Reviews and Notices

Traité pratique de la Responsabilité en cas d'Accident d'Automobile (Québec). By LOUIS BAUDOUIN. Toronto: The Carswell Company Limited. 1955. Pp. xl, 416. ($15.00)

Approximately sixty per cent of the cases on the rolls of the Superior Court of the District of Montreal arise from automobile accidents. With automobile manufacturers placing more and more emphasis on speed and horse-power, this percentage is likely to increase. The statistics are enough to demonstrate the importance of this branch of the law.

In the common-law provinces, and particularly in Ontario, there are several recent works[1] on the law of automobile accidents. In the province of Quebec nothing has been written since the excellent work of Meredith,[2] now over fifteen years old, and the only other specialized book on the subject dates from 1936.[3]

The book under review is more than a mere collection of case headnotes arranged by subjects, for a successful effort has been made to extract general principles from the numerous decisions. The author himself says at page 200: "L'intérêt d'un livre n'est pas de faire un répertoire de cas mais de tenter de tirer de ceux-ci un principe qui puisse servir de guide au praticien ou à l'homme d'affaires".

Among the subjects treated are: "L'aspect administratif de la loi sur les véhicules automobiles; "Les causes de collision"; "Voitures automobiles contre piéton et enfants"; "Voitures automobiles contre tramways"; "Voitures automobiles contre chemin de fer"; "Responsabilité éventuelle des municipalitiés et du gouvernement provincial"; "L'article 53, présomption de responsabilité? présomption de faute? ou régime autonome?"; "Le préjudice et sa réparation pécuniaire"; "L'action en réparation, son régime de procédure"; and "Assurance et automobile".

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[1] C. C. Savage, Manual of Motor Vehicle Law Civil and Criminal (1948); O'Connor, Highway Traffic Act (5th ed., 1951); Hall, Digest of Automobile Accident Cases (3rd ed., 1953, by C. H. Morawetz); Phelan, Highway Traffic Law (1954).

[2] W. C. J. Meredith, Civil Law on Automobile Accident Cases (1940).

[3] J. A. Bégin, Répertoire de Jurisprudence relative à l'automobile.

There is a very detailed and interesting discussion of the abundant jurisprudence as to whether the right of way of the dominant automobile at a protected intersection is absolute. The author concludes that it is not absolute and should not be made so by statutory amendment.

It is emphasized that the motorist is subject not only to the requirements of the Quebec Motor Vehicles Act but also to the general rules of prudence as expressed in articles 1053 and 1054 of the Civil Code. Hence, a speed permitted by the act may in particular circumstances be excessive (for example, 20 miles an hour along a street where groups of children are playing on the sidewalks on both sides) and the foundation of civil liability if an accident occurs. The act requires certain large vehicles to carry specified lights on the rear. Nothing is said of a threshing machine in the act, but under the general law of negligence a farmer, towing with a tractor an unlighted threshing machine as wide as two automobiles, was condemned to pay damages to a motorist who collided with a projecting part of the machine. While the act requires headlamps to be illuminated only one hour before sunset, the courts have condemned motorists for driving without lights before that time when in fact it was almost dark.

While, as Professor Baudouin points out, the presumption of section 53 of the Motor Vehicles Act can be invoked by a cyclist who is struck by an auto while pushing his bicycle, he does not make clear that the cyclist can also do so if struck while riding his bicycle. Indeed the cyclist is in the same situation as a pedestrian.

There is an interesting discussion of "abus de fonctions" in the case of negligence of an employee, and of the neutralisation of the presumptions—where two automobiles collide, or where an automobile strikes a cow on the highway. Professor Baudouin believes,[4] and with reason, that when an auto collides with an animal there can be no neutralisation of the presumptions of section 53 of the Motor Vehicles Act and article 1055 C.C. because of the different nature of the two presumptions, one being a presumption of fault and the other a presumption of responsibility.

One inaccuracy that should be pointed out appears on page 36, where it is stated that jurisprudence has exempted emergency vehicles, like ambulances and fire-reels, from compliance with stop signs, traffic lights and the right of way rule. In fact, by-law 1319 of the City of Montreal specifically exempts such vehicles from complying with certain traffic rules.

This reviewer disagrees with the criticism (expressed on page 295) of the jurisprudence proportionalizing fault in the case of

[4] See Mayrand, Contre la neutralisation des présomptions au cas d'accident de route (1949), 9 R. du B. 316.

common fault. This jurisprudence is admittedly arbitrary, but so is the evaluation of damages for personal injury. With its admitted shortcomings, I think that the present system is better than any alternative suggested by the author. It would have been useful to practitioners if details had been given of awards made during the last ten years in personal injury cases for pain and suffering, permanent incapacity and (in the case of the death of a parent or a child) loss of support. I agree with the author when, after an analysis of the jurisprudence, he concludes on page 283 that damages should be awarded for *solatium doloris* and that "il est temps de renverser la décision de la Cour Suprême[5] qui ne tient ni au point de vue juridique—le Conseil Privé[6] l'a demontré—ni au point de vue social, et qui se traduit par la négation même de tout l'esprit du droit de cette Province".

The book would have benefited from more careful editing. The list of abbreviations is incomplete, there are numerous typographical errors, and the method of citing cases is open to some criticism. It would have been well in the footnote references to *La Revue de Jurisprudence* or *La Revue Legale* to distinguish the judgments of the Court of Review and Court of Appeal from those of the Superior Court. There is a useful table of cases (which would have been even more useful had it been indexed under the name of the defendant as well as of the plaintiff) and a detailed index. The defects mentioned can easily be corrected in a later edition.

Automobile cases, more perhaps than any other type of case, turn upon their own facts and it is not easy to deduce general principles from them. The author has, to the extent that it is possible, made a detailed and most useful synthesis of automobile jurisprudence in the province of Quebec.

GEORGE S. CHALLIES*

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Law and Morality. By LEON PETRAZYCKI. Translated by HUGH W. BABB. With an introduction by NICHOLAS S. TIMASHEFF. The 20th Century Legal Philosophy Series, No. VII. Cambridge: Harvard University Press. Toronto: S. J. Reginald Saunders and Company Limited. 1955. Pp. xlvi, 335. ($9.75)

As Professor Timasheff observes in his interesting introduction to the present volume, a number of circumstances have combined to make Petrazycki's influence on contemporary juristic thinking

[5] *C.P.R.* v. *Robinson* (1887), 14 S.C.R. 105.
[6] *Robinson* v. *C.P.R.*, [1892] A.C. 481.
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less marked than the work of so original and vigorous a thinker deserved. Petrazycki's main thought was developed in Russia before the first world war. The war and the communist revolution combined to cut him off from the main stream of western legal thought and to delay by many years translations into other languages. To some extent this has been remedied in recent years by the extraordinarily large number of articles written on Petrazycki by former disciples (there are no fewer than three in the symposium published in honour of Roscoe Pound a few years ago). On the other hand, time marches on, and many ideas, which fifty years ago were original, now are commonplace or have been overtaken by later studies. The translation of Petrazycki's main work, nevertheless, and its publication in the 20th Century Legal Philosophy Series, is fully justified. His is one of the major contemporary contributions to legal thinking

It would be idle to pretend that the book—the translation of which by Mr. Babb is certainly a major achievement—makes easy or exciting reading. Petrazycki, whose intellectual training was divided between Germany and Russia, shares with most continental philosophers and jurists a heavy, laborious and abstract style of writing. Probably his most important contribution to legal thinking is a shift—implicit in his definitions of various types of law as well as of the function of jurisprudence—from an objectivized and formalized jurisprudence of analytical categories to law as a psychological "introspective" experience. The so-called "sources of law"—statutes, customs, court decisions, for example—a term Petrazycki rightly criticized in this context, are relegated to the position of "normative facts". In his view, they are not norms in themselves but facts whereby the corresponding legal opinions of persons and the relevant projections (including norms) are defined. It is the experience of mental processes by individuals which is the reality of law, and the normative facts only provide material for the experience.

This approach has certain significant practical consequences, for it leads to Petrazycki's most important contribution, his theory of "intuitive law", and the assertion that certain feelings of right and wrong, such as the conviction of Russian peasant serfs that they are entitled to a share in the land, are legal facts. It is easy to see the connection between this idea and such concepts as the "sense of injustice" (Cahn) and similar modern studies of problems of justice. Perhaps the most interesting part of the book is section 31, which deals with intuitive law. Petrazycki's opposition of positive and intuitive law contains much of what other contemporary jurists, such as Gény, the German exponents of *Interessenjurisprudenz* and, above all, Pound and other advocates of so-called "social engineering" have developed in far greater detail. In

Petrazycki's exposition (pp. 225 ff.), intuitive law differs from positive law in three characteristic ways: first, it varies with each individual, whereas positive law furnishes a uniform pattern of rules for larger or smaller masses of people. The content of intuitive law is defined "by each person's individual conditions and life circumstances: by his character, upbringing, education, social position, professional occupations, personal acquaintanceships and relationships, and so forth". It follows, secondly, that intuitive law is not determined, like positive law, "by a preordained pattern of corresponding precepts, settled customs, and the like, with preestablished decisions for general categories of cases". Lastly, intuitive law is variable and adaptable, it develops "gradually and symmetrically, neither subject to fixation and fossilization nor dependent upon the arbitrary caprice of anyone". Petrazycki further points out that certain aspects of law are not susceptible to intuitive law. Intuitive law extends to those relationships "in which a certain good or evil is to be caused to others or certain benefits or evils distributed as between subjects". Thus the prescribed forms of making up the state budget are matters to which the "intuitive law consciousness" is indifferent; but it is not indifferent, for example, to the problem of distributing the tax burden among individuals and classes. Matters of formal procedure, such as the formal process settling an inheritance, are generally not touched by intuitive law, but it is different with questions of the proper distribution among the various claimants.

Another interesting, though not greatly developed, suggestion by Petrazycki is his tendency to place the legal significance of court decisions higher than that of customs and statutes. There is some connection between what he says in this regard and the theories developed by Holmes, Gray and the realists, according to which only the decisions solving a particular problem are law and not the customs or statutes underlying it.

Enough has been said to illustrate the original character of Petrazycki's thought, far more unorthodox at the beginning of the century than it would be today.

W. FRIEDMANN*

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Byles on Bills of Exchange: The Law of Bills of Exchange, Promissory Notes, Bank Notes and Cheques. By SIR JOHN BARNARD BYLES. Twenty-first edition by MAURICE MEGRAH. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1955. Pp. lxxii, 439. ($11.25)

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We welcome the twenty-first edition of this classic, the original of which appeared in 1829. The first eighteen editions of the work were by the author himself or members of his family: the present is by the learned editor of the fifth edition of *Paget's Law of Banking*.

One of the outstanding features of *Byles* is the accurate, concise and lucid statement of the facts involved in the cases cited and the law enounced. Illustrations of this are furnished in the treatment of the subject of "raised" cheques on pages 25-28 of the present edition, and the interpretation of "fictitious" as that term is used in section 7(3) of the United Kingdom Bills of Exchange Act and section 21(5) of the Canadian (see pages 87-90).

The explanation and observations on pages 175-177 on the system of "aval" (introduced into Canada as a whole by section 131 of our Bills of Exchange Act) should be of particular interest and value to Canadian lawyers. On page 177 attention is drawn to the significance of the difference in the wording of the corresponding sections 56 of the United Kingdom act and 131 of ours, namely, the addition in the latter of the words "and is subject to all the provisions of this Act respecting endorsers". These words are not in the United Kingdom enactment, and *Byles* points out that there is nothing in the English cases to justify the contention that the principle of the "aval" has been recognized by English as distinguished from Canadian law since the passing of our act and that in this respect, therefore, the English and Canadian cases are in sharp contrast.

The maxim *Vigilantibus non dormientibus jura subveniunt*, which has appeared on the title page of former editions, is retained. It is not quite clear to the present reviewer just what special significance this has for the subject of bills of exchange, unless it be with regard to notice of dishonour and protest.

Throughout the edition reference is made to Commonwealth and United States decisions and parallel legislation; and the book should prove of the utmost value alike to bench and bar.

FREDERICK READ*

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The Fifth Amendment Today. By ERWIN N. GRISWOLD. Cambridge, Massachusetts: Harvard University Press. London: Geoffrey Cumberlege, Oxford University Press. 1955. Pp. vi, 82. (50 cents)

The Harvard University Press has recently collected into book form a group of three addresses given during 1954 by the Dean of

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the Harvard Law School on the general subject of the Fifth Amendment to the United States Constitution, and more specifically on the so-called "self-incrimination" clause, which declares that "[no person] shall be compelled in any criminal case to be a witness against himself".

The addresses are concerned with the major issue of American constitutional law and government during the Cold War crisis, the rôle and procedures of Congressional investigatory committees, particularly in their impact upon individual interests in speech and political activity traditionally pressed under the American constitution. The first two addresses were given in February and March of 1954, in advance of the Army-McCarthy feud, which was presented so dramatically before a nationwide television audience in the middle of 1954; the final address was delivered towards the close of 1954.

At the outset it should be said that intrinsically there is nothing in Dean Griswold's addresses that has not been said before. They are, in essence, a simple averment that the "privilege against self-incrimination" is properly a part of the United States Constitution and that it may properly be invoked before Congressional investigatory committees: that its invocation in such circumstances does not automatically render the person who raises it a "Fifth Amendment Communist" (in Senator McCarthy's words) deserving of public hatred, ridicule and contempt on that account alone.

The significance of Dean Griswold's addresses lies rather in the times at which they were given, the audiences to whom they were given, and the status of the person who gave them. The first two addresses were delivered when the Congressional investigatory power seemed unassailable: the Supreme Court had, in the early stages of the Cold War crisis, affirmed that the privilege might be availed of against Congressional investigators (*Blau* v. *U.S.* (1950), 340 U.S. 159), but had almost immediately seemed to think better of it and proceeded to whittle away the earlier rule by establishing crippling exceptions to it (compare *Rogers* v. *U.S.* (1951), 340 U.S. 367). As to the audiences, the addresses were before influential professional legal and academic groups and were widely publicized at the time. And, finally, as to Dean Griswold's own part, it must be emphasized that the dean of an American law school occupies a far more sensitive post than his Canadian counterpart in view of the strength of alumni influence, financial and policy-wise. Actually, it is a tribute to the good sense of the graduates of the Harvard Law School that they seem to have rallied around the dean, though even today he is still drawing hostile fire from various groups. He has recently been attacked inferentially in the Luce press (Time Magazine, September 5th, 1955); and at the recent annual meeting of the American Bar Association

he was described by one delegate as being "somewhat naive about Communism. His booklet is now relied upon by the Fifth Amendment Communists, fellow travelers, pseudo liberals and international one-worlders as though it constituted a gold-leaf edition of the Communist manifesto" (New York Times, August 25th, 1955).

Without wishing to over-emphasize Dean Griswold's contribution to the current movement in Congress itself to reform the procedures of Congressional investigatory committees and to define and limit their powers, it can be said that, because of their timing and the influence of the audience they reached, and perhaps also the temperateness of their language (contrasting sharply with the unbridled language of the more advanced liberal critics of the Congressional investigators), the addresses were part of the complex of factors producing the sudden and marked swing in public opinion which led to the Senate vote to censure Senator McCarthy. Quite fittingly, Chief Justice Warren in May 1955, in giving an important "opinion of the court", re-affirming and extending the availability and ambit of the privilege against self-incrimination before Congressional investigatory committees, adopted and expressly acknowledged Dean Griswold's arguments as authority for his decision (*Quinn* v. *U.S.* (1955), 75 Sup. Ct. 668, at pp. 673-674). In conclusion it may be noted that the main corrective action to the excesses of Congressional investigators during the Cold War has come from Congress itself under pressure of public opinion, some support for the thesis most strongly associated today with Mr. Justice Frankfurter and the Harvard Law School that the liberal way is best maintained not by judicial activism but by a community's own, keenly felt, "sense of injustice".

EDWARD MCWHINNEY*

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Handbook of the Law of Evidence. By CHARLES T. MCCORMICK. St. Paul: West Publishing Co. 1954. Pp. xxviii, 774. ($13.00 U.S.)

Despite the inevitable drawbacks of a text based largely on American authorities, this new book should prove of great value, not only to those lecturers entrusted with the topic of evidence, but to trial lawyers within the common-law jurisdictions generally. Although described in the preface as a "brief treatise", and apparently entitled "A Manual" in its students' edition, the 712 pages of double-column text and notes are not confined to a dogmatic statement of rule followed by a collection of often conflicting

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authorities, as has been the case in far too many other books on evidence. Nor can the book be condemned by the practising lawyer as academic; Professor McCormick has not sacrificed the working rules on the altar of intellectual provocation. Despite the various evidence acts, evidence is to a great extent a matter of common law and the trial lawyer will find much to assist him in persuading a court as to the content of the common law. Throughout, the lesson is made clear: the rules of evidence must not be considered immutable; they must be modified and developed as our knowledge of communication, psychology and scientific proof increases. Necessary modification may be achieved by statute or, more frequently, by the exercise of that judicial discretion which pervades the law of evidence.

In his preface, the author sets out seven improvements in the law which he suggests are necessary in the interests of justice. In relation to only one of these can there be any serious controversy. Professor McCormick advocates the relaxation or abandonment, in trials before a judge without a jury, of the exclusionary rules, apart from the rules of privilege. This recommendation appears to be based (p. 137) upon the premise that a judge, trained and experienced in the legal process of truth-finding, will voluntarily discard unreliable evidence. It may be questioned, with respect, whether this is not to put too great a strain on the judges' mental processes. The author suggests that the requirement of a proper factual basis for judgment obviates the risks implicit in the initial reception of doubtful evidence. This reviewer remains unconvinced that a party might not be prejudiced by the admission of evidence which centuries of experience have shown is likely to mislead a jury. At the moment in Canada there is a widespread tendency by judges, sitting alone, to admit much evidence "subject to objection". In far too many cases, the judgment makes no reference to the eventual admission or rejection of the controversial matter; the decision is based upon facts, the admissibility of which has been established, and a party is left in doubt as to the possible influence of the doubtful evidence upon the outcome of the case. It is suggested that the fallibility of judges as well as juries must continue to be recognized.

It will not be possible here to do more than sample the substance of the work. Title 2 may, perhaps, be taken as typical. To a clear exposition of the rules governing the examination of witnesses is added a pithy guide to advocacy and an interesting and unorthodox evaluation of cross-examination. The expert witness is examined at some length and various solutions are put forward to eliminate that most embarrassing contest in the judicial arena, your expert versus my expert.

In Chapter 8, the author suggests that the rule relating to the

admissibility of confessions is not an exclusionary rule but a rule of privilege. Most authorities have, in the past, accepted the view of Wigmore that the rule guarded against *false* confessions. Professor McCormick maintains that the "voluntary" rule protects the interest of an accused person not to be subject to force or improper inducements from persons in authority. That a confession, patently true, must be rejected if obtained by improper methods is not apparent if the "voluntary" rule is regarded as a protection to the court against misleading and untrustworthy evidence. This is not to say that the truth or falsity of a confession may not be a guide to its voluntary or involuntary nature (*Hammond*, [1941] 3 All E.R. 318). The author observes a danger in allowing the jury to pass on the voluntariness of a confession, suggesting that the judge may be thereby encouraged to admit a doubtful confession. This is of interest in view of *Mulligan*, [1955] O.R. 240 (C.A.), and *Bass*, [1953] 1 Q.B. 680, in which a forceful counter argument is advanced.

On the vexed subject of character and similar fact evidence, no reference is made to *Harris*, [1952] A.C. 694, but it is made clear that, subject to the rule of strict exclusion of evidence designed to blacken the accused in the eyes of the court, the judge has a discretion to admit or reject the evidence after weighing the probative value against the various risks involved in its reception. There is a short but excellent treatment of the use of similar facts in civil cases, indicating that the main difficulty is in establishing the logical relevance of the similar facts. Admissibility in most civil cases depends upon the similarity of the facts offered to the facts in issue and not upon the application of any exclusionary rule. This emphasis on logical connection is natural in a work based on Thayer's approach to admissibility: all which is logically probative should be admitted unless excluded by some rule or principle of law. The importance of keeping this principle in context is well illustrated by *Sims*, [1946] K.B. 539 (C.C.A.), and *Noor Mohamed*, [1949] A.C. 182 (P.C.). Indeed, Professor McCormick (at p. 321) writes, in relation to the term "legal relevance", "Its use tends to emphasize conformity to precedent in an area where the need for *discretionary responsibility* for weighing of value against dangers in the particular case should be stressed" (italics mine). Admissibility involves two tests in this view. Firstly, is the evidence logically relevant? If so, would its admission involve disproportionate risks? It is not enough to turn to precedent, although certainly the authorities are of great value in ascertaining both the risks and policy considerations involved and such logical connection as may exist between the evidentiary facts and the facts in issue.

As could be expected, the discussion on hearsay is not only

learned but interesting. Here, however, the book must be used with great caution as there is, apparently, a wide divergence between practice in this field in the United States and that in Canada. For example, the exception as to declarations of physical and mental state appears to be wider than our own. Further, on the authority of *Leland*, [1951] O.R. 12 (C.A.), it is clear that no such exception as spontaneous declarations is admitted, at least in Ontario, at the moment.

In conclusion, there is but one criticism I can offer. I do not understand the arrangement of the material. Why the question of the competency of witnesses should be discussed two chapters after the examination of witnesses escapes me, and I can find no justification for inserting between Title 3 (Admission and Exclusion) and Title 6 (Relevancy) two long sections on competency and privilege. Why should the chapters on burden of proof and judicial notice fall within Title 9 (The Hearsay Rule and its Exceptions)? There is a strong case for presenting a commentary on legal reasoning in some more logical order. Indeed, the organization of the material adopted may make the book less useful for the beginner, though it should present no difficulty to the more advanced reader, who will find the book a lucid, interesting and provocative guide to the common law of evidence. The cases cited have been selected carefully, with an eye to their interest as well as authority, and there is extensive reference to the periodical and text-book material on the subject. This is a book that no solicitor or barrister engaged in litigation can afford to ignore.

J. D. MORTON*

O Rare Sir Lawyer!

Ben Johnson, riding through Surrey, found the Women weeping and wailing, lamenting the Death of a Lawyer, who lived there: He enquired why so great Grief for the Losse of a Lawyer? Oh, said they, we have the greatest Loss imaginable; he kept us all in Peace and Quietness, and was a most charitable good Man: Whereupon Ben made this Distich:

God works Wonders now and then,
Behold a Miracle, deny't who can,
Here lies a Lawyer, *and an* honest *man.*

'Tis Pity that good Man's Name should not be remember'd. (John Aubrey's *Brief Lives:* Ben Jonson)

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