# Reviews and Notices

*Essays on the Conflict of Laws.* By JOHN DELATRE FALCONBRIDGE, Q.C., M.A., LL.B., LL.D. (Toronto), Docteur en droit (Montréal). Second edition. Toronto: Canada Law Book Company Limited. 1954. Pp. xxxii, 862. ($25.00)

It is a pleasure and a privilege to review the second edition of Dr. Falconbridge's well-known *Essays on the Conflict of Laws.* This edition, like its predecessor, is mainly a collection of articles and case comments previously published in this Review and elsewhere. This edition is enriched by the inclusion of much material published since the first edition, notably articles on Characterization (1952), 30 Can. Bar Rev. 103, Renvoi in the United States (1953), 6 Vand. L. Rev. 708, Annulment (1948), 26 Can. Bar Rev. 907, and Legitimacy and Legitimation (1949), 27 Can. Bar Rev. 1163. Two completely new chapters have been added, on Contract and Tort, and some "Postscripts" and "Supplementary Observations". Yet this mass of new material has been so skilfully dovetailed into the old that the size of the book is increased by only 131 pages. Some of the old material has been compressed and some has been jettisoned, but nothing of value has been lost: though this reviewer may perhaps be allowed a nostalgic lament for two of his favourite passages, which seem to have fallen by the wayside. These are (1) on renvoi: "English judges have lost their way in a labyrinth into which they have gratuitously entered"; (2) on Dicey: "There is a regrettable tendency on the part of judges to treat Dicey's propositions as a final statement, perfect in form and merely subject to be checked or modified here and there" (1st ed., pp. 208, 332).

It may be said at once that the treatment of characterization and renvoi is a great improvement on the old, good as that treatment undoubtedly was. This is because the treatment of each of these topics is now self-contained and intelligible without frequent reference to the discussion of the other, though the author rightly emphasizes their interrelation. It is good to see that he has not relaxed his hostility to the total renvoi doctrine, at least as a general rule.

Nearly one-third of the new chapter on contract (chapter 15)

reproduces a previously-published comment on the case of *Kleinwort* v. *Ungarische Baumwolle*, [1939] 2 K.B. 678. The remaining fourteen pages deal with the subject in what must frankly be described as a somewhat sketchy manner. The author recognizes this, and justifies it by pointing out that "the large body of case law in the United Kingdom has been recently reviewed in English books" (p. 375). Perhaps this is a sufficient justification, but the remark is equally true of other topics in the conflict of laws, yet (most fortunately) that fact has not deterred the author from discussing them. The chapter suffers somewhat from being overshadowed by the longer, more detailed chapter on Bills and Notes which immediately precedes it: but it serves as an introduction to the discussion of important points in the law of contract which is found in the following chapters. On the other hand, the new chapter on Tort (chapter 44) contains a masterly re-examination of Willes J.'s well-known judgment in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, an effective criticism of *Machado* v. *Fontes*, [1897] 2 Q.B. 231, and a brilliantly succinct account of recent theories on tort liability in the conflict of laws, including Yntema's theory that by "actionable in England" Willes meant "triable in England", and my own theory of the proper law of the tort

Casual perusal of the table of cases indicates that the book cites 391 cases from England (including appeals to the Privy Council, many of them of course Canadian); 177 from Canada (including those from Newfoundland before it became a province); 53 from the United States; 11 from Scotland; 4 each from Australia and New Zealand; 3 from France; and 1 each from Germany and Northern Ireland. This suggests the criticism that more use might perhaps have been made of the Australian material. In particular, the renvoi chapters would have gained in completeness if *Simmons* v *Simmons* (1917), 17 S.R. N.S.W. 419, had been cited, for it appears to be the only Australian case on the doctrine, though it is true that it faithfully reproduces many features of the well-known English cases. Similarly, the section (pp. 798-801) criticizing *Re Williams*, [1936] V.L.R. 223, a case on legitimation, should either have cited later Australian and New Zealand cases on the same point or should have been omitted altogether. The short chapter on the succession rights of adopted children (43), which does not cite a single case, would have gained in utility if the Australian, New Zealand and Canadian cases had been cited.

Though the point is of less importance than it would be in an ordinary textbook, it is not easy to determine the date to which the book was corrected. The important decision of the English Court of Appeal in *Travers* v. *Holley*, [1953] 3 W.L.R. 507, is duly noted on page 745, but we look in vain on page 540 for *Re Maldonado*, [1953] 3 W.L.R. 204 (foreign government's claim to assets of in-

testate as *ultimus heres*); on page 718 for *Starkowski* v. *A.-G.*, [1952] P. 302 (an extreme but logical application of the rule that formalities of marriage are governed by the *lex loci celebrationis*); on page 746 for *Har-Shefi* v. *Har-Shefi (No. 2)*, [1953] 3 W.L.R. 200 (recognition of non-judicial divorce); and on page 794 for *Re Hurll*, [1952] Ch. 722 (a legitimated child claiming under the will of a testator who died before the date of legitimation cannot rely on the Legitimacy Act, 1926, s. 8, but can rely on the *Wright-Grove* rule). Yet all these cases were reported before *Travers* v. *Holley*. On page 794 a list of exceptional cases is given in which the Legitimacy Act, 1926, does not apply: one more exception should be made to this list in the light of *Re Hurll*. It is strange that *Wolfenden* v. *Wolfenden*, [1946] P. 61, is not cited on page 720, note (t), for the proposition that if no local form of marriage is available, parties to a foreign marriage can use the form of their personal law; and that neither *Mitford* v. *Mitford*, [1923] P. 130, nor *Chapelle* v. *Chapelle*, [1951] P. 134, is cited in the section (pp. 690-695) on the recognition of foreign annulment decrees. Yet all three cases are cited elsewhere on other points.

I agree with Dr. Falconbridge's suggestion (pp. 786 ff.) that the decision in *Re Bethell* (1888), 38 Ch. D. 220, was right in the result on the ground that Christopher Bethell was domiciled in England at the time of his "marriage" and thus had no capacity to contract a polygamous union. But I am (with respect) unable to agree with the further suggestion that the decision can also be supported on the ground that Christopher was domiciled in England at the time of his death and therefore, "as regards the movable assets, English law would be the proper succession law" (p. 788). The reason why I cannot agree with this suggestion is that Christopher Bethell was tenant for life under his father's will, not the testator, and therefore the law governing the succession depended on his father's domicile, not on Christopher's. I think, too, that Dr. Falconbridge has slipped up in his statement of the facts in *Pugh* v. *Pugh*, [1951] P. 482 (p. 715), because he makes it appear that the man, as well as the woman, was under the age of sixteen, and thus obscures one of the interesting features of the case. It is, of course, a tribute to the extreme care which Dr. Falconbridge lavishes on his work that these two isolated instances are the only ones, in over 800 pages, which can fairly be described as errors. It is a comfort to lesser mortals to reflect that even Homer sometimes nods.

That is not to say, of course, that the reviewer always agrees with the author's views: and since the subject is so controversial, perhaps I may be permitted to indicate some of my grounds of dissent. I am unable (with respect) to agree with the criticism of *Re Martin*, [1900] P. 211, on pp. 112-117, which is much expanded in this edition. It is true that Dr. Falconbridge may well be right in

thinking that the rule of English (and Ontario) law that marriage revokes a will should be characterized as a matter of succession law and not as a matter of matrimonial law. But it is submitted that this does not prove that the decision in *Re Martin* was incorrect, unless we assume (as Dr. Falconbridge assumes) that revocation of wills is governed by the law of the testator's domicile *at the time of his death*. For is it not arguable that the matter should be governed by the law of the testator's domicile *at the time of the alleged act of revocation?* If the will is effectively revoked at that time, it is gone just as though it had never been made, and there is therefore no will on which the law of the testator's domicile at the time of his death can operate. This is especially obvious in the case of revocation by destruction. If an Italian testator while domiciled in Italy directs his solicitor to destroy his will in his absence, by Italian law the will is revoked even if the solicitor fails to comply with the direction, though by English law the will would not be revoked even if the solicitor did destroy it (unless the direction to destroy was itself attested like a will). Could it possibly be argued (apart from section 3 of Lord Kingsdown's Act) that, if the testator died domiciled in England, the will would be saved from revocation? And if not, why should a different rule apply to revocation by subsequent marriage?

In chapters 39 to 43 the author presents an ingenious argument which is designed to reconcile two opposing views on the vexed question whether the right of a legitimate, legitimated or adopted child to succeed to property is a question of status, governed by the law of the domicile of the child or its parents, or a question of construction, governed by the proper law of the succession. Briefly, the argument is that we must distinguish between status and capacity; that the proper law of the succession must define what it means by a "child" and must determine, for instance, whether it includes a child of a putative or polygamous marriage, a child legitimated by the subsequent marriage of its parents or by parental recognition, or an adopted child; and that the law of the domicile of the child or its parents must determine whether a particular child comes within these categories. With respect, I find this argument unconvincing, for the following reasons. Most of the cases in which this question has been considered were decisions of English courts before 1927 in situations where English law was the proper law of the succession, and a child legitimated by the subsequent marriage of its parents under the law of a foreign domicile was seeking to succeed. At that time English domestic law made no provision at all for the succession rights of legitimated children, for the whole concept of legitimation was unrecognized. Yet in many of the cases the foreign-legitimated child was held entitled to succeed. I cannot regard it as a correct analysis of those cases to say (p. 791) that the

child's "right to claim as successor depended not on his status alone, but also upon English succession law". (I take it that "English succession law" here means the domestic rules of that law, otherwise we are on the roundabout without any apparent means of getting off.) Moreover, if English law is the proper law of the succession in a case arising today, and English domestic law says that legitimated children can succeed only if the testator died *after* the date of legitimation (Legitimacy Act, 1926, s. 3), or that adopted children can succeed only if the will was executed *after* the date of adoption (Adoption Act, 1950, s. 13(2) ), I cannot see that it follows that foreign-legitimated or foreign-adopted children cannot succeed if they were legitimated after the death of the testator or adopted after the date of the will. Indeed, so far as legitimated children are concerned, the contrary has been held: *Re Hurll*, [1952] Ch. 722. Moreover, I think it is a fair assumption that if David Luck's father had been domiciled in California at the date of David's birth as well as at the date of the recognition, the Court of Appeal in *Re Luck*, [1940] Ch. 864, would have allowed him to succeed, though English domestic law confers no succession rights on children legitimated by parental recognition, for the simple reason that that form of legitimation has no place in English domestic law.

The author was fortunate in the circumstance that the Conference of Commissioners on Uniformity of Legislation in Canada approved the latest redraft of Lord Kingsdown's Act in time for the text to be printed as an addendum. The redraft was enacted in Ontario in April 1954[1] and, as the author says, when this new revised version is enacted by the other common-law provinces the result will be a notable improvement and clarification of the rules of the conflict of laws on succession in those provinces. The truth of this remark becomes apparent when we compare the four versions of the act which are printed in this book: the original act of 1861 (pp. 543-544), the redraft adopted in Saskatchewan (1931) and Manitoba (1936) (p. 547), the second redraft (pp. 549-550), and the final version (p. xxxii). The superiority of the last over all previous efforts is obvious, and it must be a satisfaction to the author to know that his prolonged efforts in this matter have been crowned with success. It is much to be hoped that the matter will be referred to the new Private International Law Committee in England.

Inevitably, a disproportionate amount of space in this review has been occupied in pointing out differences of opinion between the author and the reviewer. These differences are not of much significance, and they in no way weaken the reviewer's conviction that here is a book from which more can be learnt of the fundamental problems of the conflict of laws than from any other book

[1] See, for an explanation of the new legislation in Ontario, the comment by Dr. Falconbridge at page 426 of this issue.—*Editor*

of similar size in the English language. It is indeed a worthy monument to the most distinguished living exponent of the subject.

J. H. C. MORRIS*

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*The Legal Aid Society New York City 1876-1951.* By HARRISON TWEED. With a foreword by REGINALD HEBER SMITH. New York: The Legal Aid Society. 1954. Pp. ix, 122. (No price given)

Mr. Reginald Heber Smith writes in his foreword to this excellent little book that "All persons who are now interested, and all persons who ought now to become interested, in legal aid work in the United States will be rewarded by reading this story about its genesis and evolution. . .". The same promise can be held out to lawyers in Canada, where even yet the problem of legal aid has not received the attention it should.

The author writes from an experience of more than twenty years with legal aid. He has been president of the Legal Aid Society of New York, about which he now writes, president of the Association of the Bar of the City of New York and chairman of the American Bar Association's Standing Committee on Legal Aid Work; he is now president of the American Law Institute and of the National Legal Aid Association. He knows at first hand what legal aid is and why it must be speedily introduced in places where it does not already exist.

Legal aid has become an essential part of the administration of justice in a democracy. As Dr. Henry S. Pritchett, then president of the Carnegie Foundation, wrote as long ago as 1919: "An autocracy can exist without law, but a free democracy cannot. The very existence of free government depends upon making the machinery of Justice so effective that the citizen of the democracy shall believe in its impartiality and fairness." Mr. Tweed realizes fully why the organized bar should accept responsibility for leadership in this field if it wishes to preserve its independence. One of the cardinal obligations of the legal profession is to establish and maintain an adequate number of legal-aid offices and committees in all parts of the nation. The highest judicial authorities have long realized that legal aid is of critical importance because "it operates in precisely that area where our legal institutions are vulnerable to attacks and are now being attacked".

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Borrowing again from Mr. Smith's foreword: "Complex and somewhat obscure social forces of revolutionary proportions — immigration, urbanization, industrialization, the rise of the wage-earning class, unemployment, the loneliness and poverty that were the concomitants of booming cities — all these are reduced to more manageable proportions and are more readily understandable when expressed in concrete terms instead of in generalities. The concrete story of the struggle to conform the law to these new and harsh realities depicts what a few brave men and women of the preceding generation as well as our own did day after day and year after year in their determination to establish equal justice under law. The stark contrast between the promise of America and certain very real and undisputable facts afforded the moral basis for legal aid. But the pioneers were not philosophers. They were kind-hearted and God-fearing people who could not tolerate gross injustice and so they proposed to do something about it."

It is not surprising that the first legal-aid office was opened in New York City, the metropolis of the United States. The year was 1876 and the population of the city was almost exactly a million, substantially less than the present population of Montreal. The first office was opened by the German Benevolent Society for the benefit of German immigrants, who were often helpless victims in the hands of exploiters. The same need explains the opening of legal-aid offices by various religious and national benevolent societies in Canada. For example, the Jewish Baron de Hirsch Institute in Montreal has one of the best organized offices of its kind in the country.

But legal aid limited to racial minorities is not the final solution. This was well understood in New York, where the organization of *Der Deutsche-Rechtsschutz-Verein* was expanded in 1896 and the name changed to "The Legal Aid Society". The change in the society's character was brought about by Arthur Von Briesen, a lawyer, who wished to eliminate injustice by extending the equal protection of the laws to everyone. At a banquet marking the twenty-fifth anniversary of the society in 1901, Mr. Von Briesen said: "The object of the Legal Aid Society, which thus grew out of a small beginning, was to create a sense of justice to be exercised by all men and women towards all men and women. There are many persons who are deliberately cruel. There are still more who are unconsciously cruel. The work we do, although directed to individual cases of the poor and helpless, also reaches the other side, because it brightens and sweetens the lives of those who learn to become ust to the helpless." The growth of the society in the decade from 1890 to 1900 was probably greater than that of any similar organization in any city at any time.

The statistics given in this book are interesting. For instance,

contributions to the Legal Aid Society in 1951 amounted to around $220,000, subscribed about equally by lawyers and laymen. The number of civil cases handled in 1952 was of the order of 34,611. In the United States "at the close of 1949, Legal Aid Offices with paid staff were operating in 56 of the 124 cities having a metropolitan population of 100,000". Canada as a whole, in spite of recent advances in Ontario and some other provinces, is still behind in the provision of legal aid.

The Legal Aid Society of New York is the best example available to us of what can be accomplished by co-operation between the organized bar and community chest. As my confrere, Mr. K. S. Howard, wrote a few years ago to the editor of this Review, "It is later than you think!"

EMILE COLAS*

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*Income Tax Law and Practice (Commonwealth): Being the Income Tax and Social Services Contribution Assessment Act with Regulations and other Acts, together with full explanatory notes.* By N. E. CHALLONER, LL.B., A.C.A. (Aust.), and C. M. COLLINS, B.A., LL.B. Australia: The Law Book Co. of Australasia Pty Ltd. Toronto: The Carswell Company, Limited. 1953. Pp. xliii, 1092. ($22.00)

One can only marvel at the immense industry which went into the preparation of this book. It lives up fully to its description as "being the Income Tax and Social Services Contribution Assessment Act with Regulations and other Acts, together with full explanatory notes". Although one might consider that a volume running almost to eleven hundred pages, with commentary printed in a small type (which one suspects was designed by an unscrupulous manufacturer of eyeglasses) is not entirely suited to browsing, this reviewer can testify that careful reading, even by one previously unfamiliar with the intricacies of the Commonwealth income tax, was a rewarding experience. The book is in form a commentary on the Commonwealth act and discusses it section by section, but it has little of the choppiness ordinarily associated with this type of text, which all too frequently combines brief, if not cryptic, references to decided cases with a multitude of bewildering cross-references to other sections which make a reader wish that he had a few more fingers with which to keep his place in the book. As Mr. Challoner is a chartered accountant, it is probably to him that we are indebted for remarkably clear mathematical examples of the working of the more complex sections of the act. Both

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authors deserve the highest praise for the brief but lucid introductions appearing at the beginning of many of the divisions of the act.

Canadians may be a little disappointed to find that the only references to their case law are to Privy Council decisions on Canadian appeals. Although our Exchequer Court and Supreme Court of Canada decisions on income tax are scanty compared with those of Australian tribunals, nevertheless we do have a few which should be of interest to the whole Commonwealth. We are indebted, however, to the authors for full discussion of a number of topics of interest to Canadian lawyers, including residence (page 28), mutual corporations (page 101), gambling profits (page 104), assigning and licensing of patents (page 164), partnership (page 468) and revocable trusts (page 518). It is not intended to suggest that there are not other sections worthy of careful perusal, but these appear to be particularly so.

On the other hand, the discussions of the nature of income and of the deductibility of business expenses appear to be rather sketchy, perhaps not in absolute terms, but as compared with the comprehensiveness of the work as a whole. This is particularly regrettable because Australia has a very extensive case law on these subjects, the Australian statute is more like our own than the English Income Tax Act and Australian courts appear to have developed an approach to the meaning of income which is more consistent than is possible under the English act, where different standards of what is income apply under each of the five schedules.

A few remarks may perhaps be in order on some of the statements made by the authors:

(1) The authors seem to have taken the easy way out when, after a thorough discussion of *Foley* v. *Fletcher* (1858), 3 H. & N. 769, *Secretary of State for India* v. *Scoble*, [1903] A.C. 299, and the Australian cases on the distinction between an annuity and an instalment payment of capital, they state at page 146, "It is not easy to reconcile some of the cases on this subject, but any conflict between them appears to arise, not in connection with question of principle but from the view which the Courts have taken of the true nature and substance of the particular case". Since it seems almost impossible to predict in advance what view the court will take of the true nature and substance of a particular case on this point, this statement is hardly helpful to the reader.

(2) At page 234 is quoted Lord Cave's famous dictum in *British Insulated and Helsby Cables Limited* v. *Atherton*, [1926] A.C. 205, at p. 211, "A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may

yet be expended wholly and exclusively for the purposes of the trade". No reference is made to the fact that Lord Porter in *Smith's Potato Crisps (1929) Limited* v. *C.I.R.*, [1948] A.C. 508, rejected Lord Cave's dictum as obiter, and declared that the deduction claimed in the *Atherton* case was inadmissible because it was of a capital nature.

(3) It is apparent from the practice of the Canadian authorities that they have not fully considered the effect of the decision in *Rose* v. *F.C. of T.* (1951), 84 C.L.R. 118, in which it was held that formation or dissolution of a partnership or a variation in the constitution of a partnership does not involve disposal of the assets of the partnership for the purpose of computing recaptured depreciation. An analogous problem arises in the United States, where the authorities have attempted to tax inventory profits made on the disposition of a partnership interest, with differing results among the various circuit courts of appeal. In Australia, the situation has been corrected and clarified by statute (section 59 AA).

(4) The Australian rules for taxation of trusts are quite similar to our own, except for beneficiaries not entitled by reason of infancy to enforce payment, where the Australian act taxes the trustee and our act taxes the beneficiary. Since the commonest reason for the accumulation of trust income is the infancy of the beneficiary, it is not surprising that the Australians should long ago have recognized the advantages of separate trusts for each beneficiary, in order to mitigate the burden of progressive rates of taxation. Although the need is probably not so acute in Canada, draftsmen of trust instruments would probably be well advised to bear this technique in mind. They should also be interested in the discussion at page 518 of the use of irrevocable trusts of shares in a company controlled by the settlor as a method of avoiding the use of revocable trusts, with their unfortunate tax consequences under section 22(2) of our act.

(5) The reference at page 321 to the *Pioneer Laundry* case, [1940] A.C. 127, might give the impression that the present Canadian law does not contain any provision corresponding to section 60 of the Commonwealth act, although in fact section 20(4) of the Income Tax Act also restricts depreciation to original cost, where transfers have been made between persons not dealing at arm's length.

(6) There is an excellent note at page 720 dealing with the circumstances in which an assessment may be re-opened by reason of the taxpayer's fraud or evasion, after the expiry of the six-year limitation period, under section 170 of the Commonwealth act. Australia has produced an astonishing volume of case law on this question, fortunately for us under a section quite similar in scope to

section 46(4) of our act, under which there have been no cases at all.

(7) At page 742 the authors discuss at length the position of the Board of Review as an administrative body with the duty of reconsidering or reviewing the assessments of the commissioner but not exercising any part of the judicial power (*Shell Company of Australia Limited* v. *F.C. of T.*, [1931] A.C. 275). After the High Court had held in *British Imperial Oil Company Limited* v. *F.C. of T.* (1925), 35 C.L.R. 422, that the Board of Review is a court and that because its members were not appointed in accordance with section 72 of the constitution, it was not legally constituted, the Commonwealth act was amended so as to legalize the status of the Board of Review. It may, however, be open to some adventurous Canadian litigant to claim that the Income Tax Appeal Board is not legally constituted, having regard to section 96 of the British North America Act

(8) At page 872 appears a full discussion of section 260 of the Commonwealth act, which avoids all contracts, agreements or arrangements to alter the incidence of tax, to relieve from liability for tax, or to defeat, evade or avoid liability. The discussion throws light upon the circumstances in which Canadians may reasonably expect that the Treasury Board will exercise its analogous powers under section 138 of their act. It also suggests a possible compromise between the views of the legal and accounting professions, who have for years advocated outright repeal of the section and of its predecessor, and those of the authorities, who see in it a necessary means of combatting loss of revenue through tax avoidance.

Canadian readers may be especially interested in a number of novel provisions of the Commonwealth act:

(1) The Commonwealth allows amortization of the expenses of borrowing money but not of a bonus on a mortgage, a sensible approach along the lines recommended by the Joint Taxation Committee of the Dominion Institute of Chartered Accountants and the Canadian Bar Association.

(2) Only five per cent of lump sum payments made as retiring allowance are taxable in Australia, providing a concession to the taxpayer and an opportunity for legal avoidance of taxation, which makes section 36(1) of the Canadian act seem picayune.

(3) Section 36 of the Commonwealth act provides that any disposal of trading stock, whether by sale, gift or otherwise, is deemed to result in the realization of income to the extent of fair market values. Similar provision in the Canadian act would close a loophole caused by the failure to deal with gifts in section 17. Gifts are dealt with in section 20(6)(d), but only for the purpose of computing capital cost allowance on depreciable assets.

(4) In 1952 Australia replaced its previous system of taxing private companies, then surely the most complicated in the world, by a new method designed to discourage retention of corporate earnings over a statutory percentage of profits (computed on a sliding scale) by subjecting the excessive accumulations to tax at a flat rate of fifty per cent, in addition to the normal corporate rates of from twenty-five to thirty-five per cent. Obviously, the Australian authorities have been less impressed than have the Canadian with the desirability of encouraging corporate accumulation by private companies. The Australian scheme, by imposing an automatic penalty, seems more likely to accomplish its purpose than does section 102 of the U.S. Internal Revenue Code, which deals with the same matter, or section 13 of the Canadian Income War Tax Act, the repeal of which was hardly regretted by corporate taxpayers or their advisers.

(5) The provisions of section 80 on loss carry-overs are so framed as to prevent carry-over by a bankrupt or the purchase of companies with loss histories for the purpose of offsetting future profits. In this respect they seem superior to section 27(1)(e) of our Income Tax Act, even making allowance for the amendments proposed in 1954.

(6) Mutual corporations in Australia are treated generally in the same manner as are co-operatives under section 73 of our act, which seems a distinct improvement over the position in Canada, where co-operatives may be treated in two different ways, even though for all practical purposes a co-operative which does not meet all the requirements of mutuality operates in exactly the same way as one which does.

(7) Section 52 allows deduction of any loss incurred by the taxpayer upon the sale of any property or from the carrying on or carrying out of an undertaking or scheme, the profit (if any) from which would have been included in his assessable income. Except where the commissioner is satisfied that the property was acquired by the taxpayer for the purpose of profit-making by sale or for the carrying on or carrying out of any profit-making undertaking or scheme, no deduction is allowed unless the taxpayer, not later than the date upon which he lodges his first return under the act after having acquired the property, notifies the commissioner that the property has been acquired by him for the purpose of profit-making by sale or for the carrying on or carrying out of any profit-making undertaking or scheme. A similar provision would be useful in the Canadian act and would considerably reduce litigation.

Finally, we are indebted to the authors for a delightful quotation on page 439, on the meaning of goodwill, from *Whiteman Smith Motor Company* v. *Chaplin*, [1934] 2 K.B 35, at pp. 42, 49, in which the types of customers "were zoologically classified as

cats, dogs, rats and rabbits. A cat prefers the old home to the person who keeps it, and stays in the old home although the person who has kept the home leaves, and so it represents the customer who goes to the old shop whoever keeps it, and provides the local goodwill. The faithful dog is attached to the person rather than to the place; he will follow the outgoing owner if he does not go too far. The rat has no attachments, and is purely casual. The rabbit is attracted by mere propinquity. He comes because he happens to live close by and it would be more trouble to go elsewhere."

WOLFE D. GOODMAN*

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*Introduction to English Law.* By PHILIP S. JAMES, M.A. Second edition. London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1953. Pp. 26, 448. ($3.75)

The author of this book is Professor of English Law in the University of Leeds and was formerly a Fellow of Exeter College, Oxford, and a Research Fellow of Yale University. The book is intended "primarily for the serious student of the law in the early stages of his study", but with the hope expressed that it will be "digestible to the 'man in the street' ". Its method is to produce a series of miniatures of basic departments of English law (including the English courts and their administration, a little procedure and evidence, the simpler aspects of British constitutional law, criminal law, the law of contract, the law of torts, land law, the law of personal property, the law of trusts, the law of succession). The selection of subjects, their number and the relative weights given to them may not satisfy everyone but the choice seems reasonable for a book of this kind.

A surprising amount of detail is contained in each "vignette". There is no "padding" and of course a minimum of controversial material, but the author has a pleasant style and a simple, clear method of exposition which makes the book easily readable. Good use is made of the homely illustration to clarify and enliven the bare principles.

A few suggestions might be made, all of them minor, for the general standard of accuracy and clarity is high. The material on interpretation of statutes is so telescoped as to be of doubtful value (pages 9 and 10). Are there not more cogent reasons for special tribunals than those indicated at pages 56 to 58, for example, the impracticability of dealing with certain types of statutory inquiry in the ordinary courts? (In England, the Town and

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Country Planning Act, 1947, requires a public hearing of objections to a development plan. An astronomical number of objections were received in connection with the County of London Plan.) It is stated on page 61 that in England, in dealing with an application for planning permission under the Town and Country Planning Act (whether made directly or on appeal), "the Minister may ultimately have to take a quasi-judicial decision . . .". *Franklin* v. *Minister of Town & Country Planning*, [1948] A.C. 87, and other cases indicate that such a decision is administrative (cf. Heap (1952) Journal of Planning Law 131) and the issue would be better avoided in an elementary book. A writ is described (page 69) as "a written command in the Queen's name ordering the Defendant to enter an appearance within eight days" and the words "after service" should be added for clarity. It is hardly possible to explain summary procedure effectively in one sentence, even a long sentence (page 71). Evidence by a witness in an automobile case in England, that "*A* was driving *too* fast", is not inadmissible because it is "a matter of opinion" but because it involves an issue in the case; evidence as to speed is admissible and is evidence of opinion (Road Traffic Act, 1934, s. 2(3) ). The discussion of this point might be clarified. At page 297, defamation is defined in standard form, but with omission (perhaps for reasons of simplicity) of the words, "or which tends to make them shun or avoid that person" (cf. *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581, at p. 587).

A courageous and (within its limits) a successful attempt is made to serve the English real property legislation of 1925 as a small and wholesome meal. There are five major acts and Professor James's account can be recommended as valuable prefatory reading for anyone who, for one reason or another, wishes to study this important and far-reaching group of statutes for the first time. In regard to resettlement (pages 340 and 341) it might be made more explicit that its purpose is to reduce an entailed interest to a life interest on the majority of the tenant in tail, thus removing his power of disentailment The explanation of "overreaching" of equitable interests in a strict settlement (page 342) seems to imply that a purchaser is unconcerned with any equitable interest affecting the land. The purchaser is unaffected by interests or charges arising under the settlement (or by certain types of land charge extraneous to the settlement), and these attach to the purchase price, but he may, for example, be concerned with a duly registered restrictive covenant (Settled Land Act, 1925, s. 72).

The section on negotiable instruments might be improved by more explanation of the historical causes and modern uses of the bill. Sentences such as "A negotiable instrument is a written document which represents money" (page 369) should either be more

fully discussed or removed. The discussion of "material alteration" of a bill on page 374 might include some mention of the rather important proviso to the section (English, s. 64; Canadian, s. 145).

It is implied, on page 392, that *Gilmour* v. *Coats*, [1949] A.C. 426, decided that the benefit to the community of intercessory prayer by the nuns was "too speculative and intangible to be considered of value in the eyes of the law". The decision was (a) that the benefits of intercessory prayer were not susceptible of legal proof, for the "faithful must embrace their faith believing where they cannot prove: the court can act only on proof" (*per* Lord Simonds); (b) that the edification of the general public by the example of cloistered nuns engaging in no exterior work was too "vague and intangible" to satisfy the conditions of legal charity.

A list of suggestions for additional reading might be usefully included in the book. Law students will receive suggestions from other sources, but the lay reader stimulated to further interest would find it helpful.

Of what value is the book to Canadian readers? Apart from the English statute law, the sections on constitutional law, and the like, the book would be of value to a student in his early stages to provide a general conspectus of the law. There is some danger of first-year students being caught up in the detailed machinery of separate topics without having much idea of what the system as a whole looks like. Such a book as this tends to give a useful and balanced view of the map before intensive exploration of separate valleys, and can be recommended for such a purpose. The book would be useful to the layman who wishes an idea of simpler principles. It also provides in short and lucid form some information on recent statutory developments in Britain and other matters which might interest the Canadian reader, for example, chapter 7 on the "Law of the Welfare State", an excellent account of the machinery of British "national finance" (pages 149 to 152), the Town and Country Planning Act, 1947, and the Rent Acts.

IAN F. G. BAXTER*

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*The Law of the Air*. By SIR ARNOLD DUNCAN MCNAIR, Q.C. Second edition by MICHAEL R. E. KERR, M.A., and ROBERT A. MACCRINDLE, LL.B. London: Stevens & Sons, Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xxiii, 500. ($11.25)

On its publication in 1932, the first edition of this volume repre-

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sented, in the words of the present editors, "the first attempt, at least in the English language, to produce a full-scale treatment of the law relating both to aviation and to the rights and duties connected with the user of the air in general". The second edition, however, cannot be said to contain a "full-scale" treatment of air law. This branch of the law has undergone marked development since 1932, particularly on the international level. The present volume stays within the confines of the first edition and, in spite of the now vast amount of material on international air law, does not deal with that part of the subject save to the extent that the rules of English law are materially affected. Nevertheless, within this restricted scope the editors give an up-to-date view of air law on such varied matters as private rights at common law, common-law liability for damage, statutory liability for damage, jurisdiction and choice of law, carriage at common law, statutory carriage, maritime analogies, insurance and charterparties, administrative and technical regulations, investigation of accidents and the organization of civil aviation in the United Kingdom.

Since the appearance of the first edition some important changes have been made in the English rules governing carriage by air, and these rules are now largely statutory. The British Carriage by Air Act, 1932, which had not come into force on the publication of the first edition, applies to international carriage by air the rules found in the Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature at Warsaw in 1929, and commonly called the Warsaw Convention. This convention, which has been accepted by well over two-score nations, governs today the bulk of international commercial carriage by air. A more recent development is to be found in the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952, which, in effect, applies the Warsaw rules to domestic carriage. The discussion of the act and order is of more than passing interest to Canadians for two reasons: (1) the Warsaw Convention came into force for Canada on September 8th, 1947; (2) section 4(1) of the Canadian Carriage by Air Act, 1939, provides in effect for the application of the Warsaw rules to domestic carriage by air in this country by order in council, although no such action has yet been taken. The editors have taken changes in the English rules into account and the material on the contract of carriage by air in the second edition covers twice the number of pages devoted to it in the first.

Another topic the treatment of which has been brought up to date in light of statutory enactments is the liability of the operator for flights through the airspace lying over private property and for damage caused by aircraft on the surface. Since the appearance of the first edition, section 9 of the British Air Navigation Act,

1920, has been superseded by section 40 of the Civil Aviation Act, 1949. The editors discuss the effect of this section in the context of the new act. Generally, its effect is to impose absolute or strict liability on the operator of an aircraft causing damage to third parties on the surface, and he enjoys, in appropriate circumstances, immunity from actions for trespass and nuisance arising from flights over the property of others on the surface. At first glance, the section appears to have universal application, but the editors point out several cases where it does not apply; they have, therefore, explained in some detail the common-law rules governing flights over property and damage on the surface. This explanation of the common law will be of use to Canadian lawyers who might be called upon to advise in cases in this country, where there are no statutory provisions corresponding to the British rule. Some day there may be, for on May 26th, 1954, Canada signed the Rome Convention of 1952, which deals with the question of damage caused by foreign aircraft to third parties on the surface, and a statute would be required to give effect to the convention should Canada decide to ratify it.

The chapter on jurisdiction and choice of law contains useful discussions on such matters as: the aircraft in the conflict of laws, crimes and torts on board aircraft, collisions, contracts, births, deaths and marriages. The urgent need for some international agreement on these matters is pointed out by the editors. They suggest, in particular, that questions of conflict of laws or jurisdiction should be referred to the law of the flag rather than to the changing geographical position of the aircraft at different moments in their flight.

The popular misconception that air law is, after all, just another form of maritime law dies hard. To be true, there are a certain number of superficial similarities between the two branches of the law, which the editors have considered sufficient to warrant a special chapter on maritime analogies. This chapter contains such interesting conclusions as these: the analogy of the ship has no general application to aircraft (page 233); in the case of nationality and registration, it can be said that, like ships, aircraft are to some extent invested with "legal quasi-personality" (page 235); in the case of liens and charges, the legal analogy of the aircraft with the ship is less strong than in the case of nationality and registration (page 236). In these and other respects the editors show that the relationship between air law and maritime law is very often a matter of words rather than of substance.

Although this book should be on the shelf of anyone interested in the legal aspects of aviation, it is not without some minor shortcomings. Thus, while the editors have inserted a list of the thirty-eight original signatories to the Convention on International Civil

Aviation, concluded at Chicago in 1944, they have omitted the more useful list of actual parties, which now number sixty-three. Again, in view of the space devoted to the Warsaw Convention, the editors might well have included a list of the more than forty parties to it. True, lists of parties to conventions are subject to change, but even when slightly out of date they give the busy practitioner an indication of the extent to which a convention under study is applied. Yet again, in the discussion of noise and vibration by aircraft on aerodromes there is a half-hearted reference to an interesting Canadian decision: "In similar circumstances a case was heard by Nova Scotia Supreme Court where Trans-Canada Air Lines were sued by a mink farmer: see *The Times*, April 18, 1950". Surely law reports of Canadian courts are readily available in the United Kingdom. Because of its novelty this decision was the subject of a case comment in the Canadian Bar Review at the time, and it is properly cited in a book on air law as: "*Nova Mink, Ltd.* v. *Trans-Canada Airlines*, [1951] U.S. Av. R. 40, [1951] 2 D.L.R. 241, 26 M.P.R. 389 (Supreme Court of Nova Scotia).

Appendices to the volume contain a note on the origin and history of the maxim *cujus est solum, ejus est usque ad coelum et ad inferos*, as well as the texts of the Convention on International Civil Aviation, 1944, the Civil Aviation Act, 1949, the Carriage by Air Act, 1932, the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952, and the General Conditions of Carriage employed by the British Air Corporations and other air undertakings. The volume is completed with a short bibliography, lists of statutes and cases cited, and a useful index.

GERALD F. FITZGERALD*

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## Our Reason

If in a discussion of natural law as a theory of the science of law we are thinking of a theory, yet we are thinking of a theory of a practical activity. We are seeking a theory of a regime of adjusting relations and ordering conduct in civilized society through systematic and orderly application of the force of a politically organized society, and a theory of the basis of the body of authoritative norms or models or patterns of decision by which we determine the application of that force to particular cases (Roscoe Pound, Introduction to Eugene C Gerhart, American Liberty and "Natural Law" (1953) p. 4)

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