Reviews and Notices

Status in the Common Law. By R. H. GRAVESON. University of London Legal Series, under the auspices of The Institute of Advanced Legal Studies, No. II. University of London: The Athlone Press. 1953. Pp. xxiv, 151. 18s. net)

He who undertakes a legal monograph on the subject of status is a brave man, so it is quite proper for Professor Graveson to recall to us on one of his opening pages Austin's description of status as "the most difficult problem in the whole science of jurisprudence". But, as the author also remarks, the need for definition remains. The root of the problem is that the word "status" has been employed in so many different senses both in popular and legal usage. This suggests a two-fold task for one who writes under the title "Status in the Common Law": first he should attempt in some way a review of the various legal senses in which the word has been used and, secondly, he should attempt to narrow or re-define the meaning of the word so as to render it a more precise and useful tool for rational legal analysis.

On the first branch of this task Professor Graveson has brought great learning and research to bear, with illuminating and helpful results. Historically, for instance, he deals with the disabling status of Jews in England and its disappearance, and also with the correspondence in feudal law of "status" and "estate in land". Further, he brings out clearly the very narrow sense in which Sir Henry Maine was speaking of "status" when he made his famous generalization that up to his time the movement of progressive societies was from status to contract.

On the other hand, to the extent that the author addresses himself to the second branch of his task, that of narrowing or re-defining the legal meaning of status, the results, for this reviewer at least, are disappointing. Perhaps the difficulties are such that this is inevitable. At any rate, everyone does agree that the legal positions that go with being a married person, a legitimate child, a lunatic, a bankrupt, a soldier or an infant are representative forms of status. The question of substance for a legal monograph on status is why? What are the general characteristics of status as

a legal conception which enable it to comprehend, among other things, these particular instances? It seems to this reviewer that Professor Graveson's answer is contained principally in the following four propositions about the characteristics of status.

(1) *There is a "normal" legal position which is an absence of status. Status represents variations from this "normal" position and is therefore something "abnormal".* This statement must be questioned in the light of certain particular and undoubted instances of status. Is it "abnormal" to be an infant, to be married, to be a soldier? Surely not! Moreover, apparently because of this fruitless search for normalcy, Professor Graveson completely overlooks something vital, that the concept of status involves a series of dichotomous or binary classifications of persons into one group or the other as a basis for variations between them in their respective legal positions. One is either an infant or an adult, a married person or a single one, a soldier or a civilian, a national or an alien; and being an adult is just as much "status" as being an infant, and so on. Thus everyone inevitably has status in many different respects, hence "abnormality" is certainly no key to the idea of status in general.

(2) *The legal rules of status are classifiable as a part of public or social law rather than of private law, because the public or social interest in status-relations is dominant. For instance, the community or public interest in the legal rules of marriage is said to be paramount.* This proposition also is doubtful. The definition of public law that would permit the conclusion is nowhere spelled out by the author, and if it were it would be a startling one. What after all is more private and personal than marriage? Admittedly any legal relationship has both a private significance for the parties directly concerned and a public significance for the community at large, but in marriage, for example, surely the private aspect is at least as important as the public aspect. And marriage is the classic case of status.

(3) *Status is a legal position or situation such that, once it attaches to a person, it cannot be voluntarily relinquished by him.* Speaking of this alleged characteristic, the author himself says.

> A very different attitude, however, is shown towards the incidents of status. . . . They are in the first place determined by general rules of law quite independently of the will of the person affected, and secondly that person cannot by his own act and will modify or discharge those incidents unless the power of modification, as evidenced by the legality of agreements for separation between husband and wife, is itself one of the incidents of the status. [p. 133]

In other words, some status-relations may be voluntarily relinquished and some not, that is all. The author's qualification seems fatal to his main proposition.

(4) *Status-relations have a universal quality, that is, once a given status has been validly conferred upon a particular person by the "proper" national law, that person is entitled to recognition in that status in other countries.* In this statement we recognize the author's apparently unqualified acceptance of the vested rights theory of the nature of private international law, of which Professor Beale was a principal exponent. This is a very large subject and cannot be explored here, but suffice is to say that the vested rights theory is seriously challenged and at the least requires much qualification. Incidentally, it is appropriate at this point to mention that, in reviewing judicial pronouncements on status, Professor Graveson devotes himself almost entirely to English and American private international law cases on family relations, like marriage and legitimacy. These cases are simply not very helpful with the central task of defining status in general, because they take undoubted particular examples of status and address themselves to the different problems of jurisdiction and choice of law peculiar to our private international law. These are certainly interesting problems, but touching on them rather cursorily does not much advance the definition of status as a substantive conception appropriate to any given national legal system.

In summary, then, this little book has much valuable historical and current material on problems of status, but it does not do what one hopes for most from a monograph on this subject. It does not winnow out from the many legal senses of "status" a rationally or philosophically satisfying definition of status useful as a rather precise tool for the interpretation and analysis of our legal system. There are many differences and discriminations among persons provided in our laws, and the concept of status should be an idea which enables us to appreciate and understand these discriminations. Perhaps this reviewer expects the impossible, but hope remains

W. R. LEDERMAN*

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Burroughs' Income Tax Service (Canada). Written and compiled by CARL H. MORAWETZ, LL.B., LL.M., D.Jur. (Toronto), and LAWRENCE F. HEYDING, C.A. Toronto: Burroughs & Company (Eastern) Ltd. and The Carswell Company, Limited. 1954. Two binders. (Initial price, $50.00; continuing subscription, $10.00 each six months)

The law of income tax is as difficult as any other field of law, and accordingly it is a subject of considerable difficulty. In its present-day form it is of quite recent development. The basis of the in-

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come-tax law of Canada, just as the basis of the income-tax law of a province, or of another country, is a statute. The principles upon which a particular statute is based are apt to remain more or less constant over the years, but because the amount of tax levied is so large and because the general view is that a tax should be as fair as is possible and practical, the statute undergoes continual development and refinement. These circumstances created the opportunity to bring into wide use a new form of legal reporting, the loose-leaf system, which is kept up to date by the supply of substitute and new pages, whenever a change or a development of the law requires. With a loose-leaf system, there is no need, after reading the law and the discussion of the law, to go through current digests to make sure that a new, important case has not been missed. The loose-leaf system states the law and discusses the old and the latest cases.

Two tax services have been in the field for some years in Canada. In preparing for this review, I made a comparative study of the two and of this newcomer, and each seemed to me of a very high standard. After using the three services over a period of time, anyone might say that he preferred one to another, but he could hardly say that one was better than another. The method of presentation of the two older services is, generally speaking, section by section of the Income Tax Act. When it is necessary, in discussing one section, to refer to another section, the other is also reproduced in its precise words. This is a good method.

The Burroughs method is to discuss the meaning of words, word by word, starting with an article on "Abolition of Office" and continuing, for instance under "F", through "False Statements", "Family Allowance", "Family Corporations" and others, to the final article, which is "Year". Thus, with the Burroughs system, you read first the section of the act with which you are concerned and then the articles on the words used in the section. Whenever it is necessary, in the articles, to refer to the words of a section in the act, the actual words are quoted. This is also a good method.

The first volume of the Burroughs system contains an index to the articles, and the articles themselves, the whole volume of course being more or less an additional index to its contents. The documentation—the act, regulations, forms, tax conventions, provincial agreements, and the like—are in the second volume, which is called "Appendix I". This second volume contains an index to all the material, and thus is a still further index to the articles.

The other services are bulkier than the Burroughs, and will perhaps continue to be, because they are more inclined to set forth explanatory material, such as information circulars and ministerial pronouncements. Sometimes this additional material is helpful, but

sometimes it is unnecessary and puts the reader to the necessity of mentally discarding material that might have been omitted by the editors. By its very method, the Burroughs emphasizes concise statement, and that characteristic is maintained by a stricter editorial selection.

The field of circumstances to which the law of income tax applies is of course very wide. The meaning of the word "income" itself, for example, is a subject of furious debate. Further, no income-tax statute is necessarily logical, or universally fair, or consistent with its title, and none remains unamended very long. For these reasons no service develops strong reasoned arguments which might be quoted in court to bolster a case. Rather the point of the editorial comment seems to be to explain, so far as possible, a branch of law which is of necessity somewhat complicated. The chief value of the services is that, where the statute itself, or a judgment, gives an answer to a question, they reproduce the answer in readily available form. If an authoritative answer does not exist, the services give the record which is the essential starting point from which the answer must be developed. So far as my comparison went, all three give the most complete references to decided cases on income-tax law.

The Burroughs service is restricted to the Income Tax Act of Canada. The other two also reproduce the Succession Duty Act and the Excise Tax Act, and some explanatory comment, which consists mostly of government publicity.

The loose-leaf binding of the Burroughs service is of the fixed-post type. Although this is not as convenient for filing new material as the ring type, it does make the volumes easier to hold and read.

E. B. FAIRBANKS*

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Le Canada et les Droits de l'Homme: Le concept des Droits de l'Homme dans la politique étrangère et la Constitution du Canada. Par BRIGHAM DAY, B. Sc. (Econ.) Bishop's University, Diplômé de l'Institut des Hautes Etudes Internationales, Docteur de l'Université de Paris. Préface de M. J.-J. Chevallier, Professeur à la Faculté de Droit de Paris. Paris: Librairie du Recueil Sirey. 1953. Pp. iii, 154. (Fr. 900)

L'auteur nous apprend dans son avant-propos que ce travail a été présenté comme thèse de doctorat d'université à la Faculté de Droit de Paris. Il se divise en trois parties. Une première partie traite des droits de l'homme en général, de leur reconnaissance par

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les organismes internationaux modernes et de l'attitude du Canada en la matière. La seconde partie étudie la constitution canadienne en fonction des droits de l'homme, ce qui pose tout le problème du fédéralisme. Enfin la troisième partie, intitulée "La mise en oeuvre des droits politiques et économiques au Canada", expose les réalisations dans ce domaine.

L'ouvrage de M. Day, sans être original, contient d'assez bonnes synthèses. Cependant il est affaibli par de nombreuses erreurs de détails qui ne changent peut-être rien à l'argumentation générale, mais qui rendent la lecture du livre presque irritante pour toute personne connaissant quelque peu l'histoire et les institutions du Canada. Sans vouloir faire un relevé complet de ces erreurs, en voici quelques exemples. Ce n'est pas "en 1759, quelques semaines après la bataille où périrent, sous les murs de Québec, les généraux Montcalm et Wolfe" (p. 6), mais en 1760, que Montréal capitula. La déclaration citée à la page 8 n'est pas de l'*Imperial War Cabinet* mais de l'*Imperial War Conference*, deux organismes distincts. Le rapport de Lord Durham n'est pas de 1832 (p. 61) mais de 1839. Des conférences n'ont pas été tenues à Québec et à Charlottestown (sic) en 1865 et 1866 (p. 62) mais en 1864. Ce n'est pas le projet de ces conférences (p. 63) qui fut présenté au parlement britannique en 1867, mais plutôt un texte rédigé à Londres. La suppression du *Colonial Law* (sic) *Validity Act* n'est pas contenue implicitement (p. 76) dans le Statut de Westminster, mais explicitement puisque le paragraphe 2 du Statut dit que "le Colonial Laws Validity Act 1865 ne s'appliquera à nulle loi que le parlement du Dominion édictera postérieurement à l'entrée en vigueur de la présente loi". Il est difficile de comprendre comment "le 15 septembre 1949, par une 'double déclaration' faite dans le discours du trône à Ottawa, deux importants projets étaient adoptés" (p. 85). En effet il est assez difficile d'adopter un projet de loi par une déclaration dans le discours du trône.

L'ouvrage de M. Day a été honoré d'une préface de M. J.-J. Chevallier, professeur à la Faculté de Droit de Paris, bien connu en pays britanniques par son ouvrage *L'Evolution de l'Empire britannique*. On est un peu surpris que le juriste français commette l'erreur d'affirmer que le Canada est "membre de l'Union panaméricaine", d'autant plus que M. Day explique lui-même dans son livre (p. 134) que précisément notre pays n'en fait pas partie.

JEAN-CHARLES BONENFANT*

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MacGillivray on Insurance Law relating to All Risks other than Marine. Fourth edition by E. J. MACGILLIVRAY, LL.B., and DENIS BROWNE, M.A. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. lxxix, 2283 (sections), 49. ($30.25)

This book, a comprehensive treatise on the law of insurance relating to all risks other than marine, has been in general use for over forty years and needs no introduction to the profession. This review will therefore be confined to a consideration of the changes made in this, the fourth edition, and to an attempt to estimate its value to prospective readers.

There has been no change in the arrangement of chapters or sections, although two new sections have been added, one in chapter eleven dealing with policies covering accidental loss or damage to property and one in chapter twelve covering aircraft policies. For some unknown reason the latter was missed in the table of contents. The changes which are to be found in the text occur mainly in the first three chapters and are the result of new or amending English legislation, such as the Companies Act, 1948, the Industrial Assurance and Friendly Societies Act, 1948, and the welfare legislation abolishing workmen's compensation. Included, too, are the changes effected by the Civil Aviation Act, 1949, with respect to compulsory third party risk insurance on civil aircraft and by section 4 of the Defamation Act, 1952, which deals with the legality of indemnity insurance against liability for libel.

Apart from the alterations necessitated by statutory developments, there has been little change in the text. The editors point out in the preface that new cases have been scarce and, of those reported, few were of much significance. It is perhaps not inappropriate to mention that if cases are scarce in England they are fairly numerous in Canada and, although it is true that Canadian decisions may not always be relevant in England because of differences in legislation, there have been a number of decisions rendered since the last edition in 1947 which the authors appear to have overlooked. This is not to say that Canadian cases are not to be found in the book. On the contrary, two Privy Council decisions, the *Sherwin Williams* case, [1951] A.C. 319, and the *Abasand Oils* case (1949), 65 T.L.R. 713, form the basis for the new section in chapter eleven. Reference is also made to *Goulding* v *Norwich Union*, [1948] 1 D.L.R. 526, and to *In Re Home Assurance Co.*, [1950] 1 D.L.R. 611, although the editors missed the fact that the *Home Assurance* case was affirmed on appeal (see [1951] 1 D.L.R. 511). But not one of the recent Supreme Court of Canada decisions has found its way into the fourth edition, nor have several other interesting decisions, such as *McCoy* v. *Alliance*,

[1951] 2 D.L.R. 296, *Re Lavitt Potato Co.*, [1951] 4 D.L.R. 192, and *Shepherd* v. *Royal*, [1952] 2 D.L.R. 55. I have made no attempt to check all the Canadian decisions since 1947, but enough has been said to indicate that the choice of Canadian materials has been rather spotty.

While changes in the text have not been numerous, the editors, or publishers, have nevertheless managed to reduce the size of the book. The third edition was bulky and unwieldy and contained over 1,600 pages. The fourth is shorter and generally speaking easier to handle, although it is by no means small. For some unknown reason page numbers have been eliminated in the main body of the text and so an exact comparison is not easy but, as a guess, the present edition is at least 200 pages shorter. In the main the reduction seems to have been accomplished not by cutting down the text (although the first three chapters are about twenty pages shorter in this edition) but by other means. For example, fewer statutes are reprinted in the appendix and double instead of single columns are used in the tables of statutes and cases. The index, on the other hand, has practically doubled in length, and a very good thing too, because in a work of this size an extensive index is especially necessary, and the index in the last edition was far from complete.

The general format of the book has been improved in a number of ways. Thus the statutes in the table of statutes are now listed under year and title rather than regnal years. Again, the table of statutory instruments and the rules of court has been split into two separate tables. While the table of contents uses a smaller print, a heavier type is used in the general text. In addition, the marginal notes have been incorporated into the text as numbered paragraph headings in heavy black type. Many new headings have been added. Although in some respects this makes for greater ease of location, the advantage is often counterbalanced by the fact that paragraphs have replaced page numbers and when a paragraph extends over more than one page, as it often does, locating material becomes rather irksome. One decided improvement would have been the use of heavy type in the table of cases to indicate where a case is dealt with at length. The publishers apparently do not intend to bring out supplements, if one may judge from the absence of any reference to them in this edition, and of a pocket on the back cover, as appeared in the third edition.

What of the value of the fourth edition, particularly for Canadian readers? According to the editors, it was felt that in view of the changes in legislation a new edition was essential rather than a mere reprint of the third (exhausted by the end of 1951), plus a supplement. New purchasers and readers will no doubt be happy to have the fourth edition, assuming they can afford the price. For

those with the third edition, the situation is a little different. As has been shown, the changes in the text occur mainly in the first three chapters, which deal with Insurance Companies (two chapters) and Industrial Insurance. However important these changes may be, they do not affect the general practice of insurance law and the ordinary practitioner could certainly get along without them, particularly in Canada where there are different statutes in force When this is considered, along with the poor selection of Canadian materials and the relatively high cost of the book, it is difficult to advise those with the third edition to obtain the fourth. This does not however reflect in any way on the merit of the work as a whole, and *MacGillivray on Insurance Law* will undoubtedly continue to be held in high favour by the profession.

G. W. REED*

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The British Honduras-Guatemala Dispute. By L. M. BLOOMFIELD, Q.C. Toronto: The Carswell Company, Limited. 1953. Pp. 231. ($5.00)

There has been a British settlement in the territory now generally known as the Crown Colony of British Honduras since 1638. The status of that territory has always been controverted, by imperial Spain until 1821 and, subsequently, by Guatemala, one of the republics born of the break-up of the Spanish empire in Central America. In 1945 a new Guatemalan constitution proclaimed that "the Territory of Belize", that is, British Honduras, is part of the republic. The legal arguments in support of this claim have been set out at extraordinary length, in fourteen volumes to date of the Continuation Series of the 1938 White Book, Belize Question, published by the Guatemalan Ministry of Foreign Affairs, as well as elsewhere. The equitable arguments, in the words of the Guatemalan delegate to the 1947 Inter-American Conference, "have on appropriate occasions been laid before the Universal Conscience". British diplomats have been boycotted socially in Guatemala City, large crowds have rioted outside Her Majesty's legation, the border between the two countries has been closed and, apparently, Guatemala has threatened invasion.

The dispute is essentially of a legal nature, that is to say, Guatemala alleges rights recognized in international law rather than merely "manifest destiny", "liebensraum" or some such non-legal concept. It is bitter, unresolved and of an importance which transcends the interests of the parties directly concerned, being a source of serious ill-will throughout Central America. The legal issues,

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which encompass the whole field of the methods of acquiring territorial sovereignty and several nice problems of treaty law, are of considerable interest to students. Yet the book under review is the first dispassionate attempt to tell the history, or analyze the relevant law, or propose a workable compromise of the British Honduras-Guatemala dispute. The reviewer would suggest that, at first glance, it is surprising that this should be so and that the reason is that in so complex a dispute no scholar has, until now, found time to work his way through the voluminous mass of relevant diplomatic correspondence and treaties, of which there are eighteen, and the extraordinarily lengthy legal arguments put forward by Guatemalan apologists.

At one time it appeared that the dispute had been settled by the so-called Boundary Treaty of 1859, in which it was stated that "the limits of the two countries [are] clearly defined". But in a classic of ambiguous wording it was continued that Great Britain and Guatemala

> mutually agree conjointly to use their best efforts by taking adequate means for establishing the easiest communication . . between. . . Belize and the capital of Guatemala.

The treaty was ratified, but the communicating road was never built. Mr. Bloomfield inclines to the opinion that Great Britain is therefore legally liable for damages amounting to perhaps £50,000 with interest. The Guatemalan Foreign Ministry asserts that the treaty has lapsed.

Under the optional clause of the Statute of the International Court of Justice Great Britain has made a declaration of submission of all legal disputes over any treaty relating to the boundaries of British Honduras and any question arising out of any conclusion the court may reach on any such treaty. Guatemala, with a merely dilatory intention it seems, has agreed to submit to the judgment of the Hague court, but only *ex aequo et bono*. Neither side has as yet accepted the other's proposal.

In the author's opinion, for Great Britain to make a declaration asking the International Court to judge the case *ex aequo* would be "an ominous departure from the practice of solving legal disputes by legal means". His final conclusion, however, is that, paradoxically, each party to the dispute is most likely to benefit from the proposal for adjudication put forward by the other. He is unequivocally of the opinion that, in law, Guatemala has no claim to sovereignty over British Honduras. In the event of a judgment by the Hague court *ex aequo*, the author says, in the closing paragraphs of his book:

> Great Britain would incur no risk of seeing any of Guatemala's territorial pretentions recognized. The bona fide colonization and development of a territory creates a very strong 'equitable interest' (as no

rights may be alleged) in favour of the party who undertook these acts. Guatemala, however, may be precluded from alleging her rights to compensation and reparation of the 1859 Convention, as this right originates precisely in the existing positive law. Ironically enough, the *ex aequo et bono* decision could, on this point, be fatal to equity as well as to him who seeks equity.

It is highly desirable, therefore, that the realization of the latter possibility will bring the Government of Guatemala to amend its declaration by removing the condition referring to Article 38, par 2 from its declaration of acceptance of the jurisdiction of the International Court of Justice But if this were not possible, it would be logical for Great Britain, in compliance with her offer of the 29th of January, 1940, to make the declaration that Guatemala demands in one of the forms outlined above

Mr. Bloomfield's arguments are to this reviewer entirely convincing, although they seem to lead to the conclusion that the Hague court has not yet been seized of the case because the legal advisors of the two foreign offices have not correctly appreciated the relevant facts and law.

The reviewer is not competent to assess the merits of the author's conclusions: there must be few people in the world who are. But this book is recommended, without hesitation, as a stimulating and very readable examination of an important, unresolved problem of international law. The unswerving relevance and the combination of brevity and thoroughness with which the author—who parenthetically is a Montreal lawyer and one of the founders of the Canadian Branch of the International Law Association—has dealt with a complex and difficult subject are admirable. The bibliography is extensive. The introduction states that the full cooperation of the legal department of the United Nations and the foreign ministers of Great Britain and Guatemala was afforded the author. The appendices contain important diplomatic correspondence which, so far as the reviewer can determine, has not previously been published.

W. R. NOBLE*

Corrupts Absolutely

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy, at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master It is more destructive of freedom than any of man's other inventions. (Mr. Justice Douglas, dissenting, in *United States* v. *Wunderlich* (1951), 342 U.S 98, at p. 101)

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