Reviews and Notices

Criminal Law. The General Part. By GLANVILLE L. WILLIAMS, LL.D. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xliv, 786. ($11.25)

Glanville Williams is an astonishingly versatile legal author. His first book, published in 1939, was on "Liability for Animals", and he followed it with five others, none of which indicated any particular familiarity with criminal law. But within two years of the publication of a work on "Joint Torts and Contributory Negligence" he has produced what is probably the most comprehensive and important book on criminal law published in this century. He would seem, like Bacon, to have taken all knowledge to be his province.

The scope of the book cannot be better indicated than by the opening paragraph of the preface:

> This book is concerned to search out the general principles of the criminal law, that is to say those principles that apply to more than one crime. The great proliferation of criminal offences by the legislature means that many crimes are not fully covered by judicial interpretation; but all are governed by certain general principles, which are conveniently described on the Continent as the 'general part' of the law. By bringing together the authorities on such concepts as knowledge, intent to defraud, and claim of right, the root principles are thrown into relief, and the attention of the practitioner is directed to relevant authorities that may be decided under different statutes from the one with which he is immediately concerned. Although the work is complete in itself, it is hoped to follow it later with a companion volume on specific crimes.

Because our Criminal Code expressly preserves parts of the common law, and fails to deal at all with many other portions of this "general part", Dr. Williams's book is of the greatest value in Canada—probably more so than the promised "companion volume", although that too will be eagerly awaited, since there can be no doubt (with all respect to some pronouncements to the contrary by the recently-retired Chief Justice of Canada) that great parts of the common law, even in relation to specific crimes, are

also parts of our law, because of the sheer impossibility of covering, in any code, the developments of centuries.

Dr. Williams does not, as do many English authors, disregard all decisions outside his own country. He says modestly that he has included "selected authorities from other parts of the Commonwealth and from the United States", but a critical examination of the book shows an amazing familiarity on his part with the developments of the law throughout the countries whose systems are based on the common law. The number of Canadian decisions included is highly gratifying to those of us who feel that this country has made a contribution of some importance in this field. It is, of course, possible to find fault if one wishes to be carping. The question in *Robinson*, [1948] O.R. 857, for example, was not one of the meaning of the words "unlawfully procure" in section 216(1)(*a*) of the Code, but rather what was meant by the words "unlawful carnal connection" in that subsection, and the case is therefore not a particularly apt illustration of the effect of a statutory provision making it an offence "unlawfully" to do a specified act. Also, one might have expected, in the chapter on drunkenness, a reference to *Taylor*, [1947] S.C.R. 462, where the Supreme Court approved a rule as to the relation of intoxication to provocation, in homicide cases, that has no counterpart in English law. As I have suggested, however, these criticisms are very minor.

The opening chapter of the book is headed "The Criminal Act", and is a very full and valuable discussion of the *actus reus* necessary to constitute any crime. Dr. Williams defines this term as "the whole situation forbidden by law with the exception of the mental element (but including so much of the mental element as is contained in the definition of an act)". The mental element that is not included in the *actus reus* is of course what we know as *mens rea*, and this term is defined as consisting in either "intention to do the act or bring about the consequence or (in some cases) recklessness as to that consequence". Both intention and recklessness involve foresight of the probable or possible consequences, and thus exclude negligence which, to indicate its true nature, the author calls "inadvertent negligence". Negligence, he argues, is not properly considered a form of *mens rea*, the position being rather that those crimes that can be committed negligently constitute exceptions to the general rule that *mens rea* is an essential element of any crime. He points out, in this connection, "that there is no such thing as negligence in the abstract. Negligence is always negligence in relation to a particular consequence."

It is impossible, in the brief space of a review, to examine even the various subdivisions under which Dr. Williams proceeds to consider the subject. He has separate chapters on the forms of criminal responsibility commonly referred to as exceptions to the

mens rea rule, and in these he distinguishes (as is not always done) between "Strict Responsibility" (he dislikes, for convincing reasons, the term "absolute liability" in criminal law) and "Vicarious Responsibility". His discussion of "Mental Abnormality" is very full, and shows an intimate knowledge of modern psychiatry as well as of criminal law. "Drunkenness" is dealt with in a separate chapter.

Four chapters are devoted to "offences that enable the police to nip criminal tendencies in the bud". These are what are commonly referred to as "inchoate crimes", namely, incitement, attempt and conspiracy (Dr. Williams does not agree with Turner, the editor of the 16th edition of *Kenny's Criminal Law*, that the term "preliminary crimes" is preferable), and what is known as "preventive justice", which, as has just been decided by the Supreme Court of Canada in *MacKenzie* v. *Martin* (1954), 108 C.C.C. 305, is within the jurisdiction of magistrates in this country.

Following this are three chapters dealing with general defences, "Necessity, Impossibility and Good Motive", "Duress and Coercion" and "Consent, Facilitation and Entrapment", and three further chapters concerned with persons having a special position in respect of the criminal law and its enforcement ("Status", "Children and Young Persons", "Corporations").

Dr. Williams, unlike many writers on this subject, has not permitted himself to be drawn into a discussion (necessarily incomplete and fragmentary) of the law of evidence as applied in criminal cases. But he rightly points out that "Questions of burden of proof and presumptions are intimately bound up with the substantive law". He has therefore, in his final chapter, examined the question of the burden of proof, making an extremely valuable distinction (which has, of course, been made, although not in the same terms, in cases such as *Clark* (1921), 61 S.C.R. 608) between the two meanings of the term, which he defines respectively as "the risk of not persuading the jury" and "the duty of going forward with evidence to satisfy the judge" (in order that the judge may consider that there is an issue to be submitted to the jury). It is the first of these meanings that is used when it is said that the burden (with some exceptions which, in this country at least, are always statutory) is always on the Crown, and never shifts. In this connection the author is critical (and, to this reviewer at least, rightly so) of some recent decisions in which the Court of Criminal Appeal has virtually abolished the long-established directions to the jury (sanctioned by the House of Lords in several cases) concerning the necessity for proof "beyond reasonable doubt". It is only in the second sense of the term that we properly speak of the burden of proof being on the accused.

The work is an illustration of the difficulty, if not impossibility,

of building up any completely logical treatment of a body of law developed through judicial decision. Again and again the author advances a well-reasoned theory, only to be faced with a case, or a line of cases, running directly against that theory. This is of course inevitable so long as judges remain subject to ordinary human limitations, and Dr. Williams is never didactic, and does not give the impression, all too common in some legal writing, that practically all decisions are wrong. In other words, he attempts to give a rational explanation of the law as it has in fact been established, rather than a statement of the law as it should be. On the other hand, when a judgment is clearly against the whole current of authority (as in the recent case of *Bourne* (1952), 36 Cr. App. R. 125) he does not hesitate to criticize it strongly.

A word must be said about the format of this book, which is a delight. The print is clear, the pages are not overcrowded, and the binding is such that, although there are more than 800 pages, the book is easy to handle, and will lie open at any page. The author has adopted the practice, which has been followed in the Criminal Appeal Reports since their inception and might well become standard, at least in text-books, of citing a criminal case by the name of the accused alone, and not troubling to distinguish between *Regina* v *Smith*, *Rex* v. *Smith*, *Smith* v. *Regem* (frequently, though incorrectly, cited in reports as *Smith* v. *Rex*) and *Smith* v. *Director of Public Prosecutions*. Another admirable practice, not followed with complete uniformity, is that of inserting the date of a decision in parentheses in the body of the text (the citations being given in full in footnotes). Although this involves some repetition where the date is part of the citation, it is of great assistance to the reader who does not wish to drop his eye to the footnote each time a case is cited, but does want to know the date of the judgment.

It is quite impossible to do justice to this work within the compass of a review. No student of criminal law should be without it, and although, because it is so closely reasoned, it is in places not easy reading, it will very well repay the study necessary to master it.

A. B. HARVEY*

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The Statute of Westminster and Dominion Status. By K. C. WHEARE, F.B.A. Fifth edition. London, New York and Toronto: Oxford University Press. 1953. Pp. xvi, 347. ($3.25)

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Federal Government. By K. C. WHEARE, F.B.A. Third edition. London, New York and Toronto: Oxford University Press. 1953. Pp. vi, 278. ($3.25)

Professor Wheare's *The Statute of Westminster and Dominion Status* established itself as a standard text when it first appeared in 1938, and its wide acceptance today is indicated by the fact that it is already in its fifth edition. This new revision incorporates the main changes that have occurred in the legal relations of the Commonwealth since 1947. Among these are such developments as the decision of Ireland to discontinue her membership in the Commonwealth, the acceptance of India as a full member though a republic, the admission of the "Dominion" of Newfoundland as the tenth province of Canada, and the abandonment of uniformity in the royal style and titles as applied to different partner states.

Nothing demonstrates the dynamic nature of Commonwealth relations more than the rapidity with which new political problems have emerged in the short period since the end of World War II, and nothing shows the flexibility of the Commonwealth more than the relative ease, under wise guidance, with which the inevitable legal adjustments have been made. Even the adoption of the Statute of Westminster itself, in retrospect, seems less productive of structural modifications, and less indicative of the transformation of Empire into Commonwealth, than do the several independence statutes by which the Parliament at Westminster acknowledged the facts of Asian rejection of white supremacy after World War II. Similarly profound in its effects was the agreement at the Conference of Commonwealth Prime Ministers in 1949 that allegiance to the Crown was no longer an essential condition of membership. Yet, as Professor Wheare's volume makes clear, the Statute of Westminster still embodies basic principles which underlie the relationships between one member state and another; and although its language is in some degree outmoded, and its application to members incomplete (it does not apply to India and Pakistan, for example), it retains a position of first importance among the constitutional documents of the whole association.

Two matters may be singled out for comment in an edition that is substantially the same as its predecessor. As a result of the *Harris* decision in the Appellate Division of the Supreme Court of South Africa[1] and of the discussion to which it has given rise, Professor Wheare now concludes that he was wrong in his previous view that the entrenched sections of the South Africa Act are no longer binding on the Union Parliament. He is now convinced that the appellate court's judgment was correct, and that until the South African constitution is changed by the method set out in

[1] 1952 (2) A.D. 428; [1952] 1 T.L.R. 1245.

section 152, no valid act of the Union Parliament exists to which effect can be given. A bill adopted by that Parliament contrary to standing constitutional rules is not an "Act of Parliament" at all, but so much waste paper. South African sovereignty is thus restrained in a manner different from that, say, of the United Kingdom, where a statute requiring a two-thirds majority for its amendment could, if adopted, be repealed at any future time by mere majority vote. Constitutional interpretations such as that rendered in the *Harris* case have a habit of reappearing in unexpected places, and it is possible that the judicial doctrine applied in South Africa has relevance for Canada if we should ever adopt a special majority rule for statutes amending the British North America Acts under the amending powers our federal Parliament obtained in 1949.[2]

The other change to be noted consists of a new final chapter for this edition, which discusses "The End of Dominion Status". It was the contention of this reviewer[3] that the term "Dominion status" was outmoded once the concept of independent national sovereignty for members of the Commonwealth had attained legal as well as conventional recognition. It is well known that in Canada the term "Dominion" has fallen into disuse in official circles, and that the single name "Canada", authorized by section 3 of the British North America Act, 1867, is employed as the proper title of this country. This change is not due, as Professor Wheare seems to imply (p. 308), to French-Canadian opinion only, but represents a general, though not unanimous, feeling in the country He admits that the words "Dominion" and "Dominion status" are falling into disuse, and that phrases like "Member States" and "Members of the Commonwealth", which are free from historical memories of subordinate status, are replacing them. But he suggests that this is merely a new name on an old bottle, since Dominion status had come in fact to be synonymous with full sovereignty. While conceding that this is semantically correct, it is again submitted that the concept of independent nation states freely associated in a Commonwealth (no longer even defined as "British") is better expressed without the use of a title like "Dominion", which is so closely associated with a stage in colonial evolution.

The second volume here for review is the third edition of another excellent monograph by Professor Wheare, his *Federal Government*, first published in 1946. This comparative study of the essentials of federalism, illustrated by acute analysis of the American, Canadian, Australian and Swiss federal systems, has a

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[2] See my article, The British North America (No. 2) Act, 1949 (1950), 8 U of Toronto L J. 201, at p. 206.

[3] See F. R Scott, The End of Dominion Status (1944), 38 Am. J. Int'l L. 35; (1945), 23 Can. Bar Rev. 725; (1947), 64 So. Afr. L.J. 141.

secure place in the literature on the subject. Little has been added to the present edition; indeed the chapter headings, table of cases and pagination remain unchanged. It is the general problems of federal government that are dealt with—what it is, when it is appropriate, how it should be organized, and how it works—and not its detailed development in each country. A Canadian reader will find the treatment of our federal structure most illuminating, though he might wish for some comment on such recent changes as the federal amending powers of 1949, and the old age insurance amendment of 1951 with its special protection for provincial autonomy. No commentator has better portrayed the difference between the law and practice of federalism in Canada than has Professor Wheare, with his stress on the contrast between the unitary elements in the text of the constitution and the federal elements of political life. This book makes a distinct contribution to the study of comparative constitutional law at a time when this subject is seen to be of increasing importance in the international order.

F. R. SCOTT*

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Economics of Canadian Transportation. By A. W. CURRIE. Canadian Government Series. Toronto: University of Toronto Press. 1954. Pp. vii, 727. ($10.00)

It is not easy to assess the importance of this book from the point of view of the legal profession in Canada. It is in no sense an exercise in jurisprudence, but has been written along practical lines in the particular hope that it may "prove helpful to the smaller shippers who from time to time have to appear before one or other of the regulatory tribunals". These shippers, together with professional economists, consignees and others concerned with transportation in a business way, will find the book informative and useful.

There are, nevertheless, several reasons why the book should also command the attention of lawyers. In the first place, the importance of transportation in the Canadian economy is inescapable; as citizens, lawyers will wish to increase their awareness of the nature and magnitude of the problems involved. Secondly, lawyers will be interested in having available a practical description of transportation law-in-action, since this forms, if not the hard core, at least an important segment of the whole body of administrative law in Canada. Finally, a practising lawyer may at any time, and on short notice, become professionally involved in a problem of transportation law.

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It is difficult, if not impossible, for the layman (and hard enough for the expert) to keep abreast of developments in such matters as the various and often overlapping post-war applications for increases in the general level of freight rates; to understand the several types of freight rates and the machinery of rate-making; or to ascertain the jurisdiction and procedures of such regulatory tribunals as the Board of Transport Commissioners, the Air Transport Board and the Canadian Maritime Commission. The author succeeds in bringing these matters at once into focus and up to date.

Professor Currie (now Associate Professor of Political Economy and Associate Professor of Business Administration in the University of Toronto) does not set himself up as a one-man royal commission on Canadian transportation. In particular, he does not proffer any ready-made formulas for the solution of Canada's many and seemingly ever-present transportation problems. He discusses clearly and readably the present system and position in respect of transportation by rail, road, air and inland waters, and by sea, and has something to say on most matters of current interest, including "Agreed Charges", "Commutation Fares" and "The St. Lawrence Seaway Project". At the same time (though he seems to sympathize with the dissenting observations of Commissioner Angus of the Royal Commission on Transportation of 1951) he does not presume to chart a course for the future or to express firm views on the extent to which transportation should be regulated in the public interest. In the author's words, "The problem is much broader than capitalism versus socialism or public versus private ownership. 'It is whether, because of the general and widespread benefits which transportation confers on the community and nation, it is desirable to include transportation services in the same category as general governmental services . . . or whether it would be more desirable for transportation to be financed by the user as is the case with other goods and services, since transportation constitutes an integral part of the cost of production and distribution'." It was Commissioner Angus's plaint that the majority report of the Royal Commission did not face up to this basic problem. Professor Currie may be forgiven if he too permits the future to provide the answer.

E. R. HOPKINS*

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Hatred, Ridicule or Contempt: A Book of Libel Cases. By Joseph Dean. London: Constable & Company Limited. Toronto: Longmans, Green & Co. 1953. Pp. 271. ($3.00)

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As the author has said in his excellent introduction (where incidentally the general principles of the English law of libel are summarized most clearly), "this book tells the stories of a variety of English libel cases, most of them tried in recent years". It "is not meant to be either a history or a treatise" but rather "an unorthodox anthology".

Forty cases decided in English courts between 1824 and 1946 —all but five on civil rather than criminal libel—are dealt with, following no particular order, in twenty-two chapters. Mr. Dean's method is to relate the facts of each case, to describe the course of the trial, with a summary of the evidence and, when warranted, detailed quotations from the transcript; to state the verdict of the jury and resulting judgment; and to relate the case in an interesting and non-technical way to the law of libel as a whole.

Although all the cases are well worth reading, this reviewer particularly enjoyed the analysis of *Wright* v. *Lord Gladstone*, where two sons of the famous English statesman, in order to prove the falsity of a scandalous reference to their father in a book written by a certain Captain Peter Wright, employed with advantage the methods used so effectively by the Marquess of Queensberry against Oscar Wilde. By publishing their own opinion of Wright and his conduct, they provoked him to institute an action for libel, which they successfully defended and so cleared their father's name. The skilful cross-examination of Wright by Norman Birkett, K.C. (as he then was), played no small part in the result, and is described in some detail.

In another interesting chapter, "Artemus Jones and His Consequences", the author analyzes and compares four cases of unintentional defamation, commencing with *E. Hutton & Co.* v. *Jones*, [1909] 2 K.B. 444, [1910] A.C. 284. He points out how inconsistent were these four decisions and that, perhaps, one result of the inconsistency was the enactment of the Defamation Act of 1952, which permits anyone who has unintentionally libelled another to publish a proper correction and apology and avoid liability for damages.

Mr. Dean has obviously done considerable research and his skilful selection of cases and clear and humorous style have produced an eminently entertaining book, which anyone, lawyer or not, may read with pleasure and profit.

GEORGE S. CHALLIES*

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Contract and the Freedom of the Debtor in the Common Law. By I. S. PAWATE. Bombay: N. M. Tripathi Ltd. 1953. Pp. xiii, 148. ($2.50)

This short book is, to say the least, provocative, and that is praise in itself. Its title requires some explanation. Mr. Pawate sets out briefly at the start of his essay to reply to the notion that a contract creates a kind of limited slavery to the promisor. He contends that the exercise of the privilege of making a binding promise is an act of freedom, and that the promisor is only free when he can bind himself at his own choice; a withdrawal or breach of the promise is a derogation from the original free wish to be bound.

This conception is but a short preliminary to what I take to be Mr. Pawate's major propositions, which relate to the binding character of promises and the doctrine of consideration. Stated shortly, Mr. Pawate's first proposition is that a promisor is bound by his promise if he intended to be bound. If he did not intend to be bound he is not bound, although he might then be liable on the promise, Mr. Pawate contends, in deceit. Obviously, such a proposition, if upheld, must bear on our notions of consideration, perhaps putting them out of mind altogether. Mr. Pawate draws quite the opposite conclusion. His second proposition is about consideration, but he merely reforms it slightly and, I think, states a doctrine more useful in the solution of fascinating logical problems in the law of contract than the commonly accepted bargain theory widely adopted today. Mr. Pawate suggests that "there is something eternal about the doctrine [of consideration] and if the legislature should abolish it, the judge would still find it standing there unharmed" (p. 93); a statement reminiscent of Maitland's famous observation that "the forms of action we have buried but they still rule us from their graves", and Mr. Pawate's statement might prove as true as Maitland's did, and for the same reason.

Mr. Pawate suggests this revision of the doctrine of consideration: that since a promisor is bound if he intends to be bound, we need not look to consideration to make his promise effective (this disposes of the benefit to the promisor) but we need a test to see whether the promisee should have a cause of action against the promisor: Is he "worthy", has his cause "merit" (this accounts for the detriment to the promisee)? Mr. Pawate calls this the merit theory of consideration. To justify this statement of the doctrine the author has to discard the bargain theory, which requires an exchange or bargain of the promise for the consideration. Mr. Pawate goes back to the earlier statements of the doctrine and builds upon the detriment to the promisee. There is surely no ground for criticizing his rejection of the bargain theory; any single, short statement of consideration inevitably rests on rather dubious historical and

logical grounds. If Mr. Pawate's statement, dubious though its ancestry may be, should prove helpful in solving real legal problems, we shall not be stretching and straining precedent or principle any more than has been necessary to reach the accepted form of the bargain theory.

The notion of a test for merit in the promisee is, I think, a useful one, but just how useful is the important question. Mr. Pawate applies it himself to a number of troublesome logical situations. For example, the unilateral offer and its revocation present a familiar problem. Mr. Pawate takes the view that the offer is a promise (see Williston on Contracts, s. 24A) and if intended to be binding it is binding on the promisor, regardless of whether an acceptance is ever communicated to him. If the "offer" is revoked, the "promise" is broken. The "acceptance" is the performance of a requested act. The question is whether the promisee merits the court's sympathy. If he has entered upon the performance of the requested act, he clearly does. In this view the revocation of an offer is always a breach of promise, but since the promisee does not merit support until he has expressed his assent or started on the performance of the act, no liability arises from the broken promise. Under traditional notions no entirely satisfactory reason is apparent to prevent the offeror revoking his offer just before the performance of the requested act is completed, although the performance may have taken some time and involved considerable expense to the offeree.

Mr. Pawate's merit theory of consideration thus supplies easier answers to some well-known logical snags than does the current doctrine. But does his theory offer any help at all with the policy problems to which critics of consideration point when they attack the doctrine? I do not understand Mr. Pawate to say what results if his merit theory is applied to a case of detrimental reliance, or promissory estoppel, as it is more commonly called. *A* promises to pay *B* $5,000, knowing *B* is in need of money and likely to act on the promise. *B*, in reliance, incurs $1,000 in debts but not in any way at the request of *A*. Is *B* "worthy" under the merit theory? Clearly the bargain theory would offer no assistance to *B*, as his "detriment" was not requested by *A*. Perhaps Mr. Pawate would consider that *B*'s case has "merit", perhaps not—the question is not one that can be answered simply by shifting major premises (value judgments) in an argument. There ought to be an articulate reason in justice or social utility why *B* should be entitled to recover. To say, merely, that *B* has merit, without explaining why, is no answer at all. Yet that is the only answer that Mr. Pawate gives in the case of a gratuitous promise: that the promisee, having done nothing, promised nothing, has no merit. From a policy point of view, that begs the question. I get no help at all on policy questions from the

"merit theory", based as it is on the tacit assumptions of policy peculiar to the common law.

Mr. Pawate writes with a clear style. In fact the style is so clear, and he makes his points so well, that one could excuse him if he had avoided some repetition of the points and examples. He relies almost entirely on secondary sources, which I think quite legitimate in a piece of reflective writing such as this, but he carries the reliance to an extreme when he bases his discussion on *Greenleaf* v. *Barker* (pp. 49-50) on the report in Fifoot, *History and Sources of the Common Law*, p. 418, where an omission indicated after the words "Fenner, *contra*. . ." led Mr. Pawate to assume that Fenner J.'s reasons for dissent had been omitted by the editor. He even attempts to speculate on Fenner J.'s reasons and suggest what they were. Had he gone to the report of the case in Croke, Elizabeth 193, reprinted in 78 E.R. 449, he would have discovered that no reasons are reported there either. At least no one can refute Mr. Pawate's speculations! Those Canadian law students who have been raised under some version of the "case method" will be interested to see how effective an argument Mr. Pawate writes with an obvious reliance on text-books (and some edited casebooks) as his basic data.

J. B. MILNER*

The Need for Scholars

While it may be easy to make mistakes about genius, there is no great problem involved in the decision to enlarge and support the remaining community of scholars. Canada needs to detect, train, encourage, and retain every scholar she can find, for they will constitute the principal group who will keep Canada up with a rapidly changing world, who will bring Canadian brains and experience to bear on Canadian problems, and who will pass on to youth and to the nation at large the vital tradition from the past. No doubt Canada could get along, as various Canadians have suggested, by repeated transfusions from the United States and Great Britain, but that would be a melancholy existence unworthy of a vigorous people who are capable of a nobler course In fact, there is little reason to doubt that a Canada which cultivated her scholars, both academic and lay, would be quite capable of providing some transfusions for the rest of the world. That would be a Canada exciting to live in. (Scholarship for Canada: The Function of Graduate Studies (1945). By John Bartlet Brebner)

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