Reviews and Notices

Kenny's Outlines of Criminal Law. An entirely new edition, by J. W. CECIL TURNER. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada. 1952. Pp. liii, 576. ($8.00)

Although it contains many admirable features, this book is on the whole most disappointing. Those of us who used *Kenny* as students (and have constantly referred to it since) have always felt great affection for it, primarily, I think, because of the delightful personality it revealed. The book was first published in 1902, and reached its thirteenth edition (the last prepared by Professor Kenny himself) in 1929. Since then there have been two further editions before the present one, the sixteenth, which is described on the title-page as "an entirely new edition". Kenny originally wrote his book from lectures he delivered at Cambridge, and in what may be called its "Kenny form" it clearly shows what an invigorating teacher he must have been. In preparing it the author, according to his preface, had in view the needs of both "young men preparing for academical or professional examinations" and "older men when called upon to undertake, without previous legal training, the duties of a justice of the peace", and he "aimed at making the range of topics no wider than may be grasped upon a first perusal, even by a reader previously unfamiliar with the law".

These objects seem to have been almost entirely overlooked by the present editor; in fact the book is no longer either "Kenny" or "Outlines". The editor was responsible, in 1950, for the tenth edition of *Russell on Crime*, and must have found it difficult, after doing that more exhaustive work, to get his ideas into the compass of what was after all intended as an elementary textbook. This new edition is definitely not a book that can be easily read and assimilated by "a reader previously unfamiliar with the law"; it is in many places tough going even for one who has read a good deal on criminal law itself. In its present form the book seems to fall between two stools. It is much too full and detailed to serve as an elementary manual, but it is not exhaustive enough (except on some subjects, notably homicide, of which more will be said later) for the use of a practitioner busy in the criminal courts.

The book has been largely rearranged (in most cases the rearrangement is an improvement, although it is surprising to find robbery included among the offences against the person rather than among offences connected with property, since robbery is fundamentally theft plus violence, threats, or the like), and many parts of it have been rewritten. In the process, the delightful style that characterized the earlier editions has completely disappeared, and it can now be described only as heavy-handed. For example, Kenny,

in discussing general principles of criminal liability, pointed out that every crime involved both a physical and a mental element (*actus reus* and *mens rea*), and continued:

> "In Ethics, of course, this second condition would of itself suffice to constitute guilt. Hence on Garrick's declaring that whenever he acted Richard III he felt like a murderer, Dr. Johnson, as a moral philosopher, retorted, 'Then he ought to be hanged whenever he acts it.' "

Mr. Turner reproduces this passage, with slight alterations, but thinks it necessary to add the following footnote:

> "Dr. Johnson's remark was not a serious argument but a neat *jeu d'esprit*. For the actor, when on the stage, was a mere simulacrum of a man long since dead and gone, and the feeling was against another such lifeless creature; any moral censure therefore could only be levelled against the character portrayed."

The most serious criticism of the book, from the point of view of a Canadian lawyer, is that it contains exactly two Canadian cases, both of which are old and not particularly important, and were inserted by Kenny himself, presumably in his first edition. Mr. Turner seems, in fact, to be almost entirely unaware of decisions outside the British Isles. A hasty check of the table of cases, comparing it with that of the twelfth edition, shows the following cases from other jurisdictions: Australia, 11 (of which 5 were incorporated by Kenny himself); New Zealand, 4 (none in the twelfth edition); South Africa, 3 (all in Kenny's own edition); the United States, 20 (of which only 3 were not included by Kenny). As I shall point out in my consideration of the chapter on homicide, there have been decisions of some importance in this country, and a book that purports to be a general statement of the criminal law might well have included many of them. In justice to Mr. Turner it should be stated that there is one reference to an article in this Review, and one to what he calls "Toronto L. J.", meaning, presumably, the University of Toronto Law Journal.

The discussion of *mens rea* is by no means easy to follow, but contains some valuable ideas. A sentence from the chapter on homicide (p. 119) might serve as an introduction: "The alterations in the principles of criminal responsibility which were woven into the common law have almost entirely consisted of alterations in the conception of what the mental element should be". There is an excellent discussion of "Foresight of the Consequences", in which Mr. Turner deals with intention, recklessness and negligence (which he considers roughly equivalent to *dolus, culpa lata* and *culpa levis* in Roman law). Here he makes a most valuable suggestion, namely, that the word "negligence" should be eliminated entirely from the criminal law, and replaced by "recklessness", which is frequently used [1] to explain the degree of negligence required to found criminal liability. The distinction he makes is that in negligence (which should be synonymous with "inadvertence") there is a total failure to foresee the consequences of one's conduct, while in recklessness there is foresight of the possible or even probable consequences, and a persistence in the conduct despite that foresight, even if the person acting does not actually desire (or "intend") those consequences. His contention in this respect is summed up in the following passage (pp. 29-30):

> "But it should now be recognized that at common law there is no *criminal* liability for harm thus caused by inadvertence. This has been

[1] *E.g.*, in *Andrews* v. *Director of Public Prosecutions*, [1937] A.C. 576, [1937] 2 All E.R. 552.

laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute *mens rea*, and they are *intention*, and *recklessness*. The difference between recklessness and negligence is the difference between advertence and inadvertence: they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word 'negligence' with some moral epithet such as 'wicked', 'gross', or 'culpable' has been most unfortunate since it has inevitably led to a great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression to explain itself.

"Nor indeed can there be degrees of inadvertence when that word is used to denote a state of mind, since it means that in the man's mind there has been a complete absence of a particular thought, a nullity; and of nullity there can be no degrees."

This definition is given of a criminal attempt: "steps taken in furtherance of an indictable offence which the person attempting intends to carry out if he can". Kenny's definition, for which this is substituted, was: "some physical act which helps, and helps in a sufficiently 'proximate' degree, towards carrying out an indictable crime that is contemplated", and this seems to me more satisfactory. There is a helpful section on the history of attempt as a crime, and an excellent discussion (not, apparently, in Kenny) of the *actus reus* of this crime, summarized in the following sentences (p. 81):

"It is true that the criminality of the attempt lies in the intention, the *mens rea*, but this *mens rea* must be evidenced by what the accused has actually done towards the attainment of his ultimate objective. Thus the *actus reus* of attempt is reached in such act of performance as first gives clear *prima facie* evidence of the *mens rea*."

The chapter on parties to crimes, after headings for the recognized parties, such as principals in the first and second degree and accessories of different kinds, has a wholly unnecessary and misleading heading "Accomplices", as if an accomplice were yet another kind of party. The section contains merely general notes applicable to one or more of the classes previously enumerated and, since the word "accomplice" is of importance in the law of evidence (in a technical sense other than that in which it is here used), it would have been safer to omit it here.

The chapter on "Homicide" is, on the whole, admirable, although here, as we shall see, the author's apparent unawareness of any Canadian decisions is particularly unfortunate. The section has been completely rearranged, and the new arrangement is a great improvement on Kenny's original treatment. Homicides are first classified (p. 102) into "justifiable homicide, excusable homicide, murder, suicide, manslaughter, infanticide, [and] child destruction". (The last of these, a statutory offence that has no parallel in Canadian law, is not strictly homicide within the definition, since it involves the destruction of something that has not yet become "a reasonable person who is in being".)

After describing the *actus reus*, and pointing out that it is the same in all forms of criminal homicide (the *actus* is the same even in non-criminal homicide, but there it is not *reus*), the author proceeds to deal with various matters, such as causation, that are common to all types, and points out that the different kinds of homicide "are distinguishable solely by the variations in

the *mens rea* required for each", pointing out the origin of this, as of other branches of the criminal law, in the old principle of strict liability, and concluding his introductory review as follows (p. 110):

> "Our system of precedents has led to the preservation of old cases, decided on principles now obsolete, which are from time to time cited without appreciation of their ancient meaning or modern inapplicability. In the result the law of homicide now resembles a heap of interesting but mostly useless objects jumbled together in a curiosity shop. An authoritative restatement of the law of homicide is long overdue."

There follows a thorough discussion of justifiable and excusable homicides, which is presumably applicable in Canada, since our Code makes no attempt at thorough enumeration of these classes, saying merely, in section 252, that "Homicide may be either culpable or non-culpable", providing, in section 252(4), that "Homicide which is not culpable is not an offence", and then concerning itself solely with culpable homicide, which, according to section 252(3), "is either murder or manslaughter or infanticide".

Turning to murder, the author says that the words "malice aforethought", still used in England in indictments for murder, although they have been generally abandoned in Canada, have had different meanings at different times, as the law has developed, and that they "indicate the necessary mental element in the crime of murder". He proceeds (p. 120) to suggest the following definition, applicable to all but two anomalous cases, referred to later: "the freely formed intention of a man to pursue a course of conduct which he realizes will or may bring about the death of some person". This covers the various states of mind formerly listed by Kenny, without any general definition, and it would also cover the cases set out in section 259 of the Code. The two anomalous cases, referred to as cases of "implied" or "constructive" malice, are killing while resisting lawful arrest and killing in the course of or in furtherance of a felony of violence, in either of which cases the killing is murder even if the offender neither intended to kill nor realized that death was likely to result. These two cases, with others not recognized at common law, are dealt with in Canada by section 260, with some qualifications.

It is in the discussion of provocation in relation to homicide that the Canadian reader will be startled by the absence of any reference to judgments in this country. There are four points in particular in which the new *Kenny* is definitely misleading, so far as the law of Canada is concerned:

(1) The author says (p. 133):

> ". . . the old authorities were in substantial agreement that words alone, however grossly insulting, could not be regarded in law as provocation sufficient to reduce the homicide to manslaughter. The law on this point however cannot be regarded as settled since it was stated in *Holmes* v. *D.P.P.*[2] that 'one can imagine in these days at any rate, words of vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of violence'."

It appears to be clear in Canada that words alone may amount to provocation. In *Taylor* v. *The King*[3] (where, it is true, there was a slap in addition to words), Kerwin J. said, after quoting from the *Holmes* case:

> "The wording of our Code, however, is 'any wrongful act or insult',

[2] [1946] A.C. 588, [1946] 2 All E.R. 124.
[3] [1947] S.C.R. 462, 89 C.C.C. 209, 3 C.R. 475, [1948] 1 D.L.R. 545.

and the word 'insult', as generally understood and as defined in standard dictionaries, includes language as distinct from acts: *Rex* v. *Krawchuk*."[4] Kellock J. said:

> ". . . the statement of Viscount Simon [in the *Holmes* case] that 'in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime', i.e. from murder to manslaughter, requires to be placed against the language of the statute 'any insult', and, so viewed, cannot, in my opinion, be a correct statement under the Code."

Estey J. said:

> "Under . . . section 261 an insult may constitute provocation, and an insult may be effected by either words or acts or a combination of both."

(2) The author criticizes the reappearance, in *Mancini* v. *Director of Public Prosecutions*,[5] and subsequent cases, of the statement that "the mode of resentment must bear a reasonable relationship to the provocation", pointing out that it must "be taken not as intended to declare an equality of force of or weapon to be essential, but as indicating a point of evidence which the jury should bear in mind", and says that it was apparently so interpreted in the *Holmes* case. This point again is settled in Canada. There was some discussion of it in *Taylor* v. *The King*, and in *Rex* v. *Linton*[6] Robertson C.J.O. said:

> "If there is evidence of provocation, as defined by s. 261 of The Criminal Code, and the jury find provocation, and find, as a matter of fact, that the person provoked was actually deprived of the power of self-control by the provocation, there is no requirement that the consequent action of the person provoked, and who has been deprived of the power of self-control, shall be confined by him within any limit regulated according to the extent of the provocation. What s. 261 . . . prescribes is that the act be done in the heat of passion caused by sudden provocation."

(3) The question of intoxication (or the effects of alcohol not amounting to intoxication) as affecting provocation is a most interesting one, as finally settled in *Taylor* v. *The King*, which in this respect approved (by a majority) the earlier judgment of the Court of Appeal for Saskatchewan in *Rex* v. *Harms*.[7] It is quite true that, both at common law and under section 261 of the Code, the provocation must be such as would be likely to deprive an ordinary person of the power of self-control. The test is whether it was sufficient to deprive a reasonable man of self-control, not whether it was sufficient to deprive the accused of it.[8] The particular mental condition of the accused, whether caused by feeble-mindedness, by drink or otherwise, has therefore nothing to do with this question. But there is a second element in provocation. Not only must the provocation have been of the kind described, but the accused must *in fact* have been deprived by it of his self-control. It is in connection with this second, subjective element that it may be most important for the jury, if they find that there was in fact provocation, to consider the effect on the accused's mind of liquor consumed by him.

[4] 75 C.C.C. 219, [1941] 2 D.L.R. 353.
[5] [1942] A.C. 1, at p. 9, [1941] 3 All E.R. 272.
[6] [1949] O.R. 100, 93 C.C.C. 97, 9 C.R. 262.
[7] [1936] 2 W.W.R. 114, 66 C.C.C. 134, [1936] 3 D.L.R. 497. See also *Rex* v. *Ouellette (No. 1)*, [1950] 2 W.W.R. 875, 98 C.C.C. 153, 10 C.R. 397.
[8] *Rex* v. *Lesbini*, [1914] 3 K.B. 116, 11 Cr. App. R. 7; *Rex* v. *Mouers* (1920), 48 O.L.R. 505, 34 C.C.C. 287, 57 D.L.R. 569.

This aspect of the matter is not referred to, except in the following sentence (p. 135):

> "It can hardly be maintained that a man affected by alcoholic liquor should be regarded as an example of a standard 'reasonable man'; yet on several occasions when the defence of provocation has been raised by a prisoner accused of murder, the fact that a man who is to some extent the worse for drink is more liable to lose control of himself when irritated has been discussed by the courts as a matter which can be taken into account."

(4) There is no reference, as there would have been if Canadian cases had been read, to the question whether the provocation must come from the victim of the homicide — whether, in other words, provocation by *A* can be effective to reduce the killing of *B* from murder to manslaughter. It seems to follow from *Manchuk* v. *The King*[9] that it can, at least if the accused thinks, with reason, that *B* is a party to and connected with the provocation. The reason for this was made clear by Middleton J. A., speaking for the majority of the Court of Appeal:[10]

> "The true view is that in a criminal case the Court is viewing the matter from the standpoint of the prisoner subjectively. Was there that malice which is essential to the crime of murder? Was the killing with malice aforethought? Or was the crime that of manslaughter, the killing without the wicked motive in the heart? It is not a test between the slayer and the slain. It is not that the provocation by the slain in any degree justifies his death; it is rather that there was provocation, whether coming from the slain man or from another,which to some extent mitigated the offence."

Coming to "involuntary manslaughter" (so called to distinguish it from manslaughter following provocation, sometimes called "voluntary"), Mr. Turner finds that no authoritative definition is possible, and that "the *mens rea* required for manslaughter has not been defined in clear terms, and in innumerable instances has never even been referred to". (The definition in section 262(1) of our Code is not enlightening: "Culpable homicide, not being infanticide and not amounting to murder, is manslaughter".) He says that the "old principle that manslaughter was death caused in doing an unlawful act of any kind", although it has never been expressly repudiated, has been tacitly abandoned and in effect "demolished" by *Andrews* v. *Director of Public Prosecutions*.[11] The "old principle" is, I think, still very much alive in Canada. As already pointed out, Mr. Turner would abolish the conception of negligence in criminal law, and he suggests in conclusion (p. 146) that there should be

> "a statutory provision which should in effect provide that it shall be the crime of involuntary manslaughter when a man who has caused the death of another did so in a course of conduct which he realized [not merely ought to have realized] would or might cause someone a physical harm but not a fatal harm, provided that he had no lawful justification or excuse for inflicting or for risking the infliction of the physical harm which he foresaw. The question whether there was any justification or excuse for the harm foreseen would be for the judge to settle, as it is at present."

[9] [1938] S.C.R. 18, 69 C.C.C. 172, [1937] 4 D.L.R. 737.
[10] *Rex* v. *Manchuk*, [1937] O.R. 693, at p. 698, 68 C.C.C. 362, [1937] 3 D.L.R. 343.
[11] [1937] A.C. 576, [1937] 2 All E.R. 552.

In contrast to this admirable treatment of homicide, some offences, such as rape, bigamy and libel, are dealt with in a most summary fashion, without any suggestion of many difficult and interesting questions that may arise in connection with them.

In the chapter on malicious damage to property there is the following helpful definition (p. 186) of the word "malice" as used in statutes:

> "In an endeavour to bring clarity into this matter the late Professor Kenny in the first edition of this book propounded a principle which has held its position without any successful attack ever since. It is that in any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (1) an actual intention to do the particular *kind* of harm that in fact was done, or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it)."

It will be observed that this is almost identical with Mr. Turner's own definition of *mens rea*.

Throughout the chapter on "Stealing" (why not theft?) Mr. Turner is very critical of the decided cases. His thesis, for which he makes out a pretty convincing case, is that the courts have distorted the law in their desire to prevent the excape of dishonest men. This tendency is of course not unkown in Canada, and might even be said to be still noticeable in the English Court of Criminal Appeal. In discussing the *mens rea* in larceny, he points out that the word "fraudulently" in the common law definition, retained in section 1 of the Larceny Act, 1916, and in section 347 of our Code, is unnecessary, since a taking with the prescribed intent, done without colour of right, must be "fraudulent", in the sense of dishonest, which is the sense in which the word is here used.

There is an excellent description of forgery. Kenny said: ". . . an instrument is not a forgery when it merely contains statements which are false, but only when it falsely purports to *be* itself that which it is not". Mr. Turner adds (page 305—and in view of what I have said earlier, I hasten to say that this sentence is a valuable addition to the original): "The simplest and most effective phrase by which to express this rule is to state that for the purposes of the law of forgery the writing *must tell a lie about itself*".

In the chapter on "Offences against the State" Mr. Turner has added a section on sedition and similar offences. He quotes Stephen's well-known definition of "seditious intention". This is a further instance in which the absence of Canadian cases is regrettable, since the definition has been discussed in several judgments in this country, notably in *Boucher* v. *The King*,[12] which constitutes an invaluable commentary.

Book III, "Modes of Judicial Proof", attempts to summarize the whole law of evidence in some eighty pages. It consists of three chapters, one on "The Nature of Presumptions and of Evidence", one on "The General Rules of Evidence", and one on "Rules of Evidence Peculiar to Criminal Law"—this last containing seven sections, headed as follows: "A Larger Minimum of Proof is Required" (covering both the doctrine of reasonable doubt and the law on corroboration); "Special Exceptions to the Hearsay Rule" (complaints, dying declarations, and depositions); "The Prisoner's Character"; "Confessions"; "Competency of Witnesses"; "Unstamped

[12] [1951] S.C.R. 265, 99 C.C.C. 1, 11 C.R. 85, [1951] 2 D.L.R. 369.

Documents"; and "Evidence Taken Abroad". The mere enumeration of these headings shows how impossible it is to treat them adequately within a single chapter of twenty-four pages. Kenny included this very brief outline of the subject for the benefit of his two classes, students and lay justices of the peace, in order that they might "familiarize themselves with the foundations of the law of Evidence". The student preparing for examinations will obviously need much more than this and, as I have already pointed out, the book has become too detailed in treatment to be serviceable to laymen. The whole section might better have been omitted.

In dealing with the rule of practice respecting corroboration of an accomplice's evidence, Mr. Turner (p. 421) follows Kenny in including accessories after the fact among the persons whose evidence should be corroborated. No authority is cited for the proposition that an accessory after the fact is an accomplice, although some might have been found in *dicta* in *Rex* v. *Ellsom*[13] and *Mahlikilili Dhalamini et al.* v. *The King*.[14] Neither of these cases, however, directly decided the point, and it seems highly doubtful. As was pointed out in *Rex* v. *Robichaud*,[15] the rule is based upon the danger that the accomplice may himself be guilty of the crime, and be trying to escape by fastening the guilt on another, and this consideration cannot apply to an accessory after the fact, whose connection with the offence begins only after it has been completed.[16]

The final division of the work, dealing with procedure, is based almost entirely on English statutes, and is of little application in Canada.

As I have pointed out, a great deal of Kenny's original work has been rewritten. In the preparation of the new edition, many inaccuracies have been removed, but one or two still remain, and some new ones have crept in. On page 71 there is a reference to "Lord Atkins' Committee", which Kenny correctly called "Lord Justice Atkin's Committee". In at least one place (p. 96) round brackets are used intead of square in a citation, and the comma is misplaced. Kenny's mistaken date for the "judges' rules" (on questioning of prisoners by the police) is retained in this edition: they are still stated to have been made in 1918, whereas the correct date is 1912. One place where a slight change would have been an improvement is on page 438, where Mr. Turner reproduces Kenny's sentences (concerning competency of accused persons as witnesses): "In *recent* years a few statutes created further exceptions in the case of those crimes in which prisoners themselves were being rendered competent. But the whole doctrine has *now* been thrown into a new form by the Criminal Evidence Act, 1898." This would be quite appropriate in a book published in 1902, but the words I have italicized are slightly out of place in one published fifty years later.

The style, as I have said, is in places heavy-handed, and there are instances of clumsy construction and even of bad English. The type is easy to read, although the pages give the impression of being very crowded. The table of cases, in addition to containing about twice as many cases as that in the twelfth edition, is vastly improved in arrangement, all criminal cases being listed with the name of the accused first.

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[13] (1912), 7 Cr. App. R. 4, at p. 8.
[14] [1942] A.C. 583, at p. 587.
[15] (1938), 13 M.P.R. 23, 70 C.C.C. 365.
[16] See Tremeear (5th ed., 1944), pp. 1266-7, and cases there cited. Cf *Rex* v. *Zoccano and Burleigh*, 82 C.C.C. 71, [1944] 3 D.L.R. 641.

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Judge Medina. By HAWTHORNE DANIEL. New York: Wilfred Funk, Inc. 1952. Pp. 361. ($5.50)

After a brilliant career in law, Judge Harold R. Medina leaped suddenly into fame — perhaps, notoriety would be a better word, for fame is a flower of slow growth — in 1949, when he presided at the trial of eleven Communists, indicted under the Smith Act, in the District Court for the Southern District of New York. This biography, written with some co-operation from its subject, recounts the steps by which Judge Medina rose from obscurity to his present position of celebrity. It supplies a popular demand for information about a man who has caught the popular fancy. Judged by standards not too severe, it fulfills its purpose well enough. Judge Medina holds the centre of the stage from the first to the last page — and unimportant detail piled upon unimportant detail makes for too many pages. Michelangelo used to say that the more the marble wastes, the clearer the statue becomes. Had Mr. Daniel wasted less ink, perhaps his portrait of Judge Medina would be clearer.

The trial of the eleven Communists is the longest jury trial in the history of American courts, but its great length is not its only claim to distinction. It was truly a shocking affair, reflecting little credit on American jurisprudence. Aided and abetted by their counsel—members of the bar—the eleven accused converted the courtroom into something quite beyond even the conception of Hollywood's dream-world. Granted that the presiding judge exercised great patience and suffered extreme provocation, even his conduct was not above reproach. The Communists were convicted and the verdict of the jury was sustained by two appeal tribunals. Facts not to be overlooked in the record are the dissenting judgments of Mr. Justices Black and Douglas of the Supreme Court of the United States.

Counsel for the Communists were sent to prison by Judge Medina for contempt of court. On appeal to the United States Court of Appeals, Second Circuit, and the Supreme Court of the United States, the contempt proceedings were affirmed. "We affirm the orders punishing these lawyers", said Mr. Justice Frank, in the Court of Appeals, "not because they courageously defended their clients, or because their clients were Communists, but only because of the lawyers' outrageous conduct — conduct of a kind which no lawyer owes his client, which cannot ever be justified, and which was never employed by those advocates, for minorities or for the unpopular, whose courage has made lawyerdom proud" (182 F. 2d. at p. 454). One cannot, with the wildest flight of the imagination, conceive Erskine or Curran acting as did the counsel for the eleven Communists. But neither can one conceive Lord Mansfield or Chief Justice Cockburn acting as did Judge Medina.

In proceedings for contempt the presiding judge is the lawmaker, the prosecutor, the judge and the jury. In them it is essential not only that justice should be done, but that it should be made to appear that justice has been done. There will be some who will agree with the dissent of Mr. Justice Clark, in the Court of Appeals, who held that Judge Medina, in punishing for contempt, was wrong in his timing. Judge Medina sentenced defending counsel to jail, not in the face of their very flagrant contempt, not when he may have been justified by "the urgent needs of the moment", but at the conclusion of the trial of their clients. "The law should be inexorable, but not vindictive", said Mr. Justice Clark, "We cannot wisely permit officers of the court lightly to traduce justice; but on the other hand we can-

not afford to overload the sacred responsibility of providing adequate defense for all to the point when it cannot practically be fulfilled. It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts" (182 F. 2d. at p. 466).

In pondering the lesson to be learnt from the trial of the eleven American Communists, let us not say complacently that it could not happen here. Rather let us highly resolve that it shall not happen here.

ROY ST. GEORGE STUBBS*

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Enabling Instruments of Members of the United Nations. Part I—The United States of America. By WALTER H. ZEYDEL and WALDO CHAMBERLIN. New York: Carnegie Endowment for International Peace. 1951. Pp. xvii, 126. ($2.50)

This book is an experiment. It is the first part of a series that will bring together for the first time the source material for the study of the legislative and executive instruments of member governments necessary to enable them to participate in the affairs of international organizations. The materials collected in it are the principal enabling instruments of the United States of America relating to its participation in the United Nations Organization.

The contents are divided into six sections. The first deals with the ratification of the Charter; the legislative authority for establishing a United States Mission to the United Nations, its representation in the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and commissions and the main committees of these four organs; legislation to implement certain provisions of the Charter (articles 41, 43 and 83); and examples of other types of legislation on participation in the United Nations (for example, the Foreign Assistance Act of 1948).

The second section contains the United States acceptance of the compulsory jurisdiction clause, article 36(2), of the Statute of the International Court of Justice. The third deals with membership in the specialized agencies of the United Nations and the fourth contains examples of international legislation prepared under the auspices of the United Nations. The fifth sets out specimen forms of credentials for United States representatives to the United Nations. And the sixth contains a general summary. There is also an appendix containing four statutes of the State of New York relating to the United Nations.

The large number of documents published in this volume will make one realize the emphasis placed on international organization in the governmental activities of today. They also reveal the very great support that the legislative and executive branches of the United States government have given to the United Nations Organization. It should be noted, however, that the fourth section contains several documents that have not been accepted or ratified by the United States. It is difficult to see the justification for including them. Are they instruments of the United States?

This collection of enabling instruments will be of interest primarily to

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specialists in United Nations affairs. It will be particularly useful to scholars in countries where American government documents are not easily accessible. But its chief value will lie in the attention it attracts to a "hitherto untouched portion of the study of international organization".

C. B. BOURNE*

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Pollock's Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law. 15th edition by P. A. LANDON. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1951. Pp. xliv, 480. ($14.50)

Sir Frederick Pollock's text on torts, now too thoroughly established as a classic to require a descriptive review, appeared first in 1887. Thereafter for fifty years the author continued to devote a good part of his life to the exposition and clarification of tort law. In this volume he made a remarkably successful effort to reduce the heterogeneous grounds of decision to a body of interrelated principles capable of analytical exposition. Although this was, still is, and always will be premature, it offers a framework of stability and predictibility which assists in directing as well as interpreting the continuous changes compelled by shifts in the patterns of human life and economic theories.

In 1887 Pollock's text must have been as useful to a struggling student as is the chart of unknown coastal waters to a mariner. The modern law school offers the student a conducted tour and an opportunity to enlarge and refine his understanding of the law by the effort of writing his own textbook in each of his courses. Texts will therefore be less used and less relied on by undergraduates, but they will continue to be used and relied on by the profession. For members of the profession texts are convenient repositories of what they once understood but cannot hope to retain in their memories. Time may have been when a lawyer could hope to acquire and hold a reasonable proportion of what he needed to know in his daily practice. The tremendous growth of the law and the accelerated rate of change which have become manifest in the last fifty years have made that no longer a practicable aim. Faced with the problem of advising on a matter outside his usual routine, and caught between what he has forgotten and new developments he has not been able to keep up with, the practitioner can start his mind working along useful channels by skimming the appropriate chapters in a good text. Pollock's text on torts is such a book. When the text also contains full references to periodical literature, which is usually where one must look unless one can be satisfied by a general or superficial treatment, it becomes a useful tool. This book, like too many others, is not in that respect useful. It contains very few references to legal periodicals and no table of citations to them.

This text was first published some five years after Holmes's *The Common Law*, and shows the inspiration one great mind can give another. Both books were produced when the authors were, in terms of their own life spans, young men. Each book, had its author offered nothing further, would have entitled him to a place among the masters of the common law. Yet to this

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achievement (Pollock had already in 1876 published his text on contracts) each added half a century of distinguished legal thinking and writing. Throughout his life, Sir Frederick gave his readers the benefit of his research, not only in English and Roman sources, but also in American. His knowledge and use of American authorities was as unusual in his day as it is unusual today for an English writer to be conscious of Canadian legal materials. Pollock's editor has not continued Pollock's policy of keeping a watchful eye on American developments. He has made no reference to *Palsgraf* v. *Long Island Railway*,[1] a decision as significant in our day as *Brown* v. *Kendall*[2] or the *Nitroglycerine* case,[3] both cited by Pollock, were in his generation. The few scattered Canadian cases I noticed in reading this edition were all Privy Council appeals, which are, after all, English cases reported in English reports. Canadian counsel always did carry their research into the English texts and reports as well as the Canadian. They are now showing an increasing tendency to range through the American and all Commonwealth sources. The reasons for judgment in Canadian courts now have a wider base, and hence more opportunity for analysis and synthesis, than those of the separate jurisdictions from which we draw inspiration. Text-writers who intend to offer a comprehensive treatment of common law doctrine should comb Canadian reports. What writer could fail to be entranced by the facts in *Nova Mink Limited* v. *Trans-Canada Air Lines*[4] and Mr. Justice V. C. MacDonald's canvass of the theory of negligence as a basis of liability? Should not somebody whose function it is to take an overall view try to explain how *Cook* v. *Lewis*[5] can be absorbed into the body of the law without modification of the fundamental principle that the court must have proof of factual, causal connection between the defendant's act and the plaintiff's harm? Are not the facts in *Guay* v. *Sun Publishing Company*[6] almost perfect for a mid-twentieth century attempt to overthrow the past and impose liability for the negligent use of language?

This edition offers, with some excisions, Pollock's own text as it appeared in the thirteenth edition in 1929. The editor has added, in square brackets, his own opinions, his critiques of Pollock's text and his views of the effects of recent cases. He has also added five separate excurses, and has, as in the 14th edition, incorporated Pollock's own manuscript notes, which had been made in preparation for a further edition in Pollock's lifetime. Some people may not like this method of preparing a new edition of a standard text. I do. It offers distinct advantages: (1) it shows the reader at a glance what is old, and can therefore be skimmed by anyone fairly familiar with the author's views, and what is new and should therefore be read with a different mental set; (2) when the original text is the product of a mind of the range and grasp of Sir Frederick Pollock's, there is the additional reason for preserving the author's *ipsissima verba* in the new edition that otherwise the author's real thought will sooner be lost. Mr. Landon's addition of critical excurses add stimulating discussions, thereby giving added pleasure and interest to the reader as well as something to think about after he has closed the book.

One defect in the book is its failure to integrate the Law Reform (Con-

[1] (1928), 162 N.E. 99; 59 A.L.R. 1253 (New York Court of Appeals).
[2] (1850), 6 Cush 292; 60 Mass. 292 (Supreme Judicial Court Mass.).
[3] *Parrott* v. *Wells, Fargo & Co.* (1872), 15 Wall 524; 21 Led. 206 (Supreme Court of the United States).
[4] [1951] 2 D.L.R. 241 (N.S.S.C. en banc.).
[5] *Lewis* v. *Cook & Akenhead*, [1950] 2 W.W.R. 451; [1950] 4 D.L.R. 136 (B.C.C.A.); *Cook* v. *Lewis*, [1952] 1 D.L.R. 1 (S.C.C.).
[6] [1951] 4 W.W.R. (N.S.) 549, reversed on appeal [1952] 5 W.W.R. (N.S.) 97, O'Halloran J. dissenting.

tributory Negligence) Act, 1945 (chapter 11, excursus E) and Lord Campbell's Act (chapter 3, section 2). In general the treatment of the whole question of contributory negligence is in Pollock's text merely a repetition of the orthodox confusion which has resulted from lack of analysis of the various meanings lying buried in the universal solvent cause. In the excursus (excursus E) the editor does no exploratory probing but merely notes the 1945 Act and subsequent cases. It is therefore not surprising that the effect of this recent legislation on another broad field of law, the liability of occupiers of premises (discussed in chapter 12), has not been considered.[7] Another defect is the absence of any discussion of motor vehicle problems as such. This is inherent in Pollock's text, and the reason for it is probably the historical one that the motor vehicle did not appear in numbers sufficient to distort the law until after 1923. Pollock's text was then in its twelfth edition. Probably then, and certainly now, it would be extremely difficult to give adequate coverage of the special problems involved in automobile accidents without reorganizing the whole book, and that would make it cease to paint the picture as Pollock saw it. Mr. Landon believes that Pollock's view with explanations and addenda is worth his effort and that of many readers, and he is undoubtedly right.

We have now three standard English texts of approximately the same size dealing with what for want of a better name may be called the law of torts: Pollock, Salmond and Winfield. All three are in their different ways first-class elementary books. Since the fourteenth edition of Pollock appeared in 1939, the fifthteenth in 1951 does not crowd the market, and it should prove a welcome addition to any law library.

M. M. MACINTYRE*

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Province of New Brunswick: Report of the Royal Commission on the Rates and Taxes Act. Fredericton, N.B. October, 1951. 72 pp. (free).

The N.B. Rates and Taxes Act, R.S.N.B., 1927, c. 190, deals primarily with the collection of the tax revenues of the municipalities. The Royal Commission on the Rates and Taxes Act was established to consider the principles to be adopted in the forthcoming revision of that statute. The reviewer understands that the municipal authorities are to be consulted before an attempt is made to implement the report.

The Commission advocates greater central control of municipal taxation. For example, they would have legislation enacted forbidding local authorities to grant fixed valuations to industries. Another method of centralization they would use is a "Provincial Equalization and Appeal Board", which would be an intermediate level of appeal after an unsuccessful appeal has been made to the local assessors but before an appeal to a county court judge. One would think that this Equalization and Appeal Board should be completely free and independent of the pressures of politics. However, the Commission chooses to recommend that it be composed of "three permanent

[7] For an excellent judicial discussion of this problem see *Whitehead* v. *North Vancouver*, [1939] 3 D.L.R. 83 (B.C.C.A.).

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officials of the Department of Municipal Affairs". A board composed of civil servants, whose tenure of office both as civil servants and as members of the board would not be too certain and would probably be subject to the changing fortunes of party politics, the vagaries of the political head of the Department of Municipal Affairs, could not be completely objective. It would not possess the independence of a tribunal made up of persons of independent professional status possessing a fixed tenure of office.

The report contains a unanimous recommendation for the abolition of the personal property tax, generally considered archaic. Unfortunately, because motor vehicles are already heavily taxed by the provincial government, the Commissioners advocate a special personal property tax on motor vehicles and self-propelled farm machinery, to be collected by the local authorities.

The reviewer suspects that the members of the Commission missed an opportunity to do a thorough and competent task by hurrying their work too much; at least, the whole report, by reason of the paucity of references, the poverty of the bibliography and the inadequacy of coverage, gives the impression of hurry. Another six months devoted to considering the municipal tax methods of other provinces might have made the difference between a profound and thorough study and a somewhat superficial analysis. Also, the personnel of the Commission might have been broadened by increasing the membership from three to at least five and including tax experts who have been connected with the Canadian Tax Foundation.

J. CARLISLE HANSON*

A Judge's Courtesy

May I add the great importance in a Judge of courtesy to all men, and that he should, on all occasions, abstain from unnecessary bitterness and asperity of speech? A Judge always speaks with impunity, and always speaks with effect. His words should be weighed, because they entail no evil upon himself, and much evil upon others. The language of passion, the language of sarcasm, the language of satire, is not, on such occasions, Christian language: it is not the language of a Judge. There is a propriety of rebuke and condemnation, the justice of which is felt even by him who suffers under it; but when magistrates, under the mask of law, aim at the offender more than the offence, and are more studious of inflicting pain, than repressing error or crime, the office suffers as much as the Judge: the respect for Justice is lessened; and the school of pure reason becomes the hated theatre of mischievous passion. (Sydney Smith, The Judge That Smites Contrary to the Law. 1824)

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