# REVIEWS AND NOTICES

*1956 Annual Survey of American Law.* New York University School of Law. Distributed by Oceana Publications, New York. 1957. Pp. viii, 702. ($10.00 U.S.)

A lawyer from the British Commonwealth visiting in the United States discovers very soon (if he did not already know it) that our American colleagues, particularly in the law schools, have always paid careful regard to precedents and current legal developments in the English homeland of the common law, though this is not as true of their attention to Canada and other Commonwealth countries. One need only point to the thoroughly Anglo-American scope of the great American legal treatises like *Wigmore on Evidence*, *Williston on Contracts* or *Scott on Trusts*, not to mention the many American casebooks that contain numerous references to English materials. But to date there has not been much systematic and regular attention to American legal experience by lawyers and legal scholars in the British Commonwealth (I speak from first hand knowledge of England and Canada, and presume the same comment to be true of the other Commonwealth countries). Fortunately, this lack of awareness has been changing for the better, but, in attempting to follow leading developments on the American legal scene, even the best-intentioned outsider finds a lion in his path: the enormous bulk of the annual output of judicial decisions, statutes and other legal materials that collectively manifest the living law of the American Union, its States and Territories, a bulk that becomes even larger every year with the growth of population, urban concentration and the complexity of society.

My present purpose is to draw attention to one readily available instrument that usefully shrinks this lion of bulk to manageable size. The *Annual Survey of American Law* was first published in 1942, and then every year since, as a permanent project under the auspices of the New York University School of Law. The 1956 volume is before me, and some description of it will explain the plan of the Survey to those not already familiar with it. The 1956 volume has 702 pages, including over 80 pages devoted to a table of cases, a table of statutes, rules and executive orders, and a

topical index. Within this reasonable compass, the principal legal developments of the year in or affecting the United States are outlined and explained, frequently with some evaluation, in a series of some thirty-four articles by different authors. These range over the whole field of law according to a sensible topical classification that is standard for the Survey. The coverage is indeed comprehensive. All the usual subjects of public and private law are included, and also some that are certainly appropriate though rather unexpected. Public international law heads the public law list, and there are essays on legal philosophy and legal bibliography respectively surveying developments in legal theory and the publication of legal works of a general nature.

Most of the articles are written by members of the full-time faculty of New York University School of Law, though a few of the contributions, in 1956 as in previous years, are by outside authorities. One member of the N.Y.U. faculty is the general editor, and he and his contributors have the assistance of a very considerable expert staff. The articles appear first in the New York University Law Review, before they are gathered for publication in a separate volume with the full apparatus of tables and topical index. This means that all the essays have been subjected to careful checking for accuracy of statement and citation by the group of honour students who, according to prevailing American practice, form the staff of the School's regular Law Review. Extensive and precise footnotes are characteristic of the Survey.

The articles are selective and succinct, as indeed they must be if they are to fulfil their purpose. The project requires the coordinated efforts of a group of highly competent and specialized scholars in the many fields to be surveyed, for this is no mere process of digesting *all* the year's cases and materials on a given topic. Rather each author sifts out, explains and evaluates the few leading developments of the year in his field, relating them by suitable comments to the past, and also in some instances attempting to estimate the future and point up the need for reform. Only one of the top law schools of the United States could, as an institution, successfully undertake a continuing and comprehensive annual survey of American law on this plan. Few schools, even in the United States, possess the appropriate means in sufficient measure—a large and highly specialized permanent faculty, extensive library and financial resources, and subsidiary staffs of trained research workers. Nowhere else in the common-law world does one find the equal of the concentration of resources in each of these great American law schools for legal education, research and writing.

A few random examples from the 1956 volume may convey a clearer picture of the Survey. It is not of course the kind of a book

one reads from cover to cover, but a reference work, the starting point for further research. In the article on international law, for instance, the legalities of the nationalization of the Suez Canal Company are objectively explained in about eight pages. In that on conflict of laws, the cases referred to continue to show the complex implications for divorce and alimony of the prevailing American rule that husband and wife may have different domiciles. These are further developments in the field where the two Supreme Court cases of *Williams* v. *North Carolina* (in 1942 and 1945) are landmarks. Every survey volume since these years, of course, deals with the continuing significance of the *Williams* cases. Then, in the article on criminal law, in connection with a discussion of codification, the appearance of the new Canadian Criminal Code is noted, and also there is a review of the current status of the M'Naghten rules on insanity and criminal responsibility in the United States. The final sample comes from the article on legal bibliography where the following valuable item of information appears: (page 616)

> The February and August issues of the *Law Library Journal* feature a *Checklist of Current State and Federal Publications.* The *Checklist* is of value because it indicates the last published volume of court reports, session laws, attorney general reports, and judicial council and administrative decisions published in the federal, state and territorial jurisdictions. Beginning in 1956 this valuable listing will contain in addition similar listings of Canadian dominion and provincial reports and statutes.

And so one could go on. Commercial subjects, property and taxation, for example, are covered in other articles that contain much of value for the Canadian lawyer or researching scholar.

The *Annual Survey of American Law* is not, and does not purport to be, the complete answer to detailed or intensive problems in briefing and research, though, even so, useful leads would frequently turn up in the body of the Survey articles or their footnotes. Rather, the purpose of the Survey is to provide a general and economical means for keeping abreast of legal developments in the United States, and this much it does very well. Of course, treatises, textbooks and casebooks from the United States are also suitable for this purpose, and, on their particular subjects, are naturally very detailed. But in conjunction with the latter sources, the Annual Survey volumes are valuable auxiliary aids. If one is working with a 1952 American treatise on income tax, the subsequent articles in the Annual Survey on the subject will quickly bring the treatise up to date on later outstanding developments. The same is true of an American casebook that has been out some years. Leading cases in the years after the date of the book will be mentioned one way or another in the relevant Survey

articles. When teaching recently in the United States, I found myself making constant use of the Annual Survey set in this way. Hence the earlier volumes remain helpful for some time.

In Canada and other Commonwealth countries, most law libraries are deficient in United States' materials, and even where they are reasonably complete, their magnitude and expense are very great. Accordingly, it is worth pointing out that much can be accomplished modestly in both these respects. A good selection of American treatises, textbooks, casebooks and journals, with the *Annual Survey of American Law* as an auxiliary aid, puts a library collection of American law of reasonable size and expense within comparatively easy reach. Canadians and Americans should be paying more attention to one another's legal experience and developments. My estimate is that they will do so in increasing measure.

W. R. LEDERMAN*

* * *

*Trial Tactics and Methods.* By ROBERT E. KEETON. New York: Prentice-Hall, Inc., 1954. Pp. xxiv, 438. ($6.65 U.S.)

At first sight the title of this book suggests that it deals only with court-room practice; in fact, it covers the whole process of a lawsuit in civil matters, from the moment a client enters the office to the judgment of the trial court. The eleven chapters which make up the book deal with the most frequent situations which arise in connection with the judicial process before a trial court. The arrangement of these chapters is rather unusual in that situations arising first in point of time are treated in the last three chapters: (preparation for trial (Chapter IX); pleadings (Chapter X); proceedings before trial (Chapter XI)) whilst the preceding chapters deal with court-room practice proper. In his preface the author justifies this arrangement by saying that "With the understanding of the problems arising during trial, we shall then be able more adequately to consider what should be done in advance of trial for the purpose of preparing to meet these problems effectively" (p. xi). Everyone who has had experience with court practice will no doubt agree that no lesson is better learnt than that which one has acquired from being faced with a critical situation; from this point of view it can be said that the arrangement of chapters and contents of the book is just as good as any other.

In the exposition and discussion of a particular topic the author proceeds by way of illustration. Eighty-seven actual or hypo-

*W. R. Lederman, Professor of Law, Dalhousie University.

thetical cases are used for that purpose. Chapters are divided into several sections, the heading of each section being usually in the form of a provocative question; and the author's discussion revolves around the hypothetical case with a view to illustrating the particular point made. As Dean Robert G. Storey, of the Law School of Southern Methodist University, in his foreword to the book says: "This is, of course, an adaptation of classroom technique, but it is used here with great effectiveness". One can but heartily agree with that statement as well as with the old Roman maxim: *Longum iter per praecepta, breve enim per exempla.*

The author seems concerned lest some might object to the emphasis on tactics. A perusal of the book should easily dispel any idea that tactics and methods are incompatible with legal or professional ethics; on the contrary, the author demonstrates very effectively that the object of advocacy is to persuade the jury and the court that the case of a litigant is good in fact as well as law and that this object can be achieved neither by trickery nor by shysterism. As he says in his preface: "Choosing within the bounds of ethical limitations, the best method for presenting a case favorably is not merely the trial lawyer's opportunity; it is his duty".

The foreword suggests that the book under review was intended primarily as a manual for students. If that was the aim of the author, Professor Keeton is too modest. It should be most helpful not only to students but also to lawyers in practice, young and old. After thirty-six years of court practice, including five years on the bench of the Superior Court of Quebec, this reviewer regrets that such a book was not available to him sooner on many difficult occasions.

In the discussion of the various topics, the author not only explores all possible solutions but also makes suggestions as to the most proper course to be followed, at the same time making it clear that the proposed solution to the problem under examination is open to criticism and must necessarily be qualified and that one should, in the final analysis, exercise one's own judgment and find one's own solution. The value of the book is further enhanced by a detailed table of contents and by an elaborate analytical index, both of which make it easy for the reader to find the particular point in which he is interested.

All the typical situations discussed by the author are considered in connection with a jury trial in a civil case. Only one short chapter is devoted to the non-jury trial. This is probably due to the fact that in the United States the jury trial is the usual rule. Although in Quebec the opposite situation prevails, the arguments of the author, in his attempt to decide in favor of or against a particular move in a jury trial, are still of interest to students and members of the legal profession in that province as they also apply

in the case of a non-jury trial, though some of these arguments may not have the same impact or validity. Being trained in law as well as in tactics and methods, judges may be impervious to some situations which might greatly impress jurymen; they are nevertheless human and subject to the frailties of the genus. It must also be observed that, having discussed the question of the argument or summation to the jury, the author says nothing about the argument to the judge in the non-jury trial.

The dominant impression which one gathers from the book is that native ability is only the beginning or the infancy of the success of a trial lawyer, the other ingredients being hard work, in and out of court, and persistent and continuous study of the best methods of court practice.

At an age when relatively few lawyers are engaged in court practice and the art of advocacy does not receive the attention and recognition it deserves, Professor Keeton's book is very timely and welcome. The legal profession should be grateful to him for his excellent contribution to the upholding and maintenance of the art of advocacy which is the primordial and most valuable aspect of our profession.

ANTONIO GARNEAU*

* * *

*Jurisprudence.* By R. W. M. DIAS, M.A., LL.B. (Cantab.) and G. B. J. HUGHES, M.A. (Cantab.), LL.B. (Wales). London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1957. Pp. 1,529. ($10.50)

Two years ago, in the November, 1955, issue of the Canadian Bar Review, (volume 33 at p. 1090), I wrote a review of a book, *Jurisprudence*, by G. B. J. Hughes. Some months after the publication of the book it was withdrawn by the publishers, and now we have, in its place, a new book, *Jurisprudence*, by R. W. M. Dias and G. B. J. Hughes. The explanation for the change is to be found in a special Foreword to the new volume written by Professors Hamson, R. Y. Jennings, and Radzinowicz of Cambridge:

> It is not unusual in a law school to allow a colleague to use, for the purpose of preparing a course of lectures, notes and materials already brought into existence by a previous lecturer. It may, however, be difficult for the successor, who has more than once repeated the course taken over, as Mr. Hughes has done, to remain conscious of the extent to which the material which he may be legitimately using belongs to his predecessor and accurately to judge the degree of his indebtedness when the same material is used for a different purpose. . . .

*Antonio Garneau, Q.C., Professor of Law, University of Montreal.

> We formed the opinion that the larger part of the book published by Mr. Hughes was derived from Mr. Dias's course of lectures. Nevertheless, its production, especially as regards its form and style, required from Mr. Hughes an original and creative effort. Accordingly, we suggested to them that in view of their original relationship it would be appropriate for them to act as if an antecedent agreement for collaboration had been made between them but that, to prevent misconceptions, they should produce as soon as possible a joint work to supersede the previous publication. [Foreword, pp. vii-viii]

And so an intellectual relationship begun some years ago when Mr. Dias was a lecturer at the University College of Wales, Aberystwyth, and Mr. Hughes his student, is carried on in the present joint work, with Mr. Dias now a Fellow of Magdalene College and Lecturer in Law in the University of Cambridge, and Mr. Hughes a Lecturer at the University of Hull. Further comment on the circumstances of the transition from *Hughes* to *Dias-Hughes* seems both gratuitous and also irrelevant in the light of the measured remarks in the Foreword by the three distinguished Cambridge law professors.

Understandably, *Dias-Hughes* invites comparison with *Hughes* in terms of basic structure and organisation, and intellectual content. Both books follow traditional English patterns in treating jurisprudence according to the triadic scheme—sources of law (for instance custom, precedent, legislation); legal concepts (for instance rights, duties,); and legal theory and philosophy of law (an examination of the various "schools" of law). Most North American students of jurisprudence would, I think, regard the first two divisions of the subject as rather dated and not of particular interest or significance, and proceed rather impatiently to the authors' discussion of the rival bodies of legal philosophy. In so far as this latter is the liveliest and most stimulating part of the authors' work, it is not too much to hazard the guess that their hearts are in this section of the work, and that the extended discussion of "sources" and "concepts" represents no more than the deference any legal textbook writer in England must pay to the rather rigid and old-fashioned public examination requirements in law. I note that a fourth section Law and Society, in the earlier, *Hughes* volume, which was actually a *tour de force* on the rôle of the English judiciary, in industrial and labour law, and also an excursus, in rather pejorative terms, on the "Old Court" majority of the United States Supreme Court up to 1937—both of which sections I criticized in my review, two years ago, of the *Hughes* volume—have been omitted from *Dias-Hughes*, and I believe that this editorial pruning in the new volume adds to the general scholarly tone and cohesiveness of the work.

In comparison with such established "classics" in the same field as Julius Stone's *Province and Function of Law* and Wolfgang

Friedmann's *Legal Theory*, *Dias-Hughes* is rather heavily derivative and, in effect, a collection of "other men's flowers". To the extent, however, that both Stone and Friedmann, with their general Commonwealth and American associations, can no longer be regarded as purely English in their affiliations, it is possible to say of *Dias-Hughes* that it is the best single text on Jurisprudence to come out of England in a considerable number of years and indeed the only one that could in any real sense be considered as adequate by North American standards of criticism. Canadian law deans who have regretfully concluded over the last decade or so that English legal scholarship is now bogged down in positivism and in rather trivial problems of linguistic analysis, and who have, therefore, consciously diverted their own graduate students from English law schools to the graduate law centres of the United States, might do well to take note of the very broad intellectual scope and range of interests in legal problems manifested in the *Dias-Hughes* volume. Taken in conjunction with the valuable writings, in recent years, of such other Cambridge scholars as Sir Ivor Jennings, E.C.S. Wade, and C. J. Hamson, to name only a few, the *Dias-Hughes* volume is a distinctive indication that in Cambridge at least the English law professor is not prepared to turn his back on society and is genuinely concerned with the problem of ensuring a continuing adjustment of abstract positive law doctrine to changing community conditions and needs.

EDWARD MCWHINNEY*

* * *

*Not Guilty*. By JUDGE JEROME FRANK and BARBARA FRANK. Toronto: Doubleday Publishers. 1957. Pp. 261. ($4.25)

This book is a collection of thirty-six true and dramatic cases of innocent men who were wrongly convicted. The authors' purpose, however, was "not merely to narrate these cases in which the state has punished the wrong men, but to suggest ways in which the occurrence of such horrible events can be reduced to a minimum". Their success in this two-fold undertaking gives the reader an exciting series of stories that read stranger than fiction and also brings public attention to problems that deserve serious consideration not only by the legal profession, but by our society as a whole.

The scheme of the book is a description of well-documented cases prepared by Barbara Frank, followed by commentary on the legal questions by her father, the late Judge Jerome Frank, of the United States Circuit Court of Appeals. Half of the cases are barely outlined, but the remainder are told in fascinating detail,

*Associate Professor of Law, University of Toronto.

and the reasons for the error in the verdicts are carefully analyzed. The concluding chapter contains Judge Frank's views on the fallibility of witnesses, the proper function of the prosecutor, the conduct of criminal trials and the use of pre-trial "discovery" in criminal cases. There is a brief reference to his opposition to the death penalty which "may mean the judicially sanctioned governmental murder of the guiltless".

Some of the cases analyzed in the book involved perjury, while others were the result of mistaken witnesses who honestly believed they were telling the truth. "Any witness, being human, may be fallible". From this premise, the authors examine how the subjective preconceptions of an individual witness affect the objective facts. Authorities are quoted to demonstrate the unique nature of each observer: eyesight, hearing, ability to judge time, power of concentration, training, and susceptibility to illusions and hallucinations are discussed. These problems of errors of observation are compounded when they are added to errors of memory.

There are examples of the deceptive nature of the demeanour of a witness. The difficulty of proving the unconcious prejudices of a witness which influence his testimony as well as his failure to communicate are examined. When jurors are seen as "witnesses of what goes on at the trial" all the same considerations apply.

The summary of Judge Frank contains a lengthy analysis of the "legal profession's current conception of a fair trial: a fight between lawyers according to certain ground rules that the trial judge, as a referee, will enforce, with the jury giving the decision to the winner". There is criticism of books on trial tactics which are made up of methods of confusing honest witnesses and magnifying their inconsistencies. In the light of the concept of a trial as a sanctioned fight, there is a review of the function of a public prosecutor. The "dilemma of a conscientious prosecutor" who employs the usual courtroom techniques is considered as a lesser danger to the innocent than the "politically ambitious prosecutor". Judge Frank has accumulated suggestions for reform of the office of public prosecutor in the light of American experience.

Often the narrative of a case contains several reasons for the error. In addition to those already mentioned, there are such causes as the failure of the police or prosecutor to make proper investigations, photographic suggestion and faulty line-up procedure, and the "third degree". Examples are given to show that "a defendant's right to assistance by counsel is worthless unless it signifies assistance by a lawyer capable of conducting a competent defence". Counsel must be able to obtain "all reasonably procurable evidence" but if the accused is poor he may be deprived of that right. The effect of a previous conviction is studied and the English rule is approved.

One section of the book is devoted to the granting of "discovery" to the accused in a criminal case: ". . . except in the U.S.A., to-day in every civilized land the accused, in advance of trial, is informed of the evidence the government will present against him". English and Canadian practice are praised in this regard. However satisfaction in our Canadian system should be tempered with the realization that protection of an innocent accused in Canada is not perfect. Many of the suggestions indicated in the symposium on Problems in Litigation[1] and in the symposium on Problems of Legal Ethics[2] should be seriously considered by the legislator.

To quote from the concluding page of *Not Guilty*,

> The fact that trials are human affairs, and therefore necessarily imperfect, does not at all call for distrust of every conviction. Many witnesses give reliable testimony. By and large our system works justly. It accords many safeguards to those on trial for crimes. We may assume that, on the whole, men in prison are not innocent.
>
> However, that assumption does not justify complacency.

No reader of this interesting and provocative book can remain complacent to the problems of the "not guilty".

SHELDON KERT*

---

## Books Received

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

*American-Australian Private International Law.* By ZELMAN COWEN. Bilateral Studies in Private International Law, No. 8. Columbia University, Parker School of Foreign and Comparative Law. New York: Oceana Publications. 1957. Pp. 108. ($3.50 U.S.)

*Citadel, Market and Altar: Emerging Society. Outline of Socionomy: The New Natural Science of Society.* By SPENCER HEATH. Baltimore, Md.: The Science of Society Foundation, Inc. 1957. Pp. xxiv, 259. ($6.00 U.S.)

*Current Legal Problems 1957.* Edited by GEORGE W. KEETON AND GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. Volume 10 with Consolidated Index. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1957. Pp. vii, 313. ($6.75)

---

[1] (1953), 31 Can. Bar Rev. 503.
[2] (1957), 35 Can. Bar Rev. 247.
*Sheldon Kert, of Singer & Kert, Toronto.

*61st Issue of The Canadian Annual Digest containing Every Canadian Case reported during 1956. Twelfth Annual Supplement to The All-Canada Digest, 1910-34, and Consolidated Supplement, 1935-44.* Edited and compiled by CECIL A. WRIGHT, Q.C., S.J.D., LL.D., BORA LASKIN, Q.C., M.A., LL.B., LL.M., R. S. MACKAY, LL.M., GORDON F. HENDERSON, Q.C., MISS JANET V. SCOTT, LL.B., K. D. M. SPENCE, Q.C., and the Editorial Staff of Canada Law Book Co. Ltd. Toronto: Canada Law Book Company, Limited. 1957. Pp. xxxv, 1064. ($11.50)

*The Joint Venture and Tax Classification.* By JOSEPH TAUBMAN, B.A., LL.B., LL.M., J.S.D. New York: Federal Legal Publications, Inc. 1957. Pp. xvii, 493. ($15.00)

*Justice in Plato's Republic.* By PETER FIREMAN. New York: Philosophical Library, Inc. 1957. Pp. 52. ($2.00 U.S.)

*Jurisprudence.* By R. W. M. DIAS, M.A., LL.B. (Cantab.), and G. B. S. HUGHES, M.A. (Cantab.), LL.B. (Wales). London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1957. Pp. l, 529. ($10.50)

*Labour Arbitration Procedures: A study of the procedures followed in the arbitration of union-management disputes in the manufacturing industries of Ontario.* By C. H. CURTIS. Kingston: Queen's University. 1957. Pp. ii, 90. (No price given)

*The Law of AWOL.* By ALFRED AVINS. New York: Oceana Publications. 1957. Pp. 288. ($4.95 U.S.)

*The Law of Copyright.* By J. P. EDDY, Esq. With the Copyright Act, 1956, annotated by E. ROYDHOUSE, Esq., LL.B., and with Texts of Conventions. Reprinted from Butterworth's Annotated Legislation Service. London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1957. Pp. xvii, 356. ($8.75)

*The Law of Torts.* By JOHN G. FLEMING, M.A., D.Phil. Sydney, Melbourne and Brisbane: The Law Book Co. of Australasia Pty. Ltd. Toronto: The Carswell Company Limited. 1957. Pp. xxxix, 779. ($12.50)

*The Law Quarterly Review: Index to Volumes 1—72.* By PETER ALLSOP, M.A. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1957. Pp. xii, 326. ($8.00)

*Legal Ethics: A Study of Professional Conduct.* By MARK M. ORKIN. Toronto: Cartwright & Sons Limited. 1957. Pp. xlviii, 330 (No price given)

*No Moaning of the Bar.* By GEOFFREY LINCOLN. London: Geoffrey Bles. Don Mills, Ont.: Geoffrey Bles Ltd. 1957. Pp 153. ($3.00)

*The North West Company.* By MARJORIE WILKINS CAMPBELL. Toronto: The Macmillan Company of Canada Limited, 1957. Pp. xiv, 295. ($5.00)

*The Office of Lieutenant-Governor: A Study in Canadian Government and Politics.* By JOHN T. SAYWELL. Canadian Government Series. Edited by R. MACG. DAWSON. Toronto: University of Toronto Press. 1957. Pp. xii, 302. ($5.50)

*The Presidency in the Courts.* By GLENDON A. SCHUBERT, JR. Minneapolis: University of Minnesota Press. Toronto: Thomas Allen Limited. 1957. Pp. xi, 391. ($5.90)