REVIEWS AND NOTICES

The Rule Against Perpetuities. By J. H. C. MORRIS, D.C.L., and W. BARTON LEACH, LL.B. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1956. Pp. xlvii, 336. ($10.00)

Some years ago Riddell J., in *Miller* v. *Tipling* (1918), 43 O.L.R. 88, at p. 96, referred to the common law of real property as a "rubbish heap" which had been accumulating for hundreds of years and which no one understood, with the possible exception of some professors in law schools and even they, according to the learned judge, might not thoroughly understand it or all understand it the same way. There is little doubt that the mysteries of real property law with its feudal terminology, its background of legal estates, executory interests, appointments to uses and all the rest of it, still terrify students. The so-called rule against perpetuities, created by the courts in an endeavour to prevent the mischief which their own doctrine of indestructibility of executory interests had introduced, has for many years headed the list of so-called "tough" topics to be approached warily, applied mechanically, and preferably to be pushed back in the books and left strictly alone so far as humanly possible.

An unfortunate result of this attitude is that the underlying purpose or objective of the rule has been obscured, and in many cases which have considered the doctrine the discussion and application have been wooden and mechanical. As a result, some utterly nonsensical propositions have been accepted for years without much comment or criticism. Among these can be cited the incontrovertible possibility of a woman of ninety (the authors' "fertile octogenarian") or a child of five (described in the present book as the "precocious toddler") having children for the purpose of the rule. Indeed, prevailing professional opinion of practitioners and judges alike seems to consider the rule as though it were a statutory enactment to be applied with mathematical precision regardless of the havoc created as compared to any possible purpose to be served. The rule, its purpose little understood and less appreciated, frequently serves as a trap for the unwary testator or draftsman, while the courts tolerate verbal distinctions made by

the occasional draftsman who knows how to avoid the mechanics of the rule and whose adroitness is permitted by courts to frustrate the very objects for which the rule was introduced.

Some thirty years ago, the reviewer began teaching a course which developed over the years into a study of the law pertaining to the disposition of accumulated wealth (usually styled "Wills and Trusts"). It became obvious at an early stage that, apart from taxation problems, the chief difficulty in drafting instruments to effectuate a testator's intention lay in the field of future interests and the complexity of executory interests and conditions, frequently called "vesting" problems. These problems are difficult enough in relation to gifts to individuals. They assume new horrors in gifts to groups or classes. All these problems raise the possibility of a clash with the rule against perpetuities. The English books dealing with these subjects had, and still have, little to offer either in clarity of exposition or assistance on the pitfalls to be avoided. The great American treatise of Gray, *The Rule Against Perpetuities*, now in its fourth edition, contained the most comprehensive treatment of the rule, but its rigidity and conceptualism were somewhat terrifying. In these circumstances it was difficult to find stimulating or helpful materials for students.

In 1935 the reviewer stumbled upon a new casebook produced in the United States by Professor W. Barton Leach of Harvard University. That book purported to be a collection of "cases and materials on the law of future interests". Casebooks are usually thought to be pretty dull affairs, and, in particular, a casebook on future interests would ordinarily be considered neither inspirational nor refreshing. Strange to say, this book had both qualities. Professor Leach had presented a group of seemingly unrelated topics (holding a generally accepted priority for dullness) in a new way. That a book on such a subject could be lucid in expression and directed to an understandable objective, to say nothing of the inclusion of enlightening dashes of humour, was almost unbelievable. In 1938 Leach wrote an article called "Perpetuities in a Nutshell" (51 Harv. L. Rev. 638). Now, several things had been put in nutshells in a series of English books before this time. The results, in the reviewer's opinion, were usually unhappy and somewhat tragic affairs. This article was an entirely different matter. Within the few pages available in a law-review article, the author achieved the seemingly impossible task of presenting the rule, largely through the use of specific illustrations, in a manner that was simple, direct and understandable, and at the same time scholarly in performance and effective in result. In the reviewer's opinion, this was the first time that the rule against perpetuities had been removed from a legal museum and made to appear as something vital and with a

capability for adaptation and re-adaptation according to the facts as they present themselves before draftsmen or courts.

Subsequent work by Professor Leach in the property field exhibited the same ability to clarify, in understandable workmanlike language, the day-to-day problems that have to be faced by draftsmen and frequently decided by courts. This was a welcome change from the accumulated mass of extracts from learned judgments, reiterating the language and concepts of medievalism, which usually comprise a "learned" treatise on property. It is, perhaps, understandable why, during the last twenty-five years, Leach's work furnished the framework and pattern for the teaching of the generation of students in that period.

Leach, however, was writing in the United States of America and, unfortunately, as things legal have gone in the past, his work did not receive the wide publicity or professional appreciation that they deserved in England and countries like Canada. A few years ago, however, Dr. Morris of Oxford spent a year as visiting professor at the Harvard Law School. One can only guess that he came to appreciate how much light the Leach torch cast in the encircling gloom of the customary English treatment of many phases of property law. Be that as it may, the next step was for Professor Leach to reciprocate the visit of Dr. Morris and to spend a year with his English colleagues. The present book is, probably, the result of these two visits. Without in any way attempting to assess who wrote what part of the present book, and with no intent of disparaging Dr. Morris's pioneer work in this field, it seems, to this reviewer at least, fair to say that the present book introduces the Leach approach and style to the English and Commonwealth professions. This is done in what appears to be the present method by which American legal experience can be most effective in the Commonwealth countries, namely, the production of an essentially English book with English and Commonwealth citations, produced in England by a member of the English profession but using the techniques, the critical analysis and the constructive suggestions for change which had appeared earlier on the American scene and which are now focused on the law of the Commonwealth.

Unlike so many English "texts", the present book is more than a mere exposition of the "law" in the terminology of the judges. It purports to deal with the subject from a consideration of the objectives behind the "rule"; to check existing results with those objectives; to consider whether other results may not be possible within the framework of the existing case law; if so, how they can be achieved, and if not capable of attainment in that way, then to suggest legislative changes, the better to effectuate the purpose behind this particular body of doctrine. This method of

writing about law has been rare in English texts. Further, the present book is not a mere gesture in favour of a new method of presentation. It is a thorough-going job done with a compactness and a lucidity which is truly remarkable and for which both authors are to be congratulated. It is not often that one finds two legal authors, one from England and one from the United States, in such close rapport as Dr. Morris and Professor Leach. This is basically an English book for English and Commonwealth lawyers. What that means, of course, is that no English lawyer can possibly object that the law of England is being openly subjected to American influence. At the same time, however, to anyone familiar with Professor Leach's work in particular, and the recent work on property in the United States in general, it is obvious that Leach's influence has made the present book possible. When one considers that this has been done in a field as conservative as property, the result is even more remarkable.

Throughout the book the authors have made use of a device which both have used in their previous writing. Each chapter begins with a statement of the existing law in clear and succinct language followed by specific illustrations which point the issues under discussion. Criticisms of the existing rules are kept separate from statements of existing law and the criticisms, or "critiques", follow the expository part of each chapter. Undoubtedly the most important of these criticisms is that dealing with the rule which requires "prospective certainty of vesting" at the time of the creation of the interest in question. There is no doubt that this rule, whose destructive power depends on an unbridled exercise of imagination on the part of the courts, has little in its favour. The authors suggest that some "wait-and-see" principle be adopted by legislation along lines of the Pennsylvania act. One must confess that the prospect of Canadian legislatures doing anything about the matter seems fairly remote. So far as I know, there has been no suggestion made in Canada for the adoption of a section similar to section 163 of the English Law of Property Act, which in turn goes back to a 1918 statute of Victoria and a 1919 New South Wales act. All these statutory enactments are designed to validate gifts which would otherwise be rendered invalid by the rule against perpetuities because of conditions requiring the attainment of an age in excess of twenty-one years. The reasons for adopting something of this nature are so apparent that one wonders why Canada has been so backward.

Indeed, as one reads this book, devoted to an examination of the law of the Commonwealth, there is little from Canada in the way either of judicial decision or legislation that furnishes ground for any sense of pride. It is rather discouraging, for example, to find (p. 102) that Ontario courts do not seem to be cognizant of

the rule in *Cattlin* v. *Brown* (1853), 11 Ha. 372. The fact that the rule is difficult either to understand or apply may be an explanation, but it is certainly no excuse. The lack of a specialized bar dealing with questions of this kind, to say nothing of the failure to specialize on the bench, may explain the somewhat jejune character of Canadian authorities on the matters covered by this book.

To understand the application of the rule against perpetuities it is, of course, necessary to have a working knowledge of various other principles which weave their way in and out of the problems raised for decision. Thus, for example, rules for ascertaining class membership, and the various constructional rules which consider words of seeming contingency as having an operation of divesting an earlier interest rather than of suspending the "vesting" of that interest, all play their part in the complicated picture. Realizing this, the authors have dealt with these and other questions. The only regret of the reviewer is that sometimes these matters get rather short and cryptic treatment. Perhaps this is inevitable in a specialized study of this kind but, if there be any criticism of the present volume, it is that it assumes a considerable knowledge on the part of the reader. Whether that assumption is sound may be open to question. Thus, for example, in many ways the first chapter of the book is the most important, since it deals with the rationale of the "rule", the problem of substance as against form, and the doctrine of precedent in its application. The chapter is an excellent one, but it may be that a student approaching the subject should read it after he has concluded an examination of specific problems. It certainly presupposes more knowledge of the history of property than one is accustomed to find in students.

As one illustration of the clarity that the present book achieves, reference may be made to the chapter on powers of appointment. This particular subject matter in all its aspects is, certainly in Canada, generally deemed to be so abstruse and confused that most law schools are inclined to avoid it completely. Even the terminology is archaic and unduly complicated in the English texts. The present authors, by adopting the simplified terminology made popular in the United States by Leach and Casner, at least make the subject matter understandable by speaking of the "donor" of the power as the person who creates the power; the "donee" as the person to whom the power is given; the "objects" of the power as those amongst whom special power can be exercised and "appointees" as those to whom the donor makes an appointment. Simple language, it is true, but in its use many cobwebs are wiped away and this chapter, as one might expect in a book with which Leach has been associated, is a model of the "new look" so badly needed in English and Commonwealth property writing.

The eminent reasonableness of the criticisms throughout the

book is shown in the same chapter when the authors examine the English rule under which, in determining the validity of an appointment under a general testamentary power of appointment, the period of time under the rule against perpetuities is said to run from the time of the appointment. As a matter of principle, this is highly debatable and in the United States general testamentary powers, as the authors point out, are analogized to special powers, since the donee obviously cannot appoint to himself and the period, as in the case of special powers, is considered to run from the time of the creation of the power. In the criticism of the English rule, the authors give their reasons for preferring the American doctrine, although they doubt whether it is desirable for English courts to reconsider their view and therefore merely indicate the basis of the American reasoning as grounds which may be adopted by courts not already committed to the English doctrine.

A topic on which one can only hope courts will look to the lead given by the present book concerns the applicability of the rule against perpetuities to interests in the nature of a "possibility of reverter" (pp. 203-211). This is a problem which under the present state of the English authorities can not be considered as settled by peculiar cases such as *Re Chardon*, [1928] Ch. 464. At present, the decisions seem to permit a trust for non-charitable purposes to last as long as a given state of things may continue to exist, and then invalidate an express gift over on the termination of that stage of things (if the condition offends the perpetuity rule), but permit the residue to take the property on the same condition presumably as an interest vested in the creator of the trust. This result merits serious consideration by courts concerned with the policy of the perpetuity rule. As the cases stand, they simply do not make sense, and the authors say so and indicate why.

The fact that the entire book is written with a view to construing wills and other documents in light of the policy prompting a perpetuity rule makes it a much more valuable instrument for the advancement of the law in the hands of practitioner and judge alike than the ordinary textbook. Similarly, amidst the growing confusion of language dealing with so-called "purpose" trusts, or trusts which are not charitable and have no specific beneficiary, the authors do not hesitate to express their views in favour of a doctrine recognizing such trusts as "powers" which should be supported by the courts so long as they do not infringe the policy about tying up property for non-charitable purposes for too long a period. This may, indeed, be the existing law, although the conceptualism of some contemporary English judges (see *Re Astor's Settlement Trusts*, [1952] Ch. 534) in invalidating trusts simply because it is inconceivable to have a trust without a beneficiary

in the position to enforce the trust obligation, gives rise to some misgivings. Granted a method or a concept capable of supporting a disposition of property by a testator as against a method or concept invalidating it, why, under our present system of private property, choose the former unless some reason of "policy'—law—forbids the disposition? And if some "policy" forbids it, then courts should be capable of articulating the specific policy involved and its limitations.

Unless we have misunderstood the present book, this is its main text. It is a text that needs emphasizing in the field of property law more than anywhere else. We have become accustomed to talk of "judicial statesmanship" and the creative rôle of courts in fields of public, especially constitutional, law. We are perhaps not so willing to recognize the creative rôle in the realm of property. It is true that, considering the importance of security and regularity in property transactions, there may not be the same scope for this rôle as in other branches of private law, such as torts, or in public law. But, even in property law, rules exist only to effectuate a purpose and the adoption of a restrictive or liberal construction of a given rule should depend entirely on the policy or objective of the law in the field in which the "rule" is supposed to operate.

In bringing to the forefront the objective of the rule and the ways in which it has been lost sight of in judicial applications, and the manner in which the purpose may be found again either in judicial decision or by legislation, the authors have performed an invaluable service in this department of law. Indeed, they have written the type of book the profession and the bench may well look for in other departments. This is a book that can and must be recommended without reservation to law students, practitioners and the bench. It is not merely a good book: it is an excellent one.

CECIL A. WRIGHT*

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The Transfer of Chattels in Private International Law: A Comparative Study. By G. A. ZAPHIRIOU, LL.M. (Lond.). University of London Legal Series, IV. Published under the auspices of The Institute of Advanced Legal Studies. London: The Athlone Press. New York: John de Graff Inc. 1956. Pp. xix, 227. (30s. net)

The Transfer of Chattels in the Conflict of Laws: A Comparative Study. By PIERRE A. LALIVE, Ph.D. (Cantab.), Member of the

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Geneva Bar. Oxford: The Clarendon Press. Toronto: Oxford University Press. 1955. Pp. xix, 200. ($4.50)

The appearance within a short space of time of these two books, the respective products of a Master's and Doctor's thesis, testifies to the growing importance which questions arising out of the transfer of chattels play in private international law, and both are greatly to be welcomed.

Both Mr. Zaphiriou and Dr. Lalive cover approximately the same ground, though with varying degrees of emphasis and thoroughness, so that by reading both monographs the reader obtains a comprehensive view of most of the major questions which arise in this branch of the conflict of laws. There appears to be surprisingly little divergence in the conclusions reached by the learned authors—but perhaps it should occasion little surprise since, once the fundamental proposition that the *lex situs* governs the creation and extinction of property rights is accepted, the solution in a given case should follow logically from the premise, though the factual situations are of course capable of infinite variations.

The ground covered by each of these two studies falls into two main parts. The first part discusses the question of which law should govern the creation of property rights and considers in turn the merits and defects of the various connecting factors, such as the *lex domicilii*, *lex actus*, *lex loci contractus*, and so on, which have been advanced from time to time. This is followed by an exhaustive treatment of the judicial authorities which support the selection of the *lex situs*. The first part then concludes with a wholly admirable examination of the meaning and content of the *lex situs* rule and its impact on such important desiderata as the passing of risk in goods, rights of rescission, and other kindred problems. The second part is devoted to a series of problems which are particularly familiar to North American lawyers. These are the problems created by the oft-recurring situation when a chattel bought under a conditional sale agreement is unlawfully removed by the buyer from state *A* to state *B*, and there fraudulently sold by him to an innocent purchaser.

Both authors, as might be expected, accept the supremacy of the *lex situs* principle, as do indeed the overwhelming number of common-law and continental writers. The reasons given are that the *lex situs* is easily ascertainable and has the most effective control over the chattel. The latter explanation seems much less convincing than the first. If effective control is the criterion, then presumably there could be no objection to the *lex situs* (which, as Dr. Lalive rightly reminds us (pp. 117-120), includes its conflict rules) applying some law other than its own. But it is surely obvious that such a deviation from the *lex situs* rule could only re-

create the very uncertainty which the rule is designed to avoid. Again, is it to be supposed that, because a former situs no longer has effective control over the chattel, therefore any property rights created within its domain may be freely disregarded by any subsequent *lex situs?*

The rationale of the *lex situs* rule easily explains the importance of observing the distinction between property rights and contractual rights. But it is surely going too far to assert, as does Mr. Zaphiriou (on p. 85), that if the property is situated in England at the time of its transfer the validity or invalidity of the underlying contract is immaterial. Would not an English court first ascertain the nature of the alleged contractual defect, and then determine what, if any, effect, according to English law, the defect has on the validity of the transfer, for example, whether it makes the transfer void or voidable? *Royal Baking Powder Co.* v. *Hessey* (1935), 76 F. 2d 645, cited by Mr. Zaphiriou, does not support his proposition. The vendor's failure in that case to comply with the New York Bulk Sales Act was not a contractual defect, but was characterized by the court, at pages 648-649 of the report, as a defect in the essential validity of the transfer of the goods.

There are, however, a number of borderline cases where the characterization of the right in question, such as suspensive or resolutive conditions in a contract of sale, provides some difficulty. As Dr. Lalive rightly points out (pp. 138 *et seq.*), such rights may often with equal justice be characterized as both contractual and proprietary in character: each case therefore must be decided on its own merits. Canadian lawyers will be especially interested in Dr. Lalive's treatment of the vendor's rights of resiliation under article 1543 of the Quebec Civil Code. But if, as the learned author appears to think, the rights established under that article are in the nature of a resolutive condition, should not the *lex situs* at the time when the vendor purports to rescind the sale determine whether, under its law, he has such a right?

Mr. Zaphiriou's attempt to deal in a few pages with the complicated subject of the recognition of foreign confiscatory decrees is a less happy effort. His submission (p. 124) that the English courts will exclude the application of the normally applicable foreign law if its provisions are contrary to English public policy appears to be based on two decisions of first instance, *Anglo-Iranian Oil Co.* v. *Jaffrate*, [1953] 1 W. L. R. 246, and *Re Helbert Wagg & Co. Ltd.*, [1956] 1 All E. R. 129. The Aden court's proposition in the first case, that foreign confiscatory legislation which is contrary to international law will not be recognized, is contradicted by two American Supreme Court decisions (*Underhill* v. *Hernandez* (1897), 168 U. S. 250, and *Oetjen* v. *Central Leather Co.* (1917), 246 U. S. 297), and was rejected by Upjohn

J. in the *Wagg* case. On the other hand, Upjohn J.'s more limited proposition that only *discriminatory* legislation will be refused recognition is inconsistent with the recognition by the English courts of the confiscation of Jewish property by Nazi decrees, which were clearly discriminatory. To say that only legislation discriminating against British property will be disregarded is to draw a chauvinistic distinction quite out of character with the English principles of private international law. Moreover, the authority of *Wolff* v. *Oxholm* (1817), 105 E. R. 1177, and *In re Fried Krupp*, [1917] 2 Ch. 188, relied upon by both Campbell J. and Upjohn J., appears to be much weakened, if not overruled, by the Court of Appeal decision in *Re Ferdinand, Ex Tsar of Bulgaria*, [1921] 1 Ch. 107. Enough has been said to show that the whole subject awaits treatment by a higher court.

Of the problems discussed in the second part of the studies under review, Dr. Lalive's discussion is the more complete and the better of the two. Especially skilful is his treatment of the effect which the absence of the conditional vendor's consent to the removal of his chattel into another state has on the reservation of the vendor's title as developed in the case law of the various American states. The problem is of course much less troublesome in Canada, since the provincial legislatures have long since dealt with it specifically. Whether our courts, like the American courts, would have been prepared to give ex-territorial effect to conditional-sale and chattel-mortgage statutes in the absence of such legislation is a moot point, but I do not find anything in *Singer Sewing Machine Co.* v. *McLeod* (1888), 20 N.S.R. 341, and *In re Satisfaction Stores*, [1929] 2 D.L.R. 435, to support Dr. Lalive's assertion (p. 77, footnote 2) that some American influence appears to have made itself felt in Canada. Puzzling also is Mr. Zaphiriou's claim (pp. 184-185) that such American cases as *Hart* v. *Oliver Farm Equipment* (1933), 21 P. (2d) 96, and *Gen. Motors Accptce* v. *Nuss* (1939), 196 S.R. (*sic*) 323, are inconsistent with English decisions. Which decisions?

Perhaps of interest to readers of this Review will be Dr. Lalive's treatment of the effect on the vendor's reservation of title of a chattel which has been removed by the conditional buyer into another state, where the vendor's title is voidable under the first *lex situs* for, say, non-registration of the contract, since the subject has occasioned some difference of opinion in these pages between Dr. Gilbert Kennedy and this reviewer (see (1954), 32 Can. Bar Rev. 900, 1174 and 1181). Dr. Lalive endeavours to reconcile the New Jersey decision in *Charles T. Dougherty Co.* v. *Krimke* (1929), 144 Atl. 617, with the earlier decision of the same court in *Marvin Safe Co.* v. *Norton* (1886), 7 Atl. 418, by arguing (p. 184) that in the former case the New York statute applied to subsequent transfers *made anywhere*, whereas in *Marvin*'s case the Pennsylvania

statute was construed to apply to subsequent sales only when made in Pennsylvania. The reasons for judgment in *Marvin*'s case do not, with respect, support such a distinction. On the contrary, the court in that case made it abundantly plain that Pennsylvania law would not apply in any circumstances to facts occurring in New Jersey. The court said, "the title was in the safe company when the property in dispute was removed from the State of Pennsylvania. Whatever might impair that title . . . occurred in this state. *The legal effect and consequences of those acts must be adjudged by the law of this state.*" (7 Atl. 418, at p. 422. Italics added.) That *Marvin*'s case rather than *Krimke*'s case would be followed in Canada is shown by *Cline* v. *Russell* (1909), 10 W.L.R. 666 (which is not referred to by Dr. Lalive), and the more recent decisions in *In re Union Acceptance Corpn.* (1955), 16 W.W.R. 283 (see 34 Can. Bar Rev. 323), and *McAloney* v. *McInnis & G.M. A.C.* (1955), 37 M.P.R. 131 (N.S.).

Both these scholarly books can be recommended without hesitation. Both are replete with a wealth of illustrations and citations drawn from the jurisprudence of England, the United States, the continent and, to a lesser extent, Canada, and between them they provide, if not always the authoritative answer, at least much careful thought and study on practically any of the numerous problems that are likely to arise in practice. A random check has not revealed them to contain many errors. For the benefit of future possible editions, however, this reviewer would draw attention to a few and also suggest some possible improvements.

As to Mr. Zaphiriou's book: on page 13 the reference in footnote 1 should be to pp. 85/6, not 86/7; on page 27, lines 20-21, "the title validity acquired" is no doubt a misprint for "validly acquired". On page 110, footnote 1 should read "*supra*, pp. 43 et seq." On page 185, footnote 2, "S.R." is an unfamiliar abbreviation for the series of Southern Reports (So.) Under the heading of Bibliography, the latest editions are not always cited. Thus the reference to Dr. Falconbridge's book should be to the second edition; that to the casebook by Cheatham et al. and the textbook by Dr. Goodrich to the third editions. Also, there are many more American articles than Mr. Zaphiriou's list would seem to suggest: see Falconbridge (2nd ed.) p. 472, footnote (n). Both Mr. Zaphiriou and Dr. Lalive do not always give the more serviceable citation when referring to American cases: state reports are rarely accessible to non-American readers. Dr. Lalive's list of abbreviations is also very incomplete and somewhat illogical. Why should an English-speaking reader be expected to know what such abbreviations as O.L.G. or A.T.F. or R.O.H.G. stand for?

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The Constitution and what it means today. By EDWARD S. CORWIN. Eleventh edition, completely revised. Princeton: Princeton University Press. Toronto: S. J. Reginald Saunders and Company Limited. 1955. Pp. xiv, 340. ($5.75)

The constitution of the United States may not be, as Justice Johnson thought, "the most wonderful instrument ever drawn by the hand of man", but it is certainly one of the most admirable and influential political documents of all time. For the Canadian it has special interest, not only because of the proximity of the United States to this country, but also because of the part American experience has played in the development of our own constitution. The Fathers of Confederation certainly had it in contemplation during the discussions preliminary to the enactment of the British North America Act, and it has continued to influence Canadian thinking on constitutional matters. At the present day, whenever alterations to our constitution are suggested, American institutions are almost invariably brought forward for consideration. For these reasons some acquaintance with the American constitution is desirable for every Canadian lawyer and constitutional student.

No better introduction to the subject is available than Professor Corwin's book, first published in 1920 and now in its eleventh edition. The author is well qualified to write a handbook on the constitution of his country; he is one of the outstanding authorities on the subject, having written such books as *Constitutional Revolution, Limited, Court over Constitution*, and *The President: Office and Powers*. More recently he has been the editor of *The Constitution of the United States of America, Annotated: Analysis and Interpretation*, a publication of the American Government Printing Office.

The book sets out the American constitution section by section, and gives a succinct account of the history of each section and what it has come to mean today in the light of judicial interpretation and constitutional practice. The separation of powers, the legislative jurisdictions of Congress and the state legislatures, the position of the President and of the Supreme Court, the Bill of Rights—indeed, all important aspects of American constitutional law and practice receive attention. The commentary is based largely upon decisions of the Supreme Court, the various trends of which are set forth and explained. The language is brief, readable, but this has not led to oversimplification. The work is, in short, an excellent one, which well merits the recognition it has gained in the United States, where it is regarded as a classic.

For those already familiar with the book, some comparison of this edition with its predecessors should be made. It is, first

of all, somewhat larger, containing 285 pages of text and citing over 1,000 cases as compared with the tenth edition, which consisted of 220 pages and referred to some 700 cases. The increase is due largely to the fact that the author has drawn upon the resources of *The Constitution of the United States of America, Annotated* to elaborate the treatment of a number of outstanding topics. The book has nevertheless retained the general design and method adopted in earlier editions. It has, of course, been brought up to date and now covers the decisions of the Supreme Court to the end of June 1954. Not the least interesting of the new material is the discussion of the decision outlawing racial segregation in public schools. Professor Corwin's remarks on this controversial subject deserve close attention, because in the past he has been eminently successful in predicting the course of the Supreme Court.

G. V. LA FOREST*

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Three Great Systems of Jurisprudence. By K. KAHANA KAGAN, M.Litt. (Cantab.). With a foreword by HAROLD GREVILLE HANBURY, D.C.L. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xii, 199. ($4.75)

In this comparative study of Hebrew, Roman and English law, Dr. Kagan sets out to ascertain "the fundamental conceptions upon which each system is built, the basic attitude to the organization of human life which has inspired the system; that which, perhaps, may be termed the soul of the legal body". He is not, therefore, confining himself to a simple exposition and comparison of specific rules, a method he considers limited in value to comparative lawyers. Starting with a general comparison of Roman and English law, on the one hand, and Jewish law, on the other, he finds dualism, as represented by special machineries for the introduction of praetorian and equitable principles into the original systems, to be a common feature of Roman and English, in contrast to Jewish, law. Duality arose in Rome and England not only because of procedural rigidities but also because of a basically inadequate theory of "justice", more pronounced with the Romans than the English. A separate machinery, however, was not necessary in Hebrew law because the original canons, based on a very wide conception of justice, were sufficiently flexible to adjust to changing community needs. Dr. Kagan sees no merit in dualism as such; indeed, he finds it positively disadvantageous

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and, although he respects the improvements wrought by the English Chancellors, he considers equity still to be a separate and distinct body of rules requiring considerable reform in its present stage of development.

The learned author has little trouble disposing of Roman law when it is compared with the Jewish jurisprudence. Slavery, bondage and *dominium* point to gross inequality in Rome's rules; the praetorship, to be sure, illustrates high managerial ability in the regulation of everyday affairs but, *jus gentium* and *jus naturale* notwithstanding, the Romans provided posterity with a paucity of conceptual nourishment. Theirs was an achievement in the realm of administration rather than ideas and, given their mentality of "right, might and *dominium*", it could not have been otherwise. In England, however, the psychological background is entirely different. From early times English judges have been inspired by the need to do justice in human affairs and this is evinced by the rise of equity as an ethical, as opposed solely to a practical, reaction to technicalities in common law. The Chancellor's salutary influence is readily appreciated by examining the development of uses and trusts, mortgages, the interpretation of documents and the protection of married women. Nevertheless, equity itself has become rigid, much of its original creativity has disappeared and, in addition to the adequacy of dualism itself, one is forced to question the basic assumptions on which equitable rules rest. New problems demand a new approach. The Law Reform Committee, since it operates piecemeal, is incapable of instituting comprehensive reforms. While the matter of fusion requires reconsideration, especially as equity retains its distinctive attitudes and techniques, what really is needed is a *rapprochement* between equity and the concept of justice. At this point Dr. Kagan stops: he refrains from pointing forward to specific antidotes; instead, he directs our attention backwards to ancient sources where constructive material will be found to help "formulate the new conceptions which are needed in equity and, indeed, in other branches of jurisprudence also". He concludes his study by contrasting praetorian law, equity and the Rabbinical edict as methods of law adjustment and law development.

There is considerably more detail in this book than I have indicated. Property lawyers, in particular, will find a fairly full comparative treatment of fundamentals in trust, mortgages and ownership. Much space also is devoted to social contract theories and their connections with representative government. Although many will question the author's reformulation and application of those theories to the facts of Jewish life, especially his attempt to verify tautological or analytic propositions by reference to ethical judgments of fact, he succeeds in provoking an interest in the relation-

ship. It is suggested, however, that the compelling feature of this book lies not in its comparison of various rules—valuable as that is—but in its exposition of those general principles of the Jewish system which bulk so large in contemporary legal thought. Every lawyer is aware of the great spiritual vision and vitality developed by the Hebrews and subsequently transmitted to the Western world, where, although remoulded and transformed, they continue to work an influence of enormous creative importance in contemporary society. Indeed, if forced to indicate a single legacy Israel bequeathed to the modern world one would point unhesitatingly to the spiritual conception of man born in the image of God. Yet it is the merit of Rabbi Kagan's book to show that this lasting contribution includes legal as well as theological ideas. Working from the prophecies, the Talmud, the Pentateuch and other Jewish sources, he shows us the Israeli development of such basic concepts as liberty, freedom, equality and justice, as well as their application to property, family law and governmental institutions. He has really produced a study in historical jurisprudence directed to legal concepts in general and sources of law in particular. Those who read what he has written will come away with a new appreciation and respect for the Jewish legal system and the fundamental value decisions underlying Jewish society.

There are, of course, points which will not go unchallenged. The treatment of social contract has been mentioned already. In addition, one rather doubts that among the Hebrews there "were *no* problems involved in the interpretation of writs, of documents or of statutes" (p. 25) and that "landowners *never* had any hardships caused by doctrines of inequality" (p. 27). Furthermore, one can't avoid feeling that Dr. Kagan's description of adjustments in Jewish jurisprudence (p. 176) is just a bit too good to be true. We know, for example, that in post-exilic times there was considerable "legalism" and friction in the interpretation of prophetic teachings. Although this largely related to ethical norms, it was not completely absent in matters of secular law, particularly when, as Dr. Kagan repeatedly stresses, the two were interwoven. Granted that in reconciling conflicting interests the Rabbinical enactments were made according to the maxim "within the lines of the law", one feels nevertheless that problems of adjustment bulked larger than the author is willing to admit, and it would have been helpful had these been elucidated further. There will also be those who, while not gainsaying the substantial Jewish contribution to theories of individual liberty and freedom, will wonder why the Greeks, who had something to say on the matter, are not accorded more prominent recognition. There are other items on which issue could be joined—it scarcely could be otherwise with a book touching fundamentals in law—but all in all Dr. Kagan presents us with

a carefully reasoned case for the particular interpretation he himself prefers.

Enough has been said to indicate the provocative nature of his study. What he has written, however, is not limited in interest to the specialist in jurisprudence or legal history. The scope of his inquiry is so wide that the general practitioner will find it includes at least some topics that are both attractive and helpful to him; and, at a time when the importance of comparative law is becoming more generally recognized in this country, Dr. Kagan's methodology alone merits close attention by everyone interested in the subject. Finally, it is worth mentioning that the Hebrew concepts discussed here are those which obtained in the old Israel and in the exilic communities of Western Europe. It is a testimony to the author's power to stimulate that one closes his book wondering, among other things, what part these concepts now play in the new Israel where, as is well-known, an intensive and intelligent programme of law reform has been under way for some years.

R. ST. J. MACDONALD*

Full Many a Gem of Purest Ray Serene . . .

. . . All this can be accomplished by legislation that empowers the Courts to determine as a question of fact, having regard to all the circumstances including the nature of the highway and the amount and nature of the traffic that might reasonably be expected to be upon it, whether or not it would be negligent to allow a domestic animal to be at large upon it.

It is now over 200 years since Thomas Gray wrote his famous lines descriptive of rural England at eventide, 'The lowing herd winds slowly o'er the lea'. The lea no doubt included such highways as then traversed the landscape. As I read the modern English cases the herd may still wander along those same highways without the owner being subject to civil liability for the injuries they may cause. No longer in this Province does 'the ploughman homeward plod his weary way'. He goes now in his tractor, oft-times along the highway. The farmer whose lands adjoin the King's Highway can in this modern era, scarcely know the meaning of 'the solemn stillness' of which Gray wrote. No longer can he be conscious of the beetle wheeling his droning flight. What he hears, instead, is the whir of motor cars wheeling their way at legalized speed along the adjoining highway. The common law of England may have been adequate in Gray's day. The Courts in England have held that it is still adequate, but surely it must be apparent that to-day in this Province it is not. (*Per* Roach J. A. in *Atkinson* v. *Fleming*, [1956] O.R. 801, at p. 822; (1956), 5 D.L.R. (2d) 309, at pp. 323-324)

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