

Reviews and Notices

Law in the Making. By CARLETON KEMP ALLEN. Fifth edition. Oxford: Clarendon Press. Toronto: Oxford University Press. 1951. Pp. xxxii, 626. (\$6.00)

To those familiar with earlier editions of *Law in the Making*, it may be sufficient to say that, in the fifth edition, the arrangement and point of view remain unaltered but the material has been subjected to a thorough revision. The author, in the preface, remarks that it is twenty-four years since his book first appeared and that aging books, like aging mortals, can stand only a certain amount of rejuvenation. The book had its origin in the Tagore Lectures for 1926, delivered at the University of Calcutta under the title "The Sources of Law". Such a work must present an unusually strong temptation to prepare subsequent editions by the superficial process of leaving intact the bulk of the original, changing a sentence here and there and adding occasional references to new decisions and articles. In that sketchy type of revision, authorities weighty enough to cast doubt on an entire passage are relegated to footnotes and obscured under a casual "compare" or "see also".

This edition was prepared by Dr. Allen himself and, in his hands, rejuvenation is rejuvenation. The signs of a thorough-going overhaul are clearest in chapter IV (Precedent: Authority and Operation), but it is obvious that, throughout the book, the author has been at pains not only to weave recent decisions into their proper place in the fabric but to revise the statement of his own views on matters of theory. The re-writing commences with the second paragraph on page one and continues, wherever the need is felt, to the very end. Senescence may creep into later editions; this one displays none of it.

If *Law in the Making* must be classified as a text in some particular field, then that field is undoubtedly jurisprudence. The book's purpose is to discuss the place and operation of custom, precedent, equity, legislation and subordinate and autonomic legislation in the making of rules of law. It is of interest that the Swiney Prize, presented every tenth year for the best published work on general jurisprudence was awarded to Sir Paul Vinogradoff

in 1924, to Sir William Holdsworth in 1934 and to *Law in the Making* in 1944. As might be expected in the case of one who acknowledges frankly the influence of Vinogradoff and Holdsworth, the author's approach is substantially historical and discursive.

The book commences with what is designated as, and obviously intended to be, an introduction. In the first edition it consisted of 25 pages and bore the title "The Sovereign as the Source of Law". By the present edition it has expanded to 60 pages and changed its title to "Law and Its Sources". The theme of the introduction is that there are two antithetic conceptions of the growth of law. In one, the essence of law is its imposition upon society by a sovereign will. Law is artificial. The picture is of an omnipotent authority standing high above society and issuing, downwards, its behests. In the other, the essence of law is its development within society of its own vitality. Law is spontaneous and grows upwards independently of any dominant will. Starting as an analysis of Austinianism, the introduction develops into an excursion into the general realm of legal theory.

One never escapes the feeling of a strange antithesis between the introduction and the remainder of the book. In the later portions I feel that I am reading of the gradual development of law and, especially, of English law—the law that, with all its peculiarities and inconsistencies, we teach and practise. Apart from the introduction, it is mainly a book on English law, written by an English lawyer for English lawyers. The introduction, by way of contrast, is an abstract treatise on the theory of law. Being theoretical rather than concrete and devoted to generalizations and summaries of the views of others, it often lacks the characteristic Allen touch.

In the end Dr. Allen concludes that the issue between the two conceptions of the growth of law is largely one of terminology. If I agree, it is partly because it soon becomes apparent that the remainder of the book is in no way dependent on the solution of the controversy. Whether the sanctioning power creates the law or the law creates its own sanctioning power has little to do with the producing of those rules that constitute the law. The main theme of the book is not. Whence comes the obligatory force behind our law, but, Whence come the principles that comprise the law. Perhaps the English lawyer is too concerned with the formulated content of his law and too unconcerned with the problem raised in the introduction. The fact remains that this book will appeal to him mainly because of his concern in the one and his lack of concern in the other.

To this reviewer the most interesting part of the book is the 200 pages dealing with the nature, history, authority and opera-

tion of precedent. No one can read its compact presentation of the general rules for the application of precedent in English law without learning to respect the author's ability to assemble a set of modern principles in intelligible form and to amalgamate with his previous writings the effect of recent decisions. Equally attractive is the way in which he presents material that, in many hands, would degenerate into a soggy mass of antiquarianism. Few writers could trace, with illustrations, the growth of the theory of precedent from the time of Bracton without boring their readers and obscuring the dependence of English law on precedent and on a code of principles for the evaluation and application of precedents. His concern is with the past history and present effect of the doctrine, instead of with its relative merit as one of the foundation stones of a system of law. It is a fascinating story and it is illuminated by glimpses of the men who, either as judges, counsel or reporters, flit through Dr. Allen's pages.

Even those whose main concern is not with the study and teaching of jurisprudence should read *Law in the Making*. They should read it, not for its discussion of a particular topic or its eminence in a selected field, but for its wealth of illustration taken from the law that lawyers use from day to day. It will provoke a range of new ideas and revive memories that are half-forgotten. It contains the results of a research that is intensive and diversified to an almost unbelievable degree. The illustrations are timely, instructive, useful and presented with an incomparable faculty for selection, arrangement and perspective. As we watch Dr. Allen's eye range over cases from *Anon* in 1305 to *Cassidy v. Ministry of Health* in February 1951, and from recent developments in the scope of certiorari to the closing of ice-cream shops at 10 p.m., we see his mind continuously reducing the results to their simplest and most instructive form, digesting and arranging them and allocating to them a place in a vast mosaic.

If no other benefit were to be expected, there will be almost sufficient recompense from contact with Dr. Allen's command of language. Even in an era when most writers are striving to escape from the prosaic phrases of the nineteenth century texts, the quality of his style is rarely equalled. He does not shrink from enlivening his pages with his own views of persons, events and theories, often with the assistance of a felicitous phrase. He tells us that there are at least hints in the reports that whether Beresford liked a precedent or not depended to some extent on the state of his temper; that Lord Thurlow was in his most pugnacious mood; that some of the early reporters were sheep, with fleeces not as white as snow, but as white as could be expected in the strange pastures through which some of them had strayed; that the reporters also included a class of goats, not to say scapegoats; and that the diction of

statutes has varied greatly at different periods of our legal history, swinging from a telegraphic brevity to exuberant verbosity. It will be a long time before this style finds its way into the Annual Practice or treatises on landlord and tenant, but if it comes to influence some of our texts we may rejoice.

Law in the Making may not fall squarely into any department of law recognized by the practitioner, but it can be recommended as instructive and delightful reading. It is the work of a brilliant scholar and writer.

E. F. WHITMORE*

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Index to the Supreme Court of Canada Reports: 1876-1950. By JOHN SOUTHALL, B.A., and GERALD SANAGAN, M.A. Toronto: Butterworth & Co. (Canada) Ltd. 1952. Two volumes. Vol. I, pp. vi, 470; vol. II, pp. 471-900. (\$25.00 the two volumes)

Since the mantle of judicial leadership in Canada fell, three years ago, upon the nine judges of the Supreme Court of Canada, a new interest and importance have attached to the court's decisions. For the first time in Canadian history, the court has become a vital, effective part of Canadian self-government. The "yes" or "no" of this court on any legal question arising in Canada is now final; and to this court the profession and the country as a whole look for ultimate guidance.

The record of the Supreme Court of Canada's decisions, since its creation by federal statute in 1875, is contained in no less than ninety-five large volumes. The task of ascertaining whether or not it has dealt with any particular legal problem has always involved, for the practitioner, much servile labour. In 1903, a digest was published of the reported cases of the court up to that time. An additional digest appeared in 1918, for the period from 1903 to that year; still another for the four-year period from 1918 to 1922; and recently a digest has been published for the years from 1923 to 1950. But there have never been available to the practitioner a comprehensive table of cases and a classified index of those cases covering the whole life of the Supreme Court. This need has now been met by Messrs. John Southall, of Lincoln's Inn, and Gerald D. Sanagan, of Toronto, who have just compiled, in two volumes, a complete index and table of cases of the Supreme Court Reports from 1876 to 1950.

The masterly brevity and convenience of this new index can best be illustrated, perhaps, by the following examples, chosen

*E. F. Whitmore, LL.B. (Sask.). Member of the Saskatchewan Bar. Professor of Law, University of Saskatchewan. Associated as a consultant with the firm of Disbery, Bence and Walker, Saskatoon, Sask.

more or less at random. Suppose that the reader wants to know whether the doctrine of *stare decisis* applies to the decisions of the Supreme Court. By referring to "*stare decisis*" in the subject index, he finds a cross-reference, "Duty of Supreme Court; see Supreme Court of Canada"; and there, under a subheading, "Practice and Procedure", is the following:

Previous Decisions — Whether Binding.

To be followed. *Stuart v. Bank of Montreal*, 41, 516.

To be followed. *Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co.*, 43, 650.

Having thus ascertained the ruling cases on this point, the reader, by reference to the 123-page table of cases in the first volume, will find that the court's decision in *Stuart v. Bank of Montreal* was affirmed by the Privy Council. In this convenient manner he can satisfy himself that the Supreme Court of Canada (as distinct in this respect from the Privy Council) appears to be formally bound by its own previous decisions.

The new volumes are an excellent example of the art of indexing. The authors have arranged and classified the subjects so that they can be found expeditiously by the searcher. They have put to good use their "index sense", not only of how a legal subject should be classified in all its ramifications, but also where the practitioner is most likely to look for those subjects.

The index, inasmuch as it contains a highly concentrated digest of the cases, is entitled to be classified as legal literature. Those who assume that a legal index-digest is not literature would do well to heed the words of Sir James Fitzjames Stephen, himself a famous legal indexer, as well as a judge of the High Court in England: "The preparation of a digest, either of the whole or any branch of the law, is work of a very peculiar kind. It is one of the few literary undertakings in which a number of persons can really and effectively work together. . . . The great object [of law reform by private enterprise] still to be effected is the improvement of the form of the law by its condensation and rearrangement. This is essentially a literary problem, though it is not usually regarded in that light."

Whether the new index be regarded as literature or not, the profession will be grateful to the learned authors for the timely compilation of so efficient a guide to the jurisprudence of Canada's final court of appeal. Some might even feel disposed to echo the tribute expressed by Benjamin Disraeli: "I, for my part, venerate the inventor of indexes!"

J. R. STIRRETT*

*Of Osgoode Hall, Toronto.

Manual of German Law. Volume II, Private International Law, Civil Procedure, Criminal Law, Criminal Procedure. By E. J. COHN, G. MEYER and K. NEUMANN. London: H. M. Stationary Office. 1952. Pp. xv, 167. (\$4.25)

The first volume of this *Manual of German Law*, which is designed as a guide to the German legal system as a whole, was published two years ago and was reviewed in the *Canadian Bar Review* at (1951), 29 *Can. Bar Rev.* 336. It contained, besides a General Introduction, chapters on Civil Law (by Dr. E. J. Cohn) and on Commercial Law (by Professor Martin Wolff), and gave a valuable, accurate and up-to-date survey of these fields of German law. The second volume now before us brings the work to a close by dealing with the main outstanding subjects: Conflict of Laws (Dr. E. J. Cohn), Civil Procedure (Dr. E. J. Cohn and G. Meyer), Criminal Law and Procedure (both by K. Neumann), and their mere enumeration makes it clear that publication of the *Manual* has been an important and enterprising undertaking on the part of the Foreign Office.

It is unfortunate therefore that the almost unqualified approval with which it was possible to welcome the first volume of this work cannot be extended to all parts of the second. It is difficult to avoid the impression that it has been less carefully prepared than its predecessor and less scrupulously seen through the press than an important technical publication of this kind deserves. In the first place, volume II is a rather cramped affair; though dealing with four distinct fields of law, instead of two, it has only little more than half the length of the previous volume. Readers looking for guidance about German rules of conflict suffer probably least from this drastic reduction in space for, as Dr. Cohn himself points out in the bibliography to his useful outline (Part III), there are a number of big works on private international law written in the English language by refugee lawyers from Germany, which contain copious references to the German law on the subject.

Again, of the Penal Code (*Strafgesetzbuch* of 1871) a full translation was prepared and published by Dr. V. Gsovski and other officials of the Library of Congress in 1947 and, though this translation is not mentioned in the Foreign Office *Manual*, it can always be used to supplement the information here provided by Mr. Neumann. This author's contributions to the symposium, on Criminal Law and Criminal Procedure (Parts V and VI), are in any case admirably lucid and, within the available space, thorough discussions of their subjects. Mr. Neumann has wisely refused to be bound too closely either by the arrangement or by the actual wording of the text of his codes and deals more fully than his colleagues

with the decisions of the German courts, especially the definitions given by the *Reichsgericht* of the ingredients of an offence, definitions which, as he recognizes, are of the greatest importance in German courts "on account of the esteem in which the higher court is held", although there is of course no *stare decisis* rule in German law.

Mr. Neumann's attempt to give a picture of German criminal law and procedure as it now stands is complicated by the fact that not all the numerous changes and amendments introduced into the codes during the Nazi regime between 1933 and 1945 are of necessity tainted with National-Socialist ideology and thereby rendered invalid. The "simplified" method of legislation by decree relied on by the Nazis made it possible, on the contrary, to carry through a considerable amount of unobjectionable legislation, planned already before 1933, within the framework of general law reform and some provisions of it had already been formulated as draft laws. In some cases (for example, at pp. 114, 130) it is indeed not easy to say whether a given clause of the codes is still in force or must be regarded as "an abuse by the Nazis of the power to inflict punishment"; and therefore as revoked by Control Commission laws and proclamations; at least at one point, however, (abortion, p. 101, and perhaps also *Nötigung*, p. 104), the *Manual* seems to be out of touch with the current decisions of the German courts and dominant legal opinion. Some of these questions will no doubt be finally set to rest by the *Strafrechtsbereinigungsgesetz* which is on the agenda of the Federal Parliament at the time of writing.

It was the Civil Procedure Code, about which up-to-date information is not available, or at least not easily accessible in the English language, which required the fullest treatment it could possibly get, yet it is just this section which receives inadequate space, barely 40 pages compared with 200 pages allotted to the discussion of the Civil Code. Part IV (Civil Procedure) suffers from other serious shortcomings of conception and execution which severely affect its usefulness. It is a rather uncritical compilation, relying too much on the literal wording rather than the accepted meaning of certain selected passages of the Code. Not only is it written in laboured and sometimes inadequate English, which contrasts unfavourably with the remainder of the *Manual*, but it appears to have been prepared by someone not sufficiently familiar with English procedure and its terminology. Numerous expressions for which there are fairly adequate English equivalents have remained untranslated, with the result that Anglo-Saxon lawyers are little helped in their first attempt to tackle a complicated topic of considerable practical importance, while on the other hand one

comes across unnecessary and awkward formulations, such as "Bilateral hearing", "Reichslaw", "loosing" and "winning party" or misleading analogies such as "Treasury" for the German *fisc* or "Legal Aid" for proceedings *in forma pauperis*. Numerous misprints (these are spread throughout the whole volume, sometimes as many as two or three to a page, for example, on pp. 34, 75, 94, 154), wrong references and totally haphazard punctuation add further to the obscurity of sentences and whole paragraphs.

The impression that certain sections of this symposium have been prepared in a rather slovenly fashion is confirmed by a look at the index. cursory inspection shows that it lacks references to the following subjects dealt with in the text: witnesses in civil proceedings, oaths and, for criminal proceedings, amnesty and pardon, evidence, experts and inspection, publicity, costs, bigamy and several other offences.

The Foreign Office manual, now completed, represents the first work of its kind to give a comprehensive survey of the principal fields of German law and it is bound to be referred to by students and practitioners for years to come. Its potential usefulness to teachers and research-workers in comparative law cannot easily be over-estimated. It is all the more regrettable that at least one part of the second volume should have fallen so far short of the standards set by, let us say, Professor Martin Wolff's contribution, and a little more care in the preparation of the volume, not least in proof-reading, might surely have been expected from the government department concerned.

H. A. HAMMELMANN*

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Anger's Digest of Canadian Mercantile Law. Sixteenth edition by FREDERICK R. HUME, B.A., LL.B. Toronto: Cartwright and Sons Limited. 1952. Pp. vi, 530. (\$6.60)

After enjoying a good reputation in its field for over half a century Anger's handbook on commercial law needs no introduction to readers of this Review, though it is not really a lawyer's book. It would be pointless to review it as if it were; it is a businessman's book, but since it is a good one, a few words are permissible. It claims to be "A Practical Code of Mercantile Law for the Business and Professional Man embodying the variations of all ten Provinces", and in proper modesty, and to the possible relief of the legal profession, its preface concedes that it is not a substitute for legal advice. The present edition is three times the size of the

*H. A. Hammelmann, Dr. jur. utr. (Erlangen), M.A., D.Phil. (Oxon.); of the Middle Temple; a frequent contributor to this and other legal periodicals.

fifth edition of 1905 (the earliest at hand here)—the price, by the way, has risen rather more rapidly than the quantum has increased—but it is still not exhaustive enough to permit the reader to rely on it exclusively. It is not a treatise on “what to do till the lawyer comes” (for which perhaps the best advice is “don’t”). It must, however, be of very great use in leading the wary business man around, rather than out of pitfalls that lend themselves to not too difficult detection.

Academically the new edition is proving itself useful too. It is the assigned text in commercial law courses of two accounting associations in British Columbia and, supplemented by course notes and lecture materials, is meeting the purpose admirably. Next year it may be used in a course in commercial law given in the School of Commerce at the University of British Columbia, although for this purpose the necessarily scanty treatment given to a wide range of subjects may restrict its function to that of a primer. An alphabetical list of chapter headings will illustrate this wide range of content: Agency, Bankruptcy, Banks and Banking, Bills of Exchange, Bills of Sale, Chattel Mortgages, Cheques, Companies, Conditional Sales, Contracts, Copyright, Descent of Property, Forms, Guarantee and Suretyship, Income Tax, Insurance, Interest—Money-lenders, Landlord and Tenant, Limitations of Actions—Prescriptions, Married Women’s Property Rights, Master and Servant, Mechanics’ Liens, Mortgages, Partnership, Patents, Personal Property—Sale of Goods—Conditional Sales—Bailment—Bulk Sales, Promissory Notes, Real Estate Agency, Real Property, Trade Marks and Unfair Competition, Wills and Descent of Property.

Since the law instructor would not rely on the book exclusively, its value to the lay student and businessman is the point of greatest concern. In substance it is good so far as it goes, and probably it goes so far as a book of this kind can. It is not fair criticism to complain that the author did not clarify or enlarge points where demands of size and cost may have required him to curtail his text. The occasional student has observed that he finds the text “tough going”, that he has to “hang on” to avoid missing the point—comments which I suspect support the complimentary view that in trying to say much in a limited space the author has attained more than a little of Baconian brevity. Physically, the print is a bit small.

The book compares favourably with other well-known Canadian works on commercial law, Falconbridge and Smith, *Manual of Canadian Business Law*, now in its third edition, and Jennings, *Canadian Law for Business and Personal Use* (1951).

A. W. R. CARROTHERS*

*A. W. R. Carrothers, B.A., LL.B., LL.M., Faculty of Law, University of British Columbia.