young Proskauer as a student at Columbia and follow him through his early struggles as a beginner at the bar of New York. His talents were soon recognized and by 1923 he was acknowledged to be a seasoned lawyer. In that year he received from Governor Alfred E. Smith an interim appointment for one year to the bench of the Supreme Court of New York, which was followed by his election for a full term of fourteen years. Despite what the author calls "the dull routine" of a judge in a court of first instance, Judge Proskauer comments on a number of interesting cases in which he had the opportunity to make some constructive impact on the life of his community. One suspects, however, and later events confirm it, that he found the dullness of trial routine the greater since he himself, a man of active temperament, never really took to the serenity of judicial life. The rarified atmosphere of appeal work held no greater attraction for him, and, after three years as a member of the Appellate Division, he decided to join the small group of men who have left the bench to resume the more active —and remunerative—life of the bar. As a result of the author's rich experience both at the bar and on the bench, we have a number of constructive suggestions for the improvement of the civil administration of justice in a chapter entitled "Excursions into Legal Philosophy and Reform".

Judge Proskauer's interest in politics centered largely on his long association with the Happy Warrior, Alf Smith, one of whose chief political counsellors he was. He gives us an intimate view of a most colourful figure in recent American history, in his meteoric rise from the sidewalks of New York to his unsuccessful bid for the presidency and his final estrangement from Roosevelt.

Among the other fields traversed in this readable book are the rise of modern philanthropic organizations, like the welfare and community chests, and the fight against bigotry, in which Proskauer played a leading part. His efforts to provide better understanding between the different religious and racial groups won from Cardinal Spellman the description of him as "an apostle of Americanism". A doughty fighter for human rights, he was active at the San Francisco conference that saw the birth of the United Nations. For many years he gave distinguished leadership to the American Jewish Committee as its president. Skeptical at first of the political aims of Zionism, he was broadminded enough to admit a growing appreciation and under-

standing of the necessity for a Jewish homeland, and the final culmination of the Zionist dream in the establishment of the State of Israel found him rendering effective service to world Zionist leaders at critical junctures in the struggle.

The book closes with a picture of the Judge at seventy-two sitting by his boathouse on Lake Placid, gazing at a sunset; he compares the picture to the dusk of a happy, active and full life in the practice of a profession he loves, among friends and relatives he cherishes. And yet, the record of Judge Proskauer's service to his fellowmen has far from ended. Only a few weeks ago, while returning to the United States from Europe, he received a cable from Governor Dewey, asking him to head the commission named to investigate gambling activities in the State of New York.

The volume by Aron Steuer, Justice of the Supreme Court of New York County, about his father, Max D. Steuer, the celebrated trial lawyer, is admittedly not a biography. We are told by the author that instead of attempting to describe the life of one who was until recently a contemporary, his purpose is to discuss the elements of mind and character that brought Max Steuer to his eminent position at the bar. That his position was eminent, judged by any standard, there can be little doubt. Forty years devoted almost exclusively to trial practice, most often in commercial cases, revealed and developed talents that soon made him one of the most sought after of counsel. And the fact that after 1918 his fee was $1,000 for each day in court — later it became $1,500, plus a retainer depending on the importance of the case — shows that the successful practice of law, at least to those who reach the topmost rung, can be rewarding in a material sense as well.

The introductory chapter, in addition to a few biographical notes, discusses the talents that made Steuer the success he was. A capacity for hard work, a remarkably retentive and precise memory, a mastery of the art of cross-examination — these qualities made him desired as a counsel and feared as an opponent. Above all, he had the priceless faculty of always keeping his case within mental range, evaluating accurately every facet of the complicated issues he had to deal with. Apart from this introduction, the book consists of five chapters, each giving a summarized transcript of actual cases — some of them already historic, like the Triangle Fire case — with copious citations from the stenographic record to illustrate Steuer's technique and skill in action, particularly in the cross-examination of hostile witnesses. The study of the career and trial methods of such a master of cross-examination as Max Steuer cannot but prove helpful to anyone who would seek to perfect himself in this difficult art. All the more is this so today, when, as the author remarks in his postscript, the trend towards specialization has lessened the opportunities for great trial lawyers.

Can we find any common traits in the careers of these three contemporary lawyers of the Jewish faith — Leibowitz, Proskauer and Steuer — that may account for their success, as Professor Goodhart has accounted for his five lawyers of another age? One hesitates to answer in the affirmative. There is no scientific basis for ascribing to any racial or religious group predominant attributes of mind or heart that qualify its members above others in a particular field. But the temptation to generalize is strong — if only for the pleasure of giving expression to one's innate preferences or prejudices. Thus, Roy St. George Stubbs in his excellent essay in the February issue of this Review on Sir George Jessel, Master of the Rolls, expresses the opinion

that, to balance the handicap of racial prejudice against which Jessel laboured as a Jew, he had the decided advantage of being the heir to a great intellectual tradition, which developed every ounce of talent within him, without wastage. This fact, says Mr. Stubbs, accounts generally for the large contribution of the Jewish people to civilization, despite their relatively small numbers. Professor Goodhart saw running through the lives of the Jewish lawyers discussed in his book the threads of fundamental liberalism, clarity of thought, scholarly disposition and intellectual courage. Certainly one cannot deny that these traits are also portrayed, to a substantial degree, in the lives of the three contemporary lawyers we have discussed. And, perhaps, one should not be too surprised when one remembers that these men are spiritual descendants of the prophets of Israel, with the ideal of the pursuit of justice and righteousness at the very core of their faith.

HARRY BATSHAW*

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Current Legal Problems 1950. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER, on behalf of the Faculty of Laws, University College, London. Volume 3. London: Stevens and Sons Limited. Pp. vii, 305. (21s. net)

This is the third volume in a series that has already in a short space of time earned for itself a place of honour in modern legal writing. Legal writing is, perhaps, a misnomer, for the papers printed here were delivered as lectures at the Faculty of Laws, University College, London, during the session 1949-1950. How much editing was done after delivery and before printing this reviewer has no way of knowing, but it is a tribute either to the lecturers or to the learned editors, or perhaps both, that these lectures read so well.

Even the most particular and severe of readers will find one or more papers here to beguile and instruct. Provocative writing is now, as always, a necessary stimulant to an understanding of, and if necessary changes in, the law, and more particularly the law where it is most closely in contact with economics, politics and sociology. A lawyer who is looking for an answer to a particular problem will usually look here in vain, but an approach, an idea, a criticism and a suggestion he will find in abundance.

Canadian lawyers who make even a cursory examination of the current English law reports must be struck by the increasing number of cases that deal with statutes, orders and regulations having no relevance to the Canadian scene. The citation of English cases, at least recent cases, must be becoming less and less frequent. Part after part of the English law reports come to hand filled with cases on legislation or sub-legislation dealing with such topics as landlord and tenant, planning, internal revenue, many of which have not as yet, fortunately, made their way across the Atlantic to cast their dubious blessings over our economy. The subjects dealt with in *Current Legal Problems 1950* have, in part, the same bias as the recent cases. Of the fifteen subjects dealt with, three (The Changed Relation of Landlord and Tenant, The Law of the Theatre, and Some Social and Constitutional Aspects of the New Planning Law) have only a cursory interest for Canadian lawyers, and the busy man who has always more on his desk than his time will allow him

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to read, will be excused if he passes them over. Of the remaining twelve, four more (Evolution of the Law of Libel, Possession and Larceny, The Law of Courts Martial, and British Public Law and the Civil Law in Malta) are full of interest to the student of legal problems and history, but somewhat removed from the Canadian scene. Mr. Richard O'Sullivan's paper on Evolution of the Law of Libel is all that a large section of Canadian lawyers who know this distinguished writer's many interests and talents would expect, and is a sheer delight to read, even though some of his criticisms levelled at English law are now happily not applicable to our own.

No doubt it is becoming increasingly difficult to arrange for lectures that fall precisely within the title of the volume. The Origin of Administrative Centralization by Dr. M. W. Thomas, although of interest to the historian, seems almost to have crept in by mistake, for it is difficult to see how a scholarly examination of the beginnings of the establishment of factory inspectors and their control at Westminster can be classified as a current legal problem. The last two essays also, although of absorbing interest, would hardly seem to qualify either. Human Rights and the Colour Problem, by Mr. L. C. Green, states its case against discrimination with vigour and authority, but the problem is surely on the political, social and economic level, rather than the legal: the laws are only a reflection of what the political and social mores of the time happen to be. Professor G. Schwarzenberger's, The Problem of an International Criminal Law, able and scholarly though it is, seems somewhat unreal read at a time when the universal problem seems to be, not an international criminal law, but rather whether there is to continue to be a community of nations at all.

The five remaining papers, which for utilitarian reasons are regarded as more important, but for no other, cast a keen light on a number of interesting and difficult themes. The first, The Rt. Hon. Lord Normand's presidential address to the Bentham Club on The Judicial Committee of the Privy Council, is a brilliant examination of the history and rôle of this august body. Both those who opposed and those who favoured the recent abolition of appeals by Canada to the Privy Council will find further ammunition should they wish to pursue the fascinating if now somewhat futile battle, for Lord Normand's speech is eminently fair and balanced. Professor G. W. Keeton's, The Changing Conception of Trusteeship, and Professor O. R. Marshall's, Anachronisms in Equity, both deal with a subject of ever-increasing importance. Professor Keeton examines the rôle of the trustee in the light of changing economic and political conditions and comes to the melancholy conclusion that personal (as distinct from corporate) trustees seem on the verge of extinction. Professor Marshall's paper is concerned mainly with the substantive law of trusts and makes a powerful case for clarification in certain branches of the law.

The recent House of Lords decision in *Baxter* v. *Baxter*, [1948] A.C. 274, provides the starting point for Professor Raphael Powell's paper on The Concept of Marriage in Ancient and Modern Law. The author calls upon a wide acquaintance with Greek, Roman, Hindu and Jewish sources to argue powerfully that the decision, although probably unimpeachable on strict legal grounds, ignores important social and moral principles.

Trade Protection and Monopoly, by Professor R. A. Eastwood, is a valuable guide to that growing portion of the community, both lay and legal, which is coming into contact with trade associations and trade protection

agreements. The learned author illustrates with force and clarity the changing meaning attached to public policy and shows that the earlier decisions in this field must now be re-examined.

This is not a book for sustained reading. Even the most catholic of tastes can hardly pass on without interruption from the rôle of the trustee, to the pu pose of marriage, to the law of libel, to the rules regulating the licensing of theatres, and so on. It is definitely a book for casual skimming, for careful and, where the topic is close to home, intense study.

DAVID A. GOLDEN*

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La Crise de l'Etat aux Etats-Unis. Par Roger Pinto. Paris: Librairie Générale de Droit et de Jurisprudence. 1951. 241 pages. (800 francs)

Ce livre est un tirage à part de quatre chroniques constitutionnelles étrangères parues dans la Revue du Droit public et de la Science politique au cours de 1950. L'auteur, professeur à la faculté de droit de Lille, s'intéresse depuis plusieurs années au droit public des Etats-Unis, où il a séjourné l'an dernier.

Dans un premier chapitre sur le "nouveau" fédéralisme, l'auteur continue l'analyse de la jurisprudence constitutionnelle de la Cour suprême qu'il avait d'abord entreprise dans un ouvrage paru en 1938, *La Cour suprême et le 'New Deal'*. M. Pinto y étudiait les arrêts qui avaient causé la crise constitutionnelle où le pouvoir judiciaire s'était vivement opposé aux pouvoirs législatif et exécutif. Il démontre maintenant que la suprématie fédérale s'est affirmée par l'imposition de la volonté législative du Congrès et l'abandon de doctrines constitutionnelles, issues du libéralisme économique et du dixième amendement à la Constitution. Cet amendement semblait réserver aux Etats des pouvoirs résiduaires, i.e. ceux qui ne sont pas déférés au pouvoir central.

Alors que de Tocqueville avait pu écrire en 1835: "Le gouvernement fédéral . . . n'est qu'une exception; le gouvernement des Etats est la règle commune", M. Pinto conclut en 1950, sous l'oeil amusé du juriste canadien: "Ces Etats, si orgueilleux de leur souveraineté, ne constituent aujourd'hui guère plus que des provinces" (p. 22). Nous ajouterions: évidemment pas des provinces du type des provinces canadiennes, car au Canada les effets de l'Acte de Québec (1774) se font encore sentir alors que chez nos voisins les conséquences de la guerre de Sécession sont également tangibles. Cette première chronique se termine par une description de la structure actuelle de l'empire colonial américain.

La deuxième, portant sur la réforme du Congrès, résume d'abord la loi de 1946 sur la réorganisation du pouvoir législatif, puis décrit sommairement le processus d'élaboration des lois aux Etats-Unis. Les pouvoirs du Sénat américain en matière de traités, la pratique des accords internationaux dits *executive agreements*, sont des sujets que les hommes de loi de tous les pays de la communauté de l'Atlantique, qui s'intéressent le moindrement au droit public, doivent ou devront connaître. Ils sont ici présentés brièvement dans leur cadre historique et constitutionnel. M. Pinto note la faiblesse des partis politiques américains. Ils ne reflèteraient plus, suivant l'expression de son collègue de Bordeaux, M. Duverger, que "des intérêts particuliers et locaux

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qui ne sont plus à l'échelle des problèmes qui se posent désormais à la nation la plus puissante du monde" (p. 83).

Dans sa troisième chronique, l'auteur résume les travaux des deux grandes commissions sur la réorganisation de l'exécutif, celle de 1937 et la commission Hoover de 1947. Soulignons par une citation (p. 90) tout ce qui sépare notre régime de responsabilité ministérielle du gouvernement présidentiel des Etats-Unis:

> "Car le président américain ne partage pas les responsabilités du pouvoir. Il détient seul le pouvoir exécutif. Il veille à l'exécution des lois. Il est commandant en chef des forces armées. Il dirige la politique étrangère. Il participe au pouvoir législatif par ses recommandations et ses vetos. Il est chef d'un parti politique. Il est Chef de l'Etat."

Le cabinet américain ne joue donc qu'un rôle secondaire et qui semble être en baisse.

C'est au quatrième chapitre, comprenant la seconde moitié du livre, que le praticien trouvera le plus matière à profit. M. Pinto y reprend l'expression de M. Edouard Lambert en son livre paru en 1921, *Le gouvernement des juges*. M. Pinto proclame, lui, "la fin du gouvernement des juges". C'est un sujet qui lui est familier, car dans sa thèse de doctorat (*Des Juges qui ne gouvernent pas*, 1933) il avait fait une étude des opinions dissidentes à la Cour suprême des Etats-Unis de 1900 à 1933. Ce sont ces opinions qui ont voix prépondérante aujourd'hui. En trois ans, de 1933 à 1936, la Cour suprême a prononcé l'inconstitutionnalité de douze lois du Congrès. Mais ensuite, sous la pression de l'opinion publique, la Cour a accepté les mesures économiques et sociales du *New Deal*. C'est cette "révolution" qui a mis fin au "gouvernement des juges". Depuis 1937, une seule loi fédérale, qui n'avait d'ailleurs qu'une portée limitée, a été invalidée (v. Schwartz, The Changing Rôle of the United States Supreme Court (1950), 28 Can. Bar Rev. 48). Conséquences générales: respect du pouvoir judiciaire pour le pouvoir législatif du Congrès et acceptation d'un régime de droit administratif. La Cour suprême joue son grand rôle maintenant dans le domaine des libertés individuelles: respect du domicile, garanties de la procédure pénale, liberté de pensée et d'expression, discriminations ethniques, etc.

L'auteur est ici dans le meilleur de son travail. M. Pinto est, cela se voit, non seulement un juriste, mais aussi un sociologue. C'est là un luxe que l'on peut se permettre en pays unitaire. Au Canada, où le dualisme fédéral a des raisons d'être qui ne sont pas purement sociologiques et économiques, ni même uniquement historiques — car l'histoire s'y est concrétisée dans une situation culturelle de fait — la jurisprudence constitutionnelle est plus prudente et, à l'égard des textes, sa déférence est peut-être plus marquée.

Cet ouvrage a une valeur documentaire indiscutable. C'est du travail d'analyse fait par un spécialiste et documenté d'une bibliographie des plus abondante; tout ce qui a été écrit sur la matière depuis une douzaine d'années semble y être rassemblé. Toutes les décisions de la Cour suprême depuis 1938 doivent y être sinon analysées, du moins notées. Mais, pour se retrouver dans ce chantier parmi tous ces matériaux, le lecteur n'a qu'une table systématique des matières. Il aurait fallu prendre le temps de faire une table des causes citées. Or, vers la fin, l'ouvrage décèle de la précipitation. La traduction des textes cités est souvent obscure ou imprécise. Une cause importante, bien résumée et discutée à la page 179, n'est pas identifiée par un renvoi. Les fautes typographiques sont trop nombreuses et on s'étonne de lire

"construction" pour "interprétation", "dissent" pour "dissidence", "mesure drastique". Pour tout dire, les publications juridiques françaises nous avaient habitués à du travail plus soigné. Et surtout, rien ne justifie l'auteur (ou les éditeurs) d'avoir remplacé le titre *Réforme de l'Etat* qui avait d'abord servi dans la Revue par un titre-réclame. Il n'y a pas de *crise* de l'Etat aux Etats-Unis et l'ouvrage de M. Pinto n'en révèle pas.

Mais ces réserves sont d'ordre secondaire et il reste que, par cette continuation de ses études sur les problèmes constitutionnels américains, M. Pinto a élargi, s'il se peut, son autorité dans le champ de sa spécialité.

LÉON LALANDE*

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Droit International et Histoire Diplomatique. By C. A. COLLIARD. Second edition. Paris: Editions Domat Montchrestien. 1950. Pp. xiv, 784. (No price given)

The student of international law or relations frequently finds it difficult to obtain the source materials necessary for his studies. As a result he is inclined to take the line of least resistance, adopting an attitude that what is difficult to obtain is unimportant and can safely be ignored. At a time of political crisis, when passions are easily aroused, it is essential that everything should be done to enable students to obtain as nearly objective an outlook as possible. One of the surest ways of doing this is to provide the original materials and reduce the need to rely on second-hand interpretations.

The University of Grenoble has realised that documentary material is of value for other subjects than the potentially inflammable international law and relations, and has already published a collection of documents on commercial law, while others are in preparation on the law relating to electricity and on economic fluctuations. Professor Colliard, a member of its Faculty of Law, has produced a volume of selected documents on international law and diplomatic history, which was first published in 1948, but was reissued two years later with additional documents, not all of which, however, are dated after 1948.

The collection has been divided into two distinct parts, the one consisting of documents on international law, and the other, on diplomatic history. Both parts, however, are related, in that the underlying emphasis is the trend to institutionalism. A work of this nature must be kept within reasonable limits as to size if it is to serve its purpose for students. For this reason large scale editing is necessary, and it would be a waste of time to criticize Professor Colliard for excluding this or the other sentence or clause from a particular document. Rather should one be grateful to him for having brought together, so that they can easily be compared, the agreements concerning the leases of Port Arthur, Wei Hai Wei and the British West Indian island bases; for contrasting the permanent neutralisation of Switzerland with the partial neutralisation of the Aaland Islands or the left bank of the Rhine; for making available the texts of the Law of Guarantees, 1871, and the Lateran Treaty, 1929; for printing the Paris Convention relating to navigation on the Danube of 1921, with that of Belgrade of 1948; for enabling students to see how

* du barreau de Montréal.

artificial is the Statute of the Council of Europe by printing it next to the Charter of the Organisation of American States.

Since 1946 there have been developments of a major character in three Empires, and Professor Colliard is to be thanked for having devoted sixty pages to the Statute of Westminster, the 1949 Declaration by the Commonwealth Premiers, the Anglo-Irish Treaty, 1921, and the Ireland Act, 1949; the basic agreements concerning the French Union and the Netherlands Union. Here the comparative constitutional lawyer will find that despite the imitations of the Far East the British Commonwealth is still *sui generis*.

It is not unusual to find the texts of the Hague Conventions, Locarno, the Kellogg-Briand Pact, the General Act of 1928 and the Statute of the World Court used to illustrate the pacific settlement of disputes, but here they are printed side-by-side with the Bryan, Gondra and Saavedra Lamas Treaties.

Any collection of documents on modern international law is bound to include the Universal Declaration of Human Rights, and Professor Colliard's *Droit International et Histoire Diplomatique* is no exception. He however includes in the same section the texts of the agreements on the protection of minorities in Poland and Czechoslovakia. When one recalls the fate of these minorities, despite enforcement clauses in the treaties, one realizes the complete hollowness of the Universal Declaration.

The diplomatic documents start with the Holy Alliance, 1815, and the Monroe Doctrine, 1823. From there they proceed *via* the Entente Cordiale, the Anglo-Japanese Alliance, the Fourteen Points, the Nine-Power Treaty, the various Franco-Soviet Pacts, the Little Entente, the Anglo-Egyptian Treaty and the Anti-Comintern Pact to Munich. This is followed by the various German arbitral decisions for splitting up Czechoslovakia and the ordinance establishing the protectorate over Bohemia-Moravia. Then come the German-Soviet Pact, the armistice agreements with France; and Churchill's agreement with de Gaulle. There is no need to specify the various wartime agreements included in this collection, but what is important is the inclusion of the Washington Agreements concerning Germany, 1949, the Ruhr Statute, the Occupation Statute, the Franco-Saar Convention, the Schuman Plan and the Truman Declaration on Korea.

It should be clear from what has been said that Professor Colliard has provided a comprehensive and valuable collection of documents which should prove highly useful to students of international law and relations. The catholic choice of the documents printed should extend the appeal of the volume and make it useful to diplomats, politicians, journalists and all those who wish to consider themselves students of international affairs.

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