Reviews and Notices

Principles of Administrative Law. By J. A. G. GRIFFITH, LL.M., and H. STREET, LL.M., PH.D. London: Sir Isaac Pitman & Sons, Ltd. 1952. Toronto: The Carswell Company, Limited. Pp. xxxiii, 316. ($6.25)

In their new text Professors Griffith and Street make little attempt to present what might be called the substantive side of administrative law. In this I think they are wise, for it is virtually impossible to deal with this sort of thing properly in a course for law students that must cover the procedural side in thorough detail. It is, of course, now commonplace in Canada to teach two substantive administrative law courses, Income Tax and Labour. In addition, most conscientious teachers no longer ignore the impact of public law on private law subjects, so that, again, the substantive side is receiving more and more attention. This new text presents the legal and political problems arising out of the legislative powers of the administration and their control, and the same sort of problems arising out of the administrative and judicial powers of the administration and their control. The discussion is followed by a chapter dealing with suits against the administration and a final one on public corporations.

This emphasis on the procedural problems means that the new text in no sense displaces the pioneering work of Professor W. A. Robson, *Justice and Administrative Law*, now in its third edition,[1] and fully reviewed in its second edition in this journal by Professor E. F. Whitmore.[2] Professor Robson's book remains required reading for lawyers and law students who are anxious to understand the development of government and administrative law in the first half of the twentieth century. It is true, as the reviewer of the second edition pointed out, that chapter three tends to be "nothing but paragraph after paragraph of nothing but paragraph after paragraph" for the Canadian reader, since it relates in very general terms the aims and procedure of some two dozen English tribunals, and in the third edition it has been con-

[1] (London: Stevens & Son Limited. 1951).
[2] (1948), 26 Can. Bar Rev. 739.

siderably expanded without making it much more useful to the Canadian reader, for whom it serves as little more than notice of the existence of the government bodies. Professor Whitmore, in his review, further deplored the inadequate treatment of judicial review, and quite properly pointed out that *Rex* v. *The Electricity Commissioners*[3] was not cited (it is still not cited in the third edition). Professor Whitmore, on the one hand, wants the subject of administrative law to deal primarily with "the technicalities of mandamus, prohibition and certiorari, examples of the application of the ultra vires doctrine to delegated legislation, the exact scope of disqualification on the ground of bias and the precise extent of judicial immunity", but "there must be added a discussion of the administrative process and, if the author can assist in the evolving of basic or minimum standards of procedure, so much the better".[4] Professor Robson, on the other hand, is impressed with the fact that administrative tribunals now handle a large body of business, more or less as courts used to, and that what the tribunals are doing is a concern of the administrative lawyer. It seems to me that by taking this sensible broader conception of administrative law, Professor Robson has fallen, if I may coin a wholly original phrase, neatly between two stools. For it must be admitted that even his expanded chapter three leaves the reader rather in the dark about many details of the purposes and procedures of the tribunals described, as is inevitable in the space he has for the job, and certainly the legal analysis of judicial review is far from satisfactory for the lawyer or law student, although it may go a long way to meet the needs of political science students. Nevertheless, Professor Robson very properly emphasizes the fact that tribunals exist for lawyers, not merely as potential objects of writs of certiorari, but also as bodies before which they may some day appear representing clients.

Having elected to sit firmly on one stool, the authors of *Principles of Administrative Law* are to be congratulated on their functional approach to procedural administrative law. The frequent references to such material as parliamentary debates indicates their sources of assistance in presenting the problems. Of particular value is the functional analysis of administrative powers (pp. 144-158), but the reader should be warned that the danger inherent in using labels is no less when the classification is on a functional basis. When the authors criticize the conceptualists for assuming "judicial" to have a constant meaning (p. 142), they should perhaps worry whether they have not themselves in an overly optimistic Humpty Dumpty fashion rather attempted to fix one meaning to "ministerial acts" (p. 145). Although one may

[3] [1924] 1 K.B. 171.
[4] *Ibid.*, footnote 2 at p. 739.

easily agree with the functional distinction, it is too much to hope that courts will retain the same distinctions in using the label. With the functional analysis one would expect to find considerable emphasis on statutory interpretation, since most of administrative law lies in the construction of statutory powers, and the authors have not entirely omitted reference to this basic problem, but their treatment in a few pages (pp. 100-103) can hardly be considered adequate, or even sufficiently provocative. It does, however, open up the subject, and reference is made to some valuable supplementary readings (p. 101, n. 5), which the student will find carry on the realistic analysis started by the authors.

To the extent that the reader shares Professor Whitmore's desire that a text on administrative law should, if possible, assist in evolving minimum standards of procedure, he will be pleased to find that Professors Griffith and Street have made an admirable beginning. The general principles the courts have worked out under the guise of "natural justice" are discussed briefly (pp. 153-158) and this is followed by an examination of particular tribunal procedures (pp. 158-184). This examination indicates a belief (fairly directly expressed on p. 178) that the analysis of the various statutes is essential if only because the courts so often seem to confine their decision to the particular statute involved, refusing to lay down minimum standards of general application. In their most valuable general observations (pp. 188-195) the authors make it clear that they do not believe a code such as the American Administrative Procedure Act, 1946, is practicable. I venture to agree, and I think that a thorough examination of the varied and intricate functions of modern government makes any other conclusion rather difficult to defend. It may well be that the American act is quite satisfactory for their system, but it must be remembered that federal administrative agencies in the United States bear far more resemblance to the traditional judicial system than do our Dominion and provincial tribunals. Indeed, some of the American federal agencies appear to be enveloping themselves in much the same sort of cumbersomeness and delay that are commonly assumed to be inherent in the judicial system and the very evils the tribunals were set up to avoid.

Canadian teachers will be interested in the quantity and quality of Canadian cases cited in the text. They are very few in number, some half-dozen that are cited to show the Canadian state of affairs, and none of these is of any great significance. It is perhaps understandable that few Canadian cases would be cited, since for the most part they are innocuous reflections of English decisions. The most sustained reference to Canadian law is with respect to privative clauses, and even here the cases are very briefly analyzed.

Rex ex rel. Sewell v. *Morrell*[5] is accepted as authority for the proposition, "The only provision which prevents judicial review is one which expressly declares that 'want of jurisdiction' or some similarly specific head shall not be reviewed or questioned". The contrasting companion decision of the same judge in *Re Brown and Brock and Rentals Administrator*[6] is not discussed, nor is any number of the many other cases, particularly in the labour field.

Canadian teachers of administrative law may object that the analysis of judicial control is too general for their students, but I suggest that to have the general picture in 238 pages (excluding the chapters on Suits Against the Administration (pp. 239-268) and Public Corporations (pp. 269-308)) is a most valuable asset for a teacher who desires to present the detailed problems by way of case analysis—this new text will provide the student with a good perspective of the whole subject and enable him to appreciate the problems raised in case analysis that much better.

The final chapters are of expecial interest and value. Chapter VI, dealing with suits against the administration, discusses the new Crown Proceedings Act, 1947, and enters into some detail about the liability of various administrative bodies in contract and tort. The problems raised are for the most part problems in all Canadian jurisdictions as well. Chapter VII brings one of the first contributions to our small but growing literature on the public corporation and, although I must confess less familiarity with this field, I thought the analysis more thorough than in the more commonly worked over problems of judicial control of adjudicative and legislative powers. The analysis of Canadian public corporations is yet to be published, and those teachers (including myself) who include in a legislation course the public corporation as a modern device for making legislation effective are indebted to Professor Griffith as the author of the first draft of this chapter.

The authors accept joint responsibility for the whole of the text. It speaks well for the value of the text that I conclude this review reluctantly, unhappily aware that there are dozens of matters raised on which I should like to voice an opinion.

J. B. MILNER*

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Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings. Fourth edition by RICHARD O'SULLIVAN, assisted by ROLAND G. BROWN. With a foreword by THE RIGHT HONOUR-

[5] [1944] 3 D.L.R. 710.
[6] [1945] 3 D.L.R. 324.
[7] *E.g.*, *Bruton* v. *Regina City Policemen's Association Local No. 155*, [1945] 3 D.L.R. 437.
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ABLE SIR NORMAN BIRKETT. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. cxxvi, 898. ($22.75 net)

For the first time in England since 1774, when Chief Justice Mansfield penned the historic words that have been the bane of every author and newspaperman, "Whatever a man publishes, he publishes at his peril", the law of libel has been relaxed. Among other changes, a new defence has now been added by the English Defamation Act, 1952, the defence of unintentional defamation. Under the existing laws in the Canadian provinces, and in England before the new act, the innocent intention of the defendant provided no defence. Liability for defamation existed whether the words were published maliciously, innocently, or even accidently.

This new defence of unintentional defamation has caused Mr. Richard O'Sullivan to add a new chapter to his recently published fourth edition of the standard work, *Gatley on Libel and Slander in a Civil Action*. Mr. O'Sullivan is singularly well qualified to treat of the new subject for he served as a member of the Committee on the Law of Defamation, which recommended changes in the existing English law. The aim of the committee, as realized by the statute, was to make more difficult the way of the money-minded plaintiff, who sees in a publisher's unintentional error a chance to extort money. This is the type of plaintiff, at heart a blackmailer, who has no real interest in any injury to his reputation. In such a case, where the innocence of the publisher is proven to the hilt, the defamed person is forced to accept a correction and apology instead of monetary damages.

The classic case of unintentional defamation was, of course, the famous *Hulton* v. *Jones*, finally decided by the House of Lords in a decision reported at [1910] A.C. 20. There the item complained of appeared in the Sunday Chronicle, written by the Paris correspondent of the paper, who had been describing a festival at Dieppe. In his gossip column he wrote: " 'Whist! There is Artemus Jones with a woman who is not his wife. . . . who must be, you know, the other thing.' Whispers a fair neighbour of mine excitedly into her bosom friend's ear. Who would have supposed that by his goings on he was a Church warden at Peckham? Here in the atmosphere of Dieppe on the French side of the channel he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." After this item appeared, a man named Thomas Artemus Jones, who was not a churchwarden and did not live in Peckham, but was a barrister practising on the northern circuit, felt himself damaged and asked redress. His friends entered the box and asserted that they had supposed the

Artemus Jones of Dieppe was indeed their sober and sedate friend, the barrister. The defence was that the incident was merely an amusing bit of fiction. But, as the judge reminded the jury, the significant feature was that the item was not offered as fiction but as fact. Mr. Jones was awarded £1,750.

It does not follow that the new section of the English act would have afforded a defence in the *Hulton* v. *Jones* case. As Mr. O'Sullivan points out, the new act provides that, in cases of unintentional defamation, a person who claims that he published alleged defamatory words innocently in relation to the person defamed may escape liability for the damages "if and only if" certain conditions are satisfied. The publisher must prove:

(1) either that he did not intend to publish the alleged defamatory words of and concerning the person making complaint and did not know of circumstances in which the words might be understood to refer to him, or that the words were not defamatory on the face of them and that he did not know of circumstances in which they might be understood to be defamatory of the complainant; and (2) in either event, that he exercised all reasonable care in the publication.

If a publisher is able to satisfy these statutory conditions, and if he is also in a position to prove that the words were written by the author without malice, then he may make an offer of amends by way of a sufficient apology, which the plaintiff will be required to accept, unless he can prove that the defendant is not as innocent as he has claimed to be. In short, the defence is aimed only at the case of completely innocent and unintentional defamation and is very limited in its application. To that extent it is an important extension of libel defences and will be appreciated by the English publishers, who have been much more embarrassed by unmeritorious libel claims than has been the case in Canada.

Actually, the effect of the *Hulton* v. *Jones* decision is not as wide as is popularly supposed. There is little real danger to the novelist who happens to choose a name for a character in his novel, which is that of a real person, unless of course he has done so wilfully or intentionally. Therefore the practice, which has been adopted by so many novelists, of stating on the fly-leaf that the book is "a work of fiction and no reference is intended to any living person" is probably quite unnecessary. The work itself, if clearly a work of fiction, provides its own explanation. Thus, in an American law suit instituted against James T. Farrell (1947), 70 F. Supp. 276, the plaintiff was called Bernard Clare, which was also the name of the chief character and the title of Mr. Farrell's book. In the novel Bernard Clare was pictured in acid tones as an unhappy newspaperman. An actual Bernard Clare, also a newspaperman, turned up and sued for libel. But the court exonerated

Mr. Farrell in these comforting words: "It would be an astonishing doctrine if every writer of fiction were required to make a search among all the records available in this nation which might tabulate the names and activities of millions of people in order to determine whether perchance one of the characters in the contemplated book designed as a novel may have the same name and occupation as a real person".

Perhaps the most useful protection afforded by the new section of the English act will be that it covers statements truthfully made about one person which by coincidence apply to someone else with the same name or a similar description. Quite properly, it will not afford a defence to the publisher who negligently uses the wrong photograph or carelessly inserts the wrong name.

Also worthy of adoption in our provincial statutes is the extension of the occasions of qualified privilege provided by the new English act, and discussed in detail in Mr. O'Sullivan's new edition of *Gatley*. These occasions are widened and extended so as to conform to modern conditions. Thus, for the first time, a statutory privilege is extended to general meetings of a company (other than a private company) as well as to meetings of all kinds of scientific, trade and cultural associations. At the present time, under Canadian law, the proceedings at such meetings are usually not privileged at all.

Mr. O'Sullivan deals interestingly in his new edition with the vexed problem of defamation by radio and, presumably also, by television. In England, and in the American cases, the view generally held among lawyers and judges is that at common law—and apart from statute—a broadcast which is read from a written script, as is the usual practice, amounts to libel, while a broadcast spoken extemporaneously amounts to slander. "For so artificial a distinction there can be little justification", concludes the report of the Committee on Defamation. Now, by the new 1952 act, it is provided that, for the purpose of the law of libel and slander, the broadcasting of words for general reception by means of wireless telegraphy shall be treated as publication in permanent form, that is to say, as libel. Just what is meant by "broadcasting otherwise than for general reception" is difficult to say, and will fall to be determined by the courts. Presumably the broadcast of police calls would fall outside the scope of the statute. But the new act wisely removes the distinction between libel and slander so far as the radio is concerned. As the committee reported, "A defamatory statement transmitted over the radio in a broadcast, reaching as it may an audience of many millions, is calculated to cause as much, if not more, damage than a written report in a newspaper, however large its circulation".

To the practitioner who engages in libel work, whether for

plaintiff or defendant, *Gatley* is not merely a useful guide to the law, it is almost the law itself. Not many textbooks are cited in court so authoritatively and so frequently as this work. It is now fifteen years since the third edition was published. Those fifteen years have provided many libel decisions—not a few in Canadian courts—and Mr. O'Sullivan has incorporated in his text some four hundred of them. Of the book, the Right Honourable Sir Norman Birkett has this to say in his foreword, and the reviewer with respect fully endorses it: "I commend without reserve this new edition, distinguished as it is by scholarship and learning, and that practical wisdom that comes only from the experience gained in the actual contest of cases in Court".

ALEXANDER STARK*

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Frederic William Maitland. A memorial address by HENRY ARTHUR HOLLOND. London: Bernard Quaritch. 1953. Pp. 23. (4s. net to non-members of the Selden Society)

"It is astonishing with how little reading a doctor can practise medicine", observed Sir William Osler, "but it is not astonishing how badly he may do it." Medicine is not the only profession to which this observation may be applied. A lawyer, also, can practise his profession without much reading in law, or in general literature, but with no guarantee that he is not practising badly. Unless a lawyer is a student, he is not paying the price for proficiency in an exacting profession. But most lawyers must be content to remain students, for their active life in the arena of practical, workaday concerns leaves them little time to ripen into scholars. There are many students of law, but few legal scholars, and of the few scholars, only a minority gain entrance to the inner circle of legal scholarship. In this inner circle, Frederic William Maitland, the subject of a memorial address delivered by Professor H. A. Hollond as the Selden Society Annual Lecture in March 1953 (now happily available to a wider audience) holds an assured and honoured place.

Professor Hollond tells us that he set himself the task of trying "to make Maitland live for some of those who know of his repute, but little of the man himself", and says, too modestly, that his main qualification for the task is "the intensity of feeling for him which has been with me throughout the almost fifty years since I was a member of one of the last classes which heard him lecture".

To outward view, Maitland's life was quiet and uneventful, but at the scholar's level, removed from the turmoil and noisy movement of active affairs, he lived a life of intense intellectual excitement and achievement. In proof of this Professor A. L. Rowse

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offers interesting testimony: "Maitland, who was the beau idéal of the specialist researcher, was full of life and brilliance: he was indeed a man of genius and his investigations, the new trails he hit upon, often have the excitement of detective stories to the historian. He was the Robert Louis Stevenson among modern historians — and something more."[1]

Maitland was born in 1850, and died in 1906 from a sudden attack of pneumonia, after struggling stoically for several years with ill health. He attended Eton and Cambridge, and was called to the bar by Lincoln's Inn in 1876. After practising at the Chancery Bar for seven years, he was recruited to the ranks of legal scholarship by Professor Henry Sidgwick, the great moral philosopher, who persuaded Cambridge University to establish a Readership in English Law by agreeing to give up a portion of his own salary. In 1888, he was elected Downing Professor of the Laws of England, a position he held until his death. His temperament was probably unsuited to an active life at the bar. On this point Professor Hollond quotes the opinion of Benjamin Bickley Rogers, in whose chambers Maitland read law. "I doubt", said Rogers, "if he [Maitland] would have succeeded as a barrister; all the time that I knew him he was the most retiring and diffident man I ever knew; not the least shy or awkward; his manners were always easy and self-possessed; but he was the last man to put himself forward in any way. But his opinions, had he suddenly been made a judge, would have been an honour to the Bench." Maitland, himself, in those unsettled years when he was waiting for solicitors to seek him out, once wrote: "Only a few of the men who choose that profession [the Law] can succeed in it: the qualities which make a man a great lawyer are rare and space on the woolsack is strictly limited".[2]

Maitland was not to meet with too generous a success in the active ranks of the profession. The routine work of the bar—and of the bench—never wants for someone to do it. He was claimed for a work that was exactly suited to his temperament. The nature of that work may, perhaps, be suggested by his own words: "Now-a-days we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse to-morrow."[3]

Professor Hollond recalls the interesting fact that Maitland was won to a life of historical research as the result of a chance meeting, on a Sunday tramp, with the Russian scholar, Paul Vinogradoff (later Corpus Professor of Jurisprudence at Oxford), who first ap-

[1] The Use of History (1946) p. 69.
[2] Quoted by Mrs. Reynell in an article, Frederic William Maitland (1951), 11 Camb. L.J. 67, at p. 72.
[3] Collected Papers (1911), vol. 3, p. 439.

preciated the value, to the legal historian, of the vast treasure lying neglected in the plea rolls at the Record Office. A man of some private means, Maitland gave to the world at his own expense the first fruits of his researches into the plea rolls. In 1887, he became a charter member of the Selden Society, which has done so much to stimulate the interests that lay closest to his own heart, and for many years he was its literary director.

Speaking of the history of law, he once said, "It is the history of one great stream of human thought and endeavour, of a stream which can be traced through centuries, whose flow can be watched decade by decade and even year by year".[4] He saw the law, at any given moment in its history, as a debtor to the past and a creditor to the future. He saw it as a living organism, with many branches, growing from one sturdy trunk, not (as some "black-letter" lawyers do) as a gigantic and ever-growing pile of loose sticks among which a lawyer must rummage until he finds a piece adequate to his immediate, practical need. Maitland was firm in the conviction that it is impossible properly to understand the law without a knowledge of the soil—social, political, economic and cultural—in which it has developed. He regarded a sense of history, an appreciation of the solidarity of the ages, as an essential part of a lawyer's working capital.

His learning was never defrauded of its full weight by an inadequate style. He wrote with energy and neatness of phrase. His pages contain many a sentence with a burr that sticks in the memory, for example, "Equity had come not to destroy the law, but to fulfil it",[5] or again, "Equity without common law would have been a castle in the air".[6] What could be more richly suggestive of the rôle played by equity in the development of the British system of jurisprudence?

A fleeting glimpse of Maitland's own methods of work may be had from a tribute he paid to Bishop Stubbs as a working historian: "No other Englishman has so completely displayed to the world the whole business of the historian from the winning of the raw material to the narrating and generalizing. We are taken behind the scenes and shown the ropes and pulleys; we are taken into the laboratory and shown the unanalysed stuff, the retorts and test tubes; or rather we are allowed to see the organic growth of history in an historian's mind and are encouraged to use the microscope."[7]

Professor Hollond tells us that Maitland's written word has been his constant companion for nearly fifty years. A practising lawyer, of another country, and of another generation, whose ac-

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[4] *Ibid.*, vol. 2, p. 3.
[5] Equity (1929 reprint) p. 17.
[6] *Ibid.*, p. 19.
[7] Collected Papers (1911), vol. 3, p. 498.

quaintance with Maitland's work has been more casual, but yet intimate enough to realize his greatness, may be permitted, in acquitting his debt to him for many hours of profit and pleasure, to seek shelter under the authority of Sir William Holdsworth, one who by his own labours has earned the right to be heard. "In an age of great historians", said Holdsworth, "I think that Maitland was the greatest, I think that he was the equal of the greatest lawyers of his day, and that, as a legal historian, English law from before the time of legal memory has never known his like."[8]

If, as the ancient Greeks contended, the first task of education consists in keeping constantly before the mind the best models, no student of law can afford to neglect the written word of the legal scholar who merited this tribute from Sir William Holdsworth.

ROY ST. GEORGE STUBBS*

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The Law of Wills Including Intestacy and Administration of Assets: An Introduction to the Rules of Law, Equity and Construction relating to Testamentary Dispositions. By S. J. BAILEY, M.A., LL.M. Fourth edition. London: Sir Isaac Pitman & Sons, Ltd. Toronto: The Carswell Company, Limited. 1953. Pp. xlix, 305. ($7.50)

In the preface to the first edition of this book, published in 1935, the author, who is the Rouse Ball Professor of English Law at Cambridge, makes it clear that his treatise is designed primarily for the use of law students, not practitioners. In the preface to the fourth edition he reminds his readers again of the introductory character of the work. It is unlikely that the practitioner, doing research in a difficult wills problem, will turn to *Bailey on Wills* for his answer. But it would be a mistake to conclude that this excellent student's book, now revised again in the light of recent English decisions and English statutory changes, is of no value to Canadian lawyers.

Nothing is sacrificed by author and publisher to make the work a pleasure to read. Even with additional material, the text of the fourth edition runs to only 277 pages, beautifully printed with generous margins and spacing. Within this compass, in fifteen short chapters, is presented a wonderfully lucid and accurate introduction to most of the important rules of law, equity and construction. The chapter headings disclose a logical and comprehensive treatment of the subject. After an introduction, the author sketches in chapter II its historical development. Chapter III deals with

[8] Some Makers of English Law (1938) p. 279.

*Of Stubbs, Stubbs & Stubbs, Winnipeg.

intestacy. Chapters IV to VII are headed, respectively, The Execution of Wills, The Nature of a Will, The Limits of the Power of Testation, Revocation and Revival, Legacies and Devises. Then follow three chapters on Equitable Doctrines, Conditions, and Rules against Remoteness. Chapters XII to XIV discuss problems of construction and the final chapter is devoted to the law on administration of assets. A new appendix, The Intestates' Estates Act, 1952, Part I, completes the treatise.

If only to refresh his knowledge of the subject as a whole, the practitioner who takes time out to read this little book will find that he has had an illuminating, rewarding and, above all, enjoyable experience. If I may be permitted to put it this way, it seems to me that *Bailey on Wills* is a book well calculated to "refresh" the refresher.

Also worthy of favourable comment are the book's table of statutes, table of cases and reasonably good index. In the present edition the table of cases is greatly improved by the addition of references to other law reports. Where previously only one citation was given for a case, as many as seven may now appear. It should be pointed out that the table of cases is, from the nature of the work, small in length compared to those found in *Jarman* or *Williams on Wills*; this, I hope, is some explanation of why it contains not a single Canadian case.

R. GRAHAM MURRAY*

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University of Notre Dame Natural Law Institute Proceedings. Volume V: A Panel Discussion on the Natural Law Tradition in the Jewish, Hindu, Moslem, Chinese and Buddhist Cultures. Edited by EDWARD F. BARRETT. With a foreword by REVEREND JOHN J. CAVANAUGH, C.S.C. Notre Dame, Indiana: University of Notre Dame Press. 1953. Pp. 180. ($2.00 U.S.)

Our tradition in the West is that right reason prescribes constant rules for human conduct. As the groundwork of order and civilized growth, they merit the name of Natural Law. When a man says he will be true to himself, he means he will be true to the law of his own nature. This law is not of his own making, but merely a discovery of the best that lies deep within him. Our intuition is that it is written in our hearts. That is why the real force of a good law flows from within, carrying its own discipline with it, without relying too much for observance on outside sanctions.

The roots of this concept of natural law are firmly imbedded in our history, traceable back through St. Thomas Aquinas to

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Aristotle and Plato. Aristotle expressed it as that which "all men, by natural intuition, feel to be common right and common wrong". Its development as an orderly system of basic ethics depends upon the natural powers of our best reasoning and the careful tests of experience. When men, at peace with their desires, reflect about their conduct, they touch the serene realm of reason, the sphere of those noble principles that exalt and endure beyond the changes and wear of time. Usually, anything permanent as a moral principle is a gateway to religion, yet the guiding trait in the idea of natural law is that it relies upon the use of reason without resort to religious faith. To St. Thomas Aquinas, natural law is that part of the law of God which is discoverable by unaided reason in contrast to the part directly revealed by God.

This is the traditional absolute concept which Blackstone recognized when he wrote that natural law "is binding over all the globe in all countries at all times. No human laws are of any validity if contrary to this." In his time of the eighteenth century, however, such remarks were not generally supported by a clear understanding of the tradition, because by then the original idea of natural law had been degraded by jurists like Pufendorff or Vattel into a sort of naturalistic law supposed to be binding upon men in an imaginary state of nature.

Today we have other legacies. The moral foundation of law that relies on the strength of reason to reach an absolute value has been under heavy modern attack. The late Chief Justice Vinson of the United States Supreme Court could write in a judgment of 1951, as though it were a matter of course (341 U.S. at p. 508, upholding the conviction of Dennis and ten other communist leaders) that "nothing is more certain in modern society than the principle that there are no absolutes . . . , that all concepts are relative". How this moral solvent could casually slip into an American law report today is at least partly explained by the awesome influence cast by the late Justice Oliver Wendell Holmes, who reduced his definition of law to "a statement of the circumstances in which the public force will be brought to bear upon men through the courts . . ." and added, "so we get up the empty substratum, a 'right', to pretend to account for the fact that the courts will act in a certain way". It was apparently Holmes' earnest belief that the rudiment of law is force, and he consistently related this theory to his own material agnosticism as expressed in his old age at eighty-eight: "I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand".

Such positivistic views of American judges are very far from the philosophy of Thomas Jefferson, which their litigants are asked to memorize in the American Declaration of Independence. The

Declaration appeals to the "Laws of Nature and of Nature's God" in proclaiming "these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness".

The Natural Law Institute of the University of Notre Dame's College of Law was founded in 1947 with the aim of maintaining American law on its historic moral foundations of natural law. It is recognized that natural law itself needs restoring and purifying, particularly where it has faded into platitudes. Locke's ideas of natural law were not those of Suarez, nor were the ideas of Grotius as refined as those of Aquinas; and the derision to which natural law was subjected in positivist academic circles, say, fifty years ago, is explained in part by the current misrepresentations of its true scope.

This book under review is the fifth in a series of sustained studies recording the annual conferences of the Institute. It reflects the results of a panel discussion by five eminent scholars critically assessing the place that a concept of natural law holds in their own respective Jewish, Hindu, Muslim, Confucian and Buddhist traditions.

The approach of the book is pragmatic. If it be true that natural law is that part of the eternal law which unaided reason can discover, and which is binding on all men by the authority of reason, then there should be some common tradition of natural law to be found in all the great non-Christian religious cultures, particularly of the East. With this question in mind, a welcome of academic freedom was extended to the participants to present their independent points of view. Rabbi Solomon Freehof of Rodef Shalom Temple, Pittsburg, speaks of the divine and natural law in Jewish experience. Dr. Khalifa Adbul Hakim of the Institute of Islamic Culture, Lahore, Pakistan, presents a very able paper from the Muslim point of view, which is the most complete of the five contributions. Dr. M. S. Sundaram, Cultural Attaché of the Embassy of India in Washington, represents the Hindu tradition (and, in passing, discusses Mahatma Gandhi as a modern prophet of the vitality of natural law). The Buddhist view of moral law is given, with the use of many terms strange to a Western lawyer's ears, by Dr. Daisetz Suzuki, Professor of Philosophy and member of the Japanese Academy. Dr. Hu Shih, former Chinese Ambassador to the United States, discusses the wisdom of China against a comparative background more readily followed. And finally there is a clear epilogue, which serves as a careful summing up, written by Rev. Theodore M. Hesburgh, the Executive Vice-President of the University of Notre Dame.

It may first appear as a fault in this useful and realistic book

that the distinction between philosophy and religion is not always clearly maintained, as it should be in an exact study of natural law. Yet this is how things often are. The blurring is noticeable in the papers presenting the Hindu and the Buddhist traditions, where the discussion seems to center on the basic religious principles proclaimed over the ages, rather than the philosophic rules of conduct as distinct from theology. From the method of the Hindu and Buddhist approach, however, it seems that the distinction is not one that could be accurately drawn. So, too, the line between unwritten natural law, as the work of reason, and written divine law, as found in the revelation of the Old Testament, appears to remain inchoate, understandably enough, in the Jewish theocratic tradition. Rabbi Freehof rather considers the tiny compact groups of Jews all over the world as chosen laboratories for the experiences of divine and natural law merged together.

Yet this is a book of importance, if only for its direct aid in uncovering so much common ground among the great cultures of the East and between them and the traditional juridical philosophy of the West. It is heartening to survey the area of human unity staked out by the contributors. No one of them denies the reality of natural law, and all produce evidence that these five civilizations of the East share the elements which we recognize as natural law, although the support from the Buddhist tradition seems somewhat uncertain.

If Roman law was able to expand from the needs of a primitive city-state to meet the complex demands of a highly civilized world empire, it was largely owing to the universal concept of *jus gentium*, conceived as a body of law so simple and reasonable that it was assumed it could be recognized everywhere and by everyone. The *jus gentium* was closely allied to the philosophical conception of a *jus naturale*. With that in mind, a reader of this book, who is concerned about the need to foster unity at the heart of mankind, will be much impressed by the way these vast religious cultures of the East concur with Christianity about natural law. There is at least a general assent by these spokesmen, making allowances for their different terminology and habits of thought, that natural law is a valid concept, universally established, and the sum of those lasting principles which ought to control human conduct. So here we are, twenty-three centuries later, as a witness to the fact that these strong streams of thought, which have gone so far to shape our world, converge to confirm Aristotle's ancient advice to the lawyer "to urge the principles of equity" that "are permanent and changeless . . . for it is the law of nature".

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