Reviews and Notices

Report of the Director of Investigation and Research, Combines Investigation Act, for the Fiscal Year ended March 31, 1955. Ottawa: Department of Justice. 1955. Pp. ii, 72. (No price given)

Report of an Inquiry into Loss-Leader Selling. By the Restrictive Trade Practices Commission, Department of Justice. Ottawa: Queen's Printer and Controller of Stationery. 1955. Pp. xxi, 278. (No price given)

Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada. By the Restrictive Trade Practices Commission. Ottawa: Queen's Printer and Controller of Stationery. 1955. Pp. xi, 104. (No price given)

Few subjects of professional legal interest arouse so much lay misunderstanding, as well as technical concern, as the meaning and objectives of the anti-trust laws. This is true both in the United States and Canada, where the two systems dealing with restraints upon competition have a great deal in common—sharing, as they do, doctrinal origins in the English common law of "monopoly", "contracts and conspiracies in restraint of trade" and certain other rules of tort and contract that express the nice balance evolved by the law between business ethics and business aggressiveness. Indeed, nowhere else in the law do economic ideas and legal formulas impinge on each other with a directness that compels judges to talk like economists and economists to make noises like lawyers. In the fields of taxation, rate-making and evaluation problems in general, accounting and economic concepts intrude with regularity. But in a curious way income-tax law has developed its own accounting ideas, while "fair return" in rate-making cases or "market value" in expropriation and evaluation cases tends also to reflect traditional legal formulas, whatever may be the changing character of economic or accounting definitions. This is not so in the anti-combines—or anti-trust—case law or scholarship in Canada or in the United States. Lawyers truly are

concerned with the "realities" of "competition" and with what the best of economic analysis has to say about "monopoly" and kindred problems. Law reviews publish articles by economists who discuss juridical doctrines with all the seeming familiarity of the lawyer, although with an emphasis on the economic consequences of anti-trust policies.

For these reasons, and also because of the inescapable fact that the anti-trust laws remain one avowed method by which North American society is determined to maintain as much of a "free economy" as possible, the agencies concerned with the enforcement of these laws, their reports and their prosecutions, are of major concern to lawyers, economists and students of social policy in general. One consequence of the manner in which anti-trust policy has developed through administrative or quasi-administrative agencies—such as the Combines Investigation Commission until 1952 and, since that time, the Director of Investigation and Research and the Restrictive Trade Practices Commission—has been to direct some attention to the annual reports of the agencies concerned and, even more, to the individual reports resulting from inquiries into specific cases of allegations that the Combines Investigation Act or sections 411 and 412 of the Criminal Code (previously 498 and 498A) have been contravened.

Since the reorganization of the Combines Branch in 1952 into the Office of the Director and the Restrictive Trade Practices Commission, four types of documents have been emerging. First the director has been completing his own reports of cases begun by him as commissioner under the pre-1952 act. Secondly, the director has prepared at least one major collection of materials—on "Loss-Leader Selling"—for the Restrictive Trade Practices Commission. Thirdly, the commission, sitting to hear allegations based upon the preliminary investigations of the director, has reported to the Minister of Justice on a number of cases in a manner similar to the previous reports of the commissioner or *ad hoc* commissioners under the pre-1952 act. Fourthly, the director issues an annual report not only on the work of his own department, *qua* director, but also on the work of the commission itself. The reports now reviewed reflect some of the variety emerging from the new structure under the revised act.

The annual report of the director covers much ground. It summarizes the main contents of four case reports and studies issued by the commission during the year under review. It lists and states briefly the present status of nine prosecutions resulting from inquiries by the previous commissioner and the present director and commission. It deals frankly with a number of other cases where preliminary inquiries were begun, but where for the rea-

sons indicated investigation was discontinued—eight in all. It sets out shortly the recent research projects—which the director is empowered to undertake on his own motion under section 42 of the act as revised in 1952—covering automobile insurance, tied sales through service stations, and price differentials. It lists an interesting tabulation of the number of inquiries conducted throughout the year, broken down into various categories which indicate whether the inquiry led to full reports or merely preliminary investigations as well as other types of interim action. These statistics show the quite extensive number of new "files" opened up in recent years—126 in 1952-53, 128 in 1953-54 and 96 in 1954-55. And, finally, the report deals with the very important question of informal conferences with business men who seek to obtain from the director some guidance on permissible patterns of individual, group or industry-wide marketing arrangements or similar plans. Here the director must avoid the Scylla of becoming a legal advisor to industry and committing government in advance to definitions of legal and illegal business behaviour, and the Charybdis of a bureaucratic refusal to share in the problems of businessmen who are trying honestly to discover the lines within which government and courts expect them to operate.

The report reveals the quite intense activity now present in the enforcement of anti-combines legislation. It is apparent that, however immobilized that legislation became under wartime conditions, there remained widespread public support for the general social aims of the statute, and that support was soon reflected in the revitalized programme after 1946. In fact during the past nine years there have been more prosecutions than in the whole period from 1923 to 1940. The director concludes his main observations (page 61) with the following significant statement: ". . . there has . . . been discernible, in recent years, an increasing awareness of the legislation and an increasing tendency to consider its implications before, rather than after, projects have been embarked upon or arrangements entered into. It is believed that the informal meetings above described are contributing substantially to this tendency to a great degree of compliance with Anti-Combines Legislation."

A number of very difficult matters are suggested by the report directly or by implication. There is, first of all, the plain fact that the primary area of anti-combines activity remains the problem of multiple-firm arrangements having common marketing and pricing objectives. This leaves almost untouched problems of "merger", "monopoly" and associated questions. It is true, of course, that the *Eddy Match* case in 1951 and the Beer report to be discussed in a moment are both cases which indicate an increasing concern for the "merger" and "monopoly" area, but neither the

courts in their formulations nor the director or commission in their inquiries have really scratched anything but the most superficial surface of this vast, fascinating and probably unmanageable merger-monopoly problem—particularly the single-firm monopoly where "intent" to monopolize may be very difficult to "prove" as part of the record of the company's growth and competitive success. A second question that must bother the student of business and society reading this report is the ethical question how far contraventions of this kind of social policy by businessmen should be characterized as "criminal" and how far at the same time the findings of the commission should involve formulas which assess a kind of "guilt" before the courts have been able to speak. Admittedly these are old questions, but they continue to trouble at least this reviewer at the same time that he cannot deny that the criminal law may act as a deterrent to a greater degree than would some other administrative or civil process.

The "loss-leader" report is a good illustration of a sincere attempt by government officials to find out what businessmen are talking about when they complain of price-cutting, and the discovery that businessmen often do not know themselves what their complaints mean. This report grew out of the preliminary studies of the MacQuarrie Committee, whose work in 1951-1952 led to the changes in the Combines Investigation Act. Before the commission undertook its investigation, however, the director prepared extensive questionnaires that were distributed widely throughout Canada in order to gather information on the varied definitions of "loss-leaders" and other types of sale promotion methods, as well as detailed statistical information on the extent and effect of the practice in different sections of Canada. These materials were gathered together in the "Green Book", published in 1954, and this document was followed by hearings held in the major cities of Canada by the commission, which led to 4,000 pages of evidence and a large number of formal submissions by individual businessmen and associations. With this material at hand, the commission made its report in 1955.

It now seems clear that the real pressures by some sectors of the business community to have the loss-leader problem investigated stemmed from the prohibition on resale price maintenance which first appeared in the law in 1951 and was again incorporated in the 1952 amendments. Thus the elimination of resale price maintenance and the retention of section 498A (now section 412) of the Criminal Code—which prohibited discriminatory sale policies—underscored by the rapid increase in durable consumers goods and the growth of a buyers' market in Canada after 1951, all together led to increasing competition, one aspect of which had been the reduction in retail prices of brand names and

the rise in the selling operations of "cut rate" stores. The question for the commission, therefore, was the following: Did there exist a uniform understanding as to what was meant by "loss-leaders" in the business community and was the practice, if discovered, "monopolistic" in effect or harmful to "competition"?

The commission found that business men disagreed sharply over what amounted to a loss-leader in practice and that the term "loss-leader selling" "may be applied by trade groups to any level of pricing, extending from a price in any degree lower than the manufacturers' suggested resale price to a price at or below net purchase cost" (page 261). The commission concluded, rightly in my view, that the arguments of manufacturers that retailers were selling their products at a loss in order to "lead" in customers was not borne out on the whole by the facts, and that actual money losses by retailers were almost impossible to find in the many examples supplied to the commission. At the heart of the whole complaint clearly lay the brute fact that competition had come back into the sale of many durable consumer goods, particularly electrical appliances. What hurt the manufacturer was his inability to "control" the situation as he had been able to do when resale price maintenance had been lawful and demand greater than supply. The truth was that, barring glaring cases of selling at a loss—and there were no examples actually proven—retailers were behaving exactly as they should in a free economy where supply was exceeding demand, however slightly, and where competition by way of price or other reasonable advertising methods reflected the imagination and vigour of individual competition and initiative. As a result of these findings the commission refused to report that legislation at this time was required to extend the language of section 412 or modify the effects of section 34 of the Combines Act forbidding resale price maintenance.

The Beer report[1] contains some of the most suggestive findings reported on by the commission since its establishment. What we have in the Beer case is an attempt to examine into a "merger" programme on the part of Canadian Breweries Limited and to see how far that programme led to the elimination in Ontario, Quebec and Western Canada of a number of smaller breweries through purchase and liquidation, and whether the programme contravened the act by being "to the detriment or against the interest of the public". There is a certain ambivalence in the commission's findings. On the one hand, the commission clearly holds

[1] Two reports of the commission have been made public since the Beer case: Report concerning an Alleged Combine in the Manufacture, Distribution and Sale of Asphalt and Tar Roofings and Related Products in Canada; and Report concerning a Manufacturer's Advertising Plan alleged to constitute Resale Price Maintenance in the Distribution and Sale of certain Household Appliances.

that the acquisition of breweries in Ontario, Quebec and Western Canada was undertaken with the direct aim of reducing competition, of increasing the area of "domination", so far as possible, by Canadian Breweries Limited. There seems to be no question that this was the "intention" of the company and that it reduced the number of breweries and the range of brands, and that consequently "the merger and closure activities pursued by Canadian Breweries Limited throughout that period were monopolistic in their nature and were not in the public interest" (page 102).

On the other hand, the commission found that despite this "monopolistic" purpose there continued to be effective competition in Ontario and Quebec because Labatt's and Molson's had 22.8% and 8.6%, respectively, of the business in Ontario and 3.1% and 54.7%, respectively, in Quebec as of 1952. Equally there was no "domination" throughout Canada because the Canadian Breweries group averaged only 48.6% of all sales in the period 1949-1952. Moreover Canadian Breweries did not possess the power to dictate prices or eliminate competition, "except with the voluntary and willing agreement of its rivals" (page 102). The commission recommended that, in order to prevent any further attempts at control or domination, the company should be stopped from acquiring the assets or controlling interest in the capital stock of any of its competitors and, particularly, that no further acquisitions of stock or retention of board memberships in Western Canada Breweries Limited be permitted. Finally, the company was not to enter into any agreement or understanding with any competitors to regulate prices or lessen competition in Canada.

The significance of this report is its clear concern with the dualism often present in the rapid expansion of any one firm within an industry. On the one hand, such a firm actually may be trying to eliminate its competitors. On the other hand, the strength of the opposition in the industry may be great enough to slow down or prevent attempts at domination and an aggressive expansion may be tolerable in such circumstances. Presumably the report now has been passed by the Minister of Justice to counsel for advice and there is no public knowledge as yet whether prosecution is to follow. The interest of the case for the moment lies in determining whether the commission had in mind "intent" as the central test or whether the test was to be the degree of success achieved by the firm in acquiring a controlling or dominating position. It is not easy to find the answer to this question in the report. The commission seems to be saying that mere intent without action that is significant in its effect on competition may not by itself be regarded as "monopolistic" under the act—that is, not "per se" unlawful. But the commisson is not unaware that it would be undesirable to encourage businessmen to eliminate

rivals, however insignificant might be the consequences for the total supply or market arrangements thereby affected—that is, almost "per se" unlawful.

In all these matters the commission doubtless will be thrown back more and more upon some kind of "rule of reason", with all the variability of that rule. This is bound to be the result if the commission seeks to measure "detriment" apart from "intent" as the weightier guide to the oracular secrets of "public interest". Yet what surely is significant is the emergence of a trend in the commission to test, in each case, the notion of liability against some objective criteria of "monopoly" or "domination" —at least in the new merger cases. I do not know how far this is an entirely desirable trend, but it may be inevitable, and there is probably much to be said for it. But the difficulties with this measuring rod surely arise out of the fact that the Combines Act is one major piece of machinery designed to prevent reductions in the total of free and competitive economic activity. It is true that these reductions, to create liability in law, must be "undue" or "to the detriment of the public". Yet the original anti-trust theory seems to have been that "any" reduction, if "deliberate", is behaviour which the law intended to proscribe, and, if not "deliberate", then some measurable effects on the market and on competition should be evident. This view, appearing with some consistency in the judicial interpretation of Canadian anti-trust law, reflects a Canadian faith in "competition" as a regulator and the correlative fear that any legal concessions to business restraints would lead to more monopoly or restraints and that in the end these prove to be very costly to the social order.

The sad truth remains that there are no final answers to these dilemmas. All we can hope to do is to strike a running balance between the need of the business man for the fullest opportunity to give his imagination and initiative their day and the need to protect the less powerful and the less aggressive, as well as the general public, because of the wider social goals for which protection is designed. Ultimately anti-trust policy is a social decision, not a rational economic judgment standing alone—however valid or significant may be many aspects of the economic objectives, particularly the aim of assuring the most effective and flexible use of resources.

These reports have disclosed the serious efforts of government to enforce a policy chronically filled with difficulties of application for the business man and with challenges to adequate formulation by courts. Yet, until something better comes along to assure a decent level of self-restraint by enterprise in a relatively free economic order, whether entrepreneurs are searching for domination or co-ordination, the Combines Investigation Act and

the Criminal Code will have to do. Of course, government and the public should be prepared to review the details of the legislation from time to time so as to reduce unnecessary hardships and prevent new forms of evasion. It may be desirable in the near future, for example, to consider alternative methods that modify if they do not remove the "criminal" stigma in some kinds of cases. We have yet really to think through the ethical meanings and the full administrative needs of anti-trust policy. Meanwhile the Director and the Restrictive Trade Practices Commission, aided by an increasing number of counsel and scholars familiar with these problems, as well as a growing body of case law, are marking out together the new pathways with a degree of skill that suggests a fresh era in this experiment in social geography.

MAXWELL COHEN*

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Foundations of Canadian Nationhood. By CHESTER MARTIN, Professor Emeritus, Department of History, University of Toronto. Toronto: University of Toronto Press. 1955. Pp. xx, 554. ($7.50)

Books with titles of this kind have a claim prima facie on the time of Canadians. It was so with Massey's *On Being Canadian;* it is so with this book. We are Canadians and we seek, many of us, expressions of the significance of that fact. We seek in many cases without finding, but not in this case. Professor Martin has written a heart-warming, discerning account of the meaning of the building of the Canadian nation.

The thrill of this book is the realization, as it proceeds, of the faith of the author in Canada and Canadians. The pace is slow, strangely repetitive in theme and word, but, on a sudden, the reader realizes that here is a wise and learned man who deeply loves his country. At once the erudition, the constant quotation of familiar phrases, the reiterated characterizations and conclusions, all these fall into place, important not for themselves but for the radiance they throw around the central theme. At some stage Professor Martin "makes his number" with the reader and from then on he can be a trusted and illuminating guide to the significance of our history. His last chapter, "Foundations and Superstructure: Functioning of Nationhood", is a sober essay on whence we came, where we stand and whither we may be going. Professor Martin puts it forward modestly as a substitute for a study originally to be written by the late J. W. Dafoe. It needs no apology. Indeed it would have been a pity if Dr. Dafoe had silenced Professor Martin on this theme.

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In the course of this chapter the author says: "More enduring history has been made than written in Canada". That may be true of this book, but there is one library shelf on which it will always have a home, and there will be many times a year when it will be consulted. Of course, like Bruchesi's *History of Canada* and Lower's *From Colony to Nation*, the book is assessment and prophecy based on history. That is needed now, but equally we need what might be called "pure history".

The Canadian Bar Review is not a historical review and this reviewer took up the book initially, not as history, but to see if it recognized the courts and the law as foundations of Canadian nationhood. But this book is not a description of the Canadian house as it is but of how it was built. The legal institutions are foundations of Canadian nationhood but in a historical sense the matters with which Professor Martin deals are the real foundations. The fact is that our legal institutions have never been the issue that our political institutions have been. It is significant too that, perhaps for the same reason, very little is said of Canada's armed forces, a firm and living foundation of Canadian nationhood.

There are a number of legal references, although for the reason mentioned they do not bulk largely in the work. At pages 48 and 52 the words of Lord Mansfield in *Campbell* v. *Hall*, that the principles of a British constitution were "irrecoverably granted" by the proclamation of 1763, are misquoted as "irrevocably granted" and used to point up an implied injustice in that these principles were "revoked, annulled and made void" by the Quebec Act of 1774. But this is not a fair reading of *Campbell* v. *Hall* (1774), 1 Cowp. 204, which dealt with the time at which the King's prerogative in conquered dominions gave way to the authority of the King in Parliament. The enactment of the Quebec Act was in no way in conflict with Lord Mansfield, but rather a practical example of the very proposition he was at such pains to lay down.

At page 394 Professor Martin commences to discuss the residuary power. He says at page 395:

> It is true that this indubitable purpose of the fathers of confederation has had a strange and chequered history at the hands of reinvigorated provincialism in Canada and above all at the hands of the Judicial Committee of the Privy Council who conceived, not without reason, under Lord Watson and Lord Haldane, that they were interpreting the prevailing temper of the Canadian people at that time.

Where is the evidence of such a conception? Not in their judgments surely? Did they ever confess that they were not strictly interpreting an imperial statute but the temper of a colonial people?

At page 398 the author records a familiar view that "the Judicial Committee of the Privy Council, with a few conspicuous ex-

ceptions, has veered notoriously towards provincial rights until the demonstrable designs of the fathers of confederation have been substantially undermined". He says in this connection that "Much of the long tradition of provincial rights in Ontario was built upon law cases like the St. Catharines Milling Company case or the Manitoba Boundary dispute in which Sir Oliver Mowat's litigious skill and resourcefulness became a familiar feature of provincial politics". This does not ring true to a lawyer's ear. Neither *St. Catharines Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46, nor *City of Winnipeg* v. *Barrett*, [1892] A.C. 445, has to do directly with the basic interpretation of the division of powers under the British North America Act, 1867. They do not represent the substantial undermining of the "demonstrable designs of the fathers of confederation" of which so many complain. The veering to which Professor Martin refers is traced rather in *Attorney General of Ontario* v. *Attorney General of Canada*, [1894] A.C. 189 (the Assignments and Preferences Case); *Attorney General for Ontario* v. *Attorney General for the Dominion and the Distillers and Brewers Association of Ontario*, [1896] A.C. 348, the judgments in subsequent cases of Lord Haldane, who had appeared as counsel for Ontario in the two cases cited, and finally in the judgments in the 1937 Bennett Reform references, found in [1937] A.C. at pp. 326, 355 and 377. These cases can give support to Professor Martin's thesis but not the two he cites.

The greatest irritation in the book, and it is considerable, is the repetition of contemporary descriptions of persons or events. For example, Charles Fisher of York County, New Brunswick, is reported four times, on pages 65, 103, 110 and 113, to have said of New Brunswick that it was "*too loyal* and given over to their idol of £ s. d." And there are many similar and unnecessary examples, which lead the reader to wonder if the quoted man ever said anything else or if the event could be given any other description.

The activities of some figures do not receive a mention in the index. For example, "Simonds and Crane and Chandler" are active enough in the text on pages 108 and 111, but do not appear in the index, and there are a number of other omissions of names or references: Huntington, pages 115, 126; Matthews, page 139; Morley, page 14; Mowat, page 398; the Judicial Committee of the Privy Council, pages 395, 396, 398; and there must be many others.

But this is by the way. Here is a fine dividend for the Rhodes Trust from one of its first scholars.

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Nuremberg: German Views of the War Trials. Edited by WILBOURN E. BENTON and GEORG GRIMM. Dallas: Southern Methodist University Press. 1955. Pp. vii, 232. ($4.00 U.S.)

This volume is a compilation of ten articles written by eminent German jurists. It also includes an introduction by Professor W. E. Benton, one of the editors, the text of a preliminary motion made by the attorneys for the defence at the Nuremberg Trial, as well as the address to the court by a leading counsel for the defence at the end of the first trial. The German originals have been translated into English, mostly by the other editor, Dr. Grimm.

As a reference book, it is of comparatively little interest to the research student or to the specialist on the international law of war crimes and cognate offences. It does not add anything new to the legal discussion or the juridical thinking on the problem. The majority of the writers oppose the principles of international law applied by the International Military Tribunal, which heard the case, and disagree with the judgment rendered by the tribunal. Their objections are not new; they merely restate most of the contentions that were analyzed and refuted by many authoritative writers in Allied countries, both before and after the end of World War II.

The volume is, however, of great interest to us as students of the history, ethics and mass psychology of post-war Germany. It again confirms the view that large segments of the German people, the learned as well as the uninformed, still prefer to think of the last war as a game, which they unfortunately lost. The repetitious demands that the sentenced war criminals be liberated —the bill introduced in the Austrian Parliament by the leading party (People's Party, of which the present Prime Minister Raab is the leader) asking that the war criminals be freed and *pardoned* is an example—merely echo the attitudes of a considerable proportion of their eminent legal thinkers.

The contentions of the objecting essayists may be summarily listed as follows:

(a) The London Charter, which created the International Military Tribunal, proclaimed that war of aggression is a crime for the first time in the history of civilization. Hence, the accused could not be charged with such a crime, because of the maxim, *nullum crimen nulla poena sine lege*, and the inacceptability of an *ex post facto* law.

(b) Even if the Paris Pact of 1928 (usually called the Pact to Outlaw War) could be interpreted as declaring aggressive war a crime, political conditions were changed so drastically after 1928 that on the principle of *rebus sic stantibus* the pact no longer applied.

(c) The accused could not be charged personally because they were merely executing "acts of state".

(d) "Heads of state" are not personally responsible for "acts of state".

(e) The tribunal was without jurisdiction over German nationals, who should be tried only in German courts.

(f) It is not just that the victorious powers should act both as prosecutors and judges at the same time.

(g) The accused were merely carrying out Hitler's orders, hence *respondeat superior*.

(h) Conspiracy as a crime is wider in scope in Anglo-Saxon law than in German law and the Anglo-Saxon conception should not be applied to German nationals.

Thus, Von Otto Kranzbühler, presumably a leading German lawyer, one of the defence counsel at the trial, complains in his essay (originally read to the meeting of the German Society for International Law at Hamburg in 1950):

> Within these restricted boundaries [*his* interpretation of the meaning of 'war crimes'] you will not find anything which could justify the punishment of statesmen and generals because of a policy leading to war, of jurists because of laws worked out by them, or of industrialists because of their pursuing the economic war policy of their government. . . . [page 111]

The distortions of elementary principles of international law are as startling as the writer's impudence in suggesting that Himmler, Goering et al. were statesmen, generals, jurists and industrialists *merely* pursuing the war policy of their government. To me it is inconceivable how anyone could have written in such terms in 1950, after listening to the voluminous evidence of atrocities during the course of the trial. It has taken twenty-two fair sized volumes to record the extermination and torture of the victimized millions.

Even Hitler's legal adviser, Hans Frank, one of the accused, with his life at stake, could stand it no longer. After five months of listening to the testimony, he admitted his responsibility and added "A thousand years will pass and this guilt of Germany will still not be erased" (see *Nuremberg Trial*, Part 12, p. 109).

Most of these contentions were discussed, analyzed and found inapplicable by a number of authoritative writers, even before the end of World War II. Reference may be made to Professor Sheldon Glueck's 1944 volume, *War Criminals: Their Prosecution and Punishment*. Above all, they were dealt with in the summations of the prosecutors and the comprehensive judgment rendered by the International Military Tribunal at the end of the first trial. For the purpose of this review, it is enough to say that neither precedent nor sound doctrine interprets the rules of

international law to mean that, although war crimes are universally accepted as violations of a criminal nature, yet the organizing and conducting of a war of aggression, conditioned and based on the vilest *fürchterlichkeit* will leave the leaders totally immune.

In international law, the concept of *lex* in the phrase *sine lege* does not mean a written text such as is found in a penal code. "Acts of state", as interpreted by Wharton seventy years ago, does not include concentration camps, crematoria and all the other forms of diabolical atavism proved at this trial (see Quincy Wright (1945), 39American Journal of International Law at p. 265). Similarly, all other objections dissolve at the merest touch of logical scrutiny so long as the reasoning refuses to dissociate itself from elementary morality.

There is, however, a redeeming feature about the present collection that can give hope to us of the non-Teutonic world, which I am happy to record and emphasize. Not all the essayists speak with one voice. Four of them write in tones of sincere repentance, fully conscious of a sense of national shame. Thus, Doctor Hans Ehard writes, "The blush of shame must rise in the face of every German if he hears the incontrovertible proof thereof and sees how cowardly cruelty, currish fealty, insane obsession debased honour and humanity and forfeited the German reputation [*sic*]. One would like to tell every German to read these documents, particularly those people who forget too soon and would like to avert their eyes from the horrors of the near past. Then they would understand more readily that the tragic today had to develop from the criminal yesterday." (page 85) Another essayist, Ra. Th. Klefisch, after discussing and approving the legality of declaring war of aggression a criminal offence, says: "It was therefore in no way unjust to punish war criminals; it was rather unjust to leave such evil-doing with its horrible consequences unpunished" (page 206).

The outstanding essay, in my judgment, is that of Professor Karl S. Bader, Professor of Jurisprudence at the University of Mainz. His essay captivated the mind and heart of at least one non-Germanic reader. Written in 1946 shortly after the judgment of the International Military Tribunal, obviously under its spell, it reveals deep wretchedness and misery because of Germany's behaviour during World War II. Often the essay attains the emotional intensity of the prophet Isaiah, who denounced his people exclaiming, "Ah sinful nation, a people laden with iniquity, a seed of evil-doers, children that are corrupters . . .". Professor Bader urges the German people to read the trial record and judgment and realize the national guilt. "We, every one of us who claims to face the time fully, must occupy ourselves with

this material. Not only, as many of us lawyers are accustomed to do, with the legal foundations on which the Charter of the Tribunals was based, with the principle *nulla poena sine lege*, which is now suddenly on the tongues of so many and all those who until April 1945 firmly despised it. . . . We must occupy ourselves with just this historical material which we have to cut out of our own bodies if we want to think of recovery." (page 155)

In 1944 I said in a volume I wrote that "There is, however, one salvation for the Germanic people—whole-hearted, sincere, thorough, soul-wrecking expiation". Now, twelve years later, amidst changes in the international climate, the fear of atomic war and the need for Western Germany's co-operation, I still continue to believe that Germany will be forgiven if and when the spirit of such men as Professor Bader (and one may add Chancellor Adenauer) permeate the mind and heart of the German people as a whole. After that, history will record, but men may begin to forget.

M. H. MYERSON*

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Lowndes & Rudolf's Law of General Average and the York-Antwerp Rules. Eighth edition by J. F. DONALDSON, B.A. (Cantab), and C. T. ELLIS, M.C., with a special chapter, "The Law of the United States of America", by W. H. COE and J. P. NELSON. The Library of Shipping Law, Number 4. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xxxi, 600. ($19.00)

Although the 1948 edition of *Lowndes and Rudolf* was successful in merging two of the leading texts in the field of general average, there has been a definite need for revision since the approval, by the Copenhagen Conference in 1950, of the revised York-Antwerp Rules, which effected important changes in the 1924 rules. In spite of the 1948 merger, the Lowndes text, on the common law and maritime code development of general average, remains separate and distinct from the Rudolf portion of the text, dealing specifically with the York-Antwerp Rules. Since the rules are, broadly speaking, an affirmation or denial of the principles developed through the common law, the Lowndes text is essential to a clear understanding of the York-Antwerp rules and their interpretation.

General average is an equitable principle which was formulated in the earliest days of maritime commerce. As an equitable prin-

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ciple, its source is lost in what might be termed the pre-historic development of the law, but it was set out in some detail in the early maritime codes and laws. The term is now loosely used to cover such categories of general average as acts, losses, sacrifices, expenditures and contributions. Basically, however, these categories are all dependent on the doing of an act by man which results in a loss. A general average loss has been defined by the Marine Insurance Act of 1906 and by the various acts which are based on it, including most of the provincial Marine Insurance Acts in Canada. A shorter definition, and one generally accepted as authoritative in English law, was set out by Lawrence J. in *Birkley* v. *Presgrave* (1801), 1 East 220, at p. 228, as being "A loss arising out of extraordinary sacrifices made or extraordinary expenses incurred for the preservation of ship and cargo".

Although general average losses may be divided into losses resulting from sacrifices and losses arising from expenditures, the principle is the same in both cases. This principle requires the substituting of a certain lesser loss for a probable greater loss, with contribution being made by all interested parties to the person suffering the loss for the good of his co-adventurers. This equitable principle of general average was, and still is, recognized by the courts of most maritime nations. With the growth of national courts and the development of national codes, it was almost inevitable that differences would arise in the interpretation of the basic principle. The differences have, for many years, been a source of practical difficulty to people of every nation engaged in maritime commerce.

Efforts looking to uniformity in the many legal systems involved have never been successful and it finally became apparent that the practical solution to the difficulty lay in securing some measure of uniformity by incorporating in contracts of affreightment an agreed set of rules rather than by formulating an international legal code. The history of this search for uniformity by the maritime interests of the world is set out in detail in the introductory chapter to part two of *Lowndes and Rudolf* dealing with the 1950 rules. The compilation of the 1950 rules was a vital stage in the development of the law of general average. It is interesting to note that it resulted from agreement among the persons most directly concerned, that is, the ship owners, the underwriters and the average adjusters, assisted and guided by such organizations as the International Law Association and, in recent years, the *Comité Maritime International.* The introductory chapter to part two of the text provides a valuable digest of the work done by the various conferences and an enduring record of their history.

Part one of *Lowndes and Rudolf* deals with the development and history of general average as the law of various maritime

countries. As a piece of editing, the present edition is a distinct improvement over the 1948 edition, in that the chapters are subdivided by individual headings with case law being set out in a distinctive type size, thus assisting the reader to assimilate the information presented. In content there is no radical change from the 1948 edition. One interesting addition, however, is the inclusion by the editors of a decision of the Court of King's Bench from the year 1245. This decision states the law on jettison as it was over twenty years before the promulgation of the Rolls of Oleron and lends support to the claim that general average was a well developed principle of equity long before it was codified in the Rhodian law or in other ancient legal systems.

But part one of *Lowndes and Rudolf* is not merely of academic interest. This portion of the text deals with the legal aspects of general average. The York-Antwerp Rules, on the other hand, do not form part of the law of any nation. As the editors point out at page 377, the 1950 rules, "like their predecessors, apply only when the parties to the contract, whether it be of affreightment, of Marine Insurance or of some other nature, so agree and they fall to be construed in the same manner as any other contractual terms which have been reduced into writing". At this time it is possible to say that they are almost universally accepted by maritime interests, but until 1950 most American contracts either contained restricted versions of the rules or did not mention them at all. The editors, at page 369, discuss the American criticism of the 1924 rules and conclude that most of the difficulties which prevented their general adoption in the United States have been eliminated in the 1950 version. The revised rules have been approved by American shipping and insurance interests almost unanimously. Even now, however, American bills of lading usually provide that the rules shall be supplemented by American law and practice in respect of matters not covered by the rules. For this reason the American law on the subject, which has been adequately reviewed in chapter 10 of the text, is of considerable importance. This chapter appeared as an appendix by W. H. Coe to the 1948 edition. It has been revised by Mr. J. P. Nelson and included as an integral part of the eighth edition.

The situation in English law is similar to the present American one, since the rules cannot be fully effective in certain circumstances. Thus where the rules do not adequately cover a common-law right, the common law will prevail. Rule XVII of the 1950 version, for example, deals with contributory values. At the time the 1924 rules were drafted it was proposed that when a ship is in ballast, but under charter, the ship and the freight earned under the charter should contribute to general average. The proposal was rejected at that time and does not appear in the 1950 version of the rules.

As the editors point out at page 483, "There is no doubt that the York-Antwerp Rules are not wholly appropriate if the vessel is in ballast, but so long as policies of insurance and charters which involve a ballast voyage incorporate the rules, some effect must be given to the intention of the parties. In such circumstances it is submitted that the rules take effect in accordance with the common law." The effect of the common-law rule in such an instance is set out in *Williams* v. *London Assurance Company* (1813), 1 M. & S. 318. Here it was held that, where a voyage had been commenced in which the ballast portion was indivisible from the laden portion, chartered freight should contribute to a general average loss or expense suffered or incurred on the ballast portion of the voyage. This treatment conforms with the change proposed and rejected in 1924. It is one circumstance where the common law and the rules do not coincide. Since the rule is silent, the parties to the contract have not waived their rights and the matter falls to be decided by the common law.

In the interpretation of marine contracts which incorporate the York-Antwerp Rules, 1950, part two of *Lowndes and Rudolf* is invaluable. Here the reader will find the historical background of the present rules, beginning with the important rule of interpretation added in 1950. It was held in *Vlassopoulos* v. *British and Foreign Marine Insurance Company*, [1929] 1 K.B. 187, that the actual intention of the draftsman is not an admissible aid to the construction of the rules since they fall to be construed in the same manner as any other contractual terms which have been reduced to writing. In this case Roche J. stated, "It is, I think, as if the rules had provided that Rules A, B, C, and so forth, constitute the general rules for general average and then followed the words: 'And in particular 1, 2, 3, 4', and so on 'are cases of general average'." Since the York-Antwerp Rules are divided into a group of lettered rules and a group of numbered rules, this decision had a vital effect on their construction. It was clear that the decision did not conform with the intention of the draftsmen and the case resulted in an agreement which formed a supplement to the rules. The agreement, known as the "Makis" Agreement, stated in part, "Except as provided in the numbered rules 1 to 23 inclusive, the adjustment shall be drawn up in accordance with the lettered rules A to G inclusive". The "Makis" Agreement is the basis of the new rule of interpretation which appears in the 1950 version. Under this rule of interpretation, if the facts support a claim in general average under the numbered rules, it matters not that there has been no general average act within the meaning of Rule A. The result is a striking example of how contractual rules sometimes alter the effect of common-law decisions.

We must therefore conclude that no study of general average is

complete unless it covers both the contractual and the common law or maritime code aspects of the matter. As a text book this edition of *Lowndes and Rudolf* deals with both and, in the result, it must be recognized not only as one of the leading texts in the field of general average but also as a valuable contribution to the organic growth of the law.

The fact that the 1950 rules are more widely accepted than their predecessors does not mean that this field of law has achieved a static condition. Vital questions can still arise where the rules do not form a part of the contract or do not cover a specific situation. Nor is the argument acceptable that general average is obsolete because it is now basically an adjustment between underwriters. The contention that the problem can be solved by insurance coverage rather than by general average adjustment was answered by the late G. R. Rudolf in chapter 2 of his original book, *The York-Antwerp Rules*. His interesting and provocative argument is included as appendix 5 to the present work. Instead of becoming obsolete, the equitable principles of general average may possibly provide an answer to difficult problems of land transport in the future. If they do, the legal and average-adjusting professions will have cause to thank the editors of *Lowndes and Rudolf* for providing a basic text. Undoubtedly improvements will be made in subsequent editions, but this edition will be recalled as a milestone. The revision of the York-Antwerp Rules in 1950 was an important step. *Lowndes and Rudolf* places the new rules in their proper perspective against the background of general maritime law.

J. J. MAHONEY*

Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Administration et Législation du Système Scolaire de la Province de Québec. Par PH.-A. MILLER. Problèmes Scolaires, Vol. 2. Québec: Société des Editions Champlain. 1954. Pp. xii, 205. ($3.00)

American Constitutional Law. By BERNARD SCHWARTZ. With a foreword by A. L. GOODHART, K.B.E., Q.C. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada Limited. 1955. Pp. xiv, 364. ($4.25)

Canadian Oil and Gas. By DAVID E. LEWIS, B.A., LL.B., and ANDREW R. THOMPSON, LL.B., LL.M. With a foreword by R. H. C. HARRISON, Q.C. Vol. 2: Statutes and Regulations; Federal, Alberta and British

*Of Wright and McTaggart, Toronto.

Columbia. Vol. 3: Statutes and Regulations; Manitoba to Saskatchewan, Appendices and General Index. Toronto: Butterworth & Co. (Canada) Ltd. 1955. Loose-leaf: pages unnumbered. ($65.00, 3 vols. includes full servicing to December 1955)

The Cashier. By GABRIELLE ROY. A translation of *Alexandre Chenevert, Caissier,* by HARRY BINSSE. Toronto: McClelland and Stewart Limited. 1955. Pp. 251. ($3.95)

Chitty's Mercantile Contracts. Edited by BARRY CHEDLOW. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1955. Pp. lx, 673. ($10.00)

Code of Hebrew Law: Shulhan 'Aruk, Hoshen. Translated into English with commentary, glosses and indices by RABBI DR. CHAIM N. DENBURG, M.A., Ph.D. Containing original Hebrew text of R. JOSEPH CARO and glosses of R. MOSES ISSERLES. Two volumes. Vol. I, *Yorah De'ah* §335-§403. 1954. Pp. xxii, 455. Vol. II, *Hoshen ha-Mishpat* §1-§27. 1955. Pp. xiii, 376. (No price given)

Les Conflits de Droit dans les Rapports Collectifs du Travail. Par MARIE-LOUIS BEAULIEU. Québec: Les Presses Universitaires Laval. 1955. Pp. liii, 542. ($18.50)

Comparative Studies in Community Property Law. Edited by JAN P. CHARMATZ and HARRIET S. DAGGETT. Baton Rouge: Louisiana State University Press. 1955. Pp. xii, 190. ($6.00 U.S.)

Constitutional Law: An Outline of the Law and Practice of the Constitution, Including Central and Local Government and the Constitutional Relations of the British Commonwealth. By E. C. S. WADE, M.A., LL.D., and G. GODFREY PHILLIPS, C.B.E., M.A., LL.M. Fifth edition by E. C. S. WADE. London, New York, Toronto: Longmans, Green and Co. 1955. Pp. xxxi, 538. (35s. net)

Current Legal Problems 1955. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. Volume 8. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. vii, 247. ($6.25)

A First Book of English Law. By O. HOOD PHILLIPS, M.A., B.C.L. (Oxon). Third edition. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1955. Pp. xxiv, 298. ($3.25)

The Freedom Reader. Selected and edited by EDWIN S. NEWMAN, LL.B. Docket Series, Vol. 2. New York City: Oceana Publications. 1955. Pp. 256. (Clothbound: $3.50 U.S.; paperbound: $1.00 U.S.)

Law and the Practice of Medicine: Revised and Enlarged. By KENNETH GEORGE GRAY, M.D., B.Sc. (Med.), Q.C., E.D. Second edition. Toronto: The Ryerson Press. 1955. Pp. x, 133. ($3.25)

The Law of Negotiable Instruments in South Africa. Third edition by DENIS V. Cowen. Assisted by LEONARD GERING. Cape Town, Wynberg and Johannnesburg: Juta & Company, Limited. 1955. Pp. xxxvii, 534. (£3 12 6 net)