REVIEWS AND NOTICES

Damages for Personal Injury and Death in Canada. By IMMANUEL GOLDSMITH, LL.B. (Lond.). Toronto: The Carswell Company Limited. 1959. Pp. xxxi, 374. ($13.50)

The assessment of damages has attracted increasing attention in recent years having been the subject of two books published in England,[1] one book written in France,[2] and of the Special Lectures of the Law Society of Upper Canada delivered in Toronto in 1958.[3] The present work is the first treatment of this important problem in Canada.

The author points out that the relative paucity of detailed Canadian jurisprudence on the quantum of damages is probably due in part to lack of interest on the part of the law reporters and in part to the judges having refrained from amplifying their reasons for the awards they have made. The more recent cases referred to seem to indicate that both law reporters and judges are now treating the amount of damages in greater detail.

The main body of the book is divided into two parts—Non-Fatal Injuries and Fatal Injuries. The first part opens with a brief but lucid discussion of the general principles of assessment of non-fatal injuries which would be more useful in Quebec if more detailed reference were made to Quebec authorities and jurisprudence. Then follows a classification of awards based upon an anatomical division of the human body—into Head, Body, Arms, Legs, and Multiple and Unspecified Injuries. Each main division is subdivided—for instance "Arms" are subdivided into Whole Arm, Upper Arm, Elbow, Forearm, Wrist, Hand and Fingers. Each subdivision is again redivided into appropriate sub-headings (*e.g.* Whole Arm is resubdivided into Dislocation, Fracture, Injury, Loss One, and Paralysis) and under each heading the digests of the cases are listed in descending order with the highest award first.

[1] Kemp and Kemp, The Quantum of Damages in Personal Injury Claims, in two volumes (1954), reviewed in (1957), 35 Can. Bar Rev. 583; and Munkman, Damages for Personal Injuries and Death (1956).

[2] Le Roy, L'évaluation du préjudice corporel, Paris: Librairies Techniques, (1957).

[3] Published by Richard de Boo Limited, Toronto.

Part Two opens with a nine-page summary of the general principles of assessing damages for loss of life. Here again more attention could usefully have been paid to Quebec law. The statement on page 264 that in most provinces but not in Quebec it is expressly provided that insurance payments shall not be taken into account in assessing damages should be corrected because article 2468 C.C. does specifically so provide. On page 265 in a footnote under the general heading of "Estate Actions" where it is said that damages for both pain and suffering and loss of expectation of life are recoverable in Quebec, reference might be made to *Green* v. *Elmhurst Dairy Limited*,[4] and *Levesque* v. *Malinovsky*,[5] the two leading cases on the subject up to the end of 1958.

Under Part Two the awards are classified according to the relationship between the party claiming and the deceased, *i.e.* Father, Mother, Son, *etc.* The digests of the awards are again arranged in descending order of financial value. Awards in respect of the loss of sons and daughters are also classified by the age of the deceased.

The appendices contain a consumer price index; seven diagrams of various parts of the body; and a glossary of medical terms which should prove useful to lawyers and judges faced with the medical witness who does not translate technical terminology into ordinary language.

In perusing the awards listed, one is struck by the apparent inadequacy of many awards in the earlier cases—as little as $2,200 has been awarded for the loss of an eye by a six year old child; and by the fact that recent awards in all the provinces, both by juries and judges, have substantially increased. A Saskatchewan court in 1957 awarded to the thirty-year old widow of a doctor aged thirty-seven, earning $8,000 per year at death, $50,000 (of which $15,000 was for the only child). In the same year an Alberta Court awarded $50,000 to the widow of a cabinet minister killed at forty-three, and $30,000 to the five minor children. This is still a long way from the large awards by juries in the United States which in 1956 were reported[6] to have risen to a record of $700,000.

As Mr. Goldsmith points out in the introduction, the book "is concerned only with the amount of damages assessed" and not with the theoretical basis of assessment. It provides a quick method of evaluating damages for personal injury or death although such evaluation can at best be only approximate because the facts of two cases are rarely if ever exactly the same.

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[4] [1953] Q.B. 85.

[5] [1956] Q.B. 351, and see *Village of Gracefield* v. *Bainbridge*, [1959] Q.B. 44.

[6] Modern Trials by M. M. Belli, reviewed by A. M. Watt, Q.C. in (1956), 34 Can. Bar Rev. 100, at p. 106.

Approximately 650 cases decided between 1942 and June 1958 by the courts of all the Canadian provinces are digested, of which over 150 are from Quebec. Almost all the cases should be of interest in all the provinces of Canada.

The book is well printed, well arranged, and contains an excellent index and a detailed table of cases. It should prove useful in court and of substantial assistance to both lawyers and insurance adjusters engaged in endeavouring to settle claims in all the provinces of Canada.

GEORGE S. CHALLIES*

* * *

The French Law of Wills, Probate, Administration and Death Duties of the Estates of English Decedents Leaving Property in France. By PIERRE PELLERIN, Licencié en droit of the University of Paris and of Lincoln's Inn (London), Barrister-at-Law and Jean Pellerin, Fourth Edition. London: Stevens & Sons Limited. 1958. Pp. 68. (7s. 6d.)

This little book, written in English, can be very useful to any Canadian lawyer who has to find his way through the intricacies of French estate laws. While it does not pretend to be a treatise on the subject it could, perhaps, be termed the "*Guide Pellerin*" by which the foreign practitioner can comprehend the problems with which he has to deal under another legal system in an extremely complicated field.

Accustomed, as we are, to the principle of the "freedom of willing" it is necessary, above all, to understand the restrictions placed upon the testator in France. These have been made clear by the authors. Likewise, with the several forms of wills, one of which, the mystic or secret will, I must confess was quite unknown to me. They also describe the "seizin" obtained by legal heirs and universal legatees by the mere fact of the death, and the procedure by which others obtain possession of their interest in an estate.

The order of intestate succession is set out with commendable clarity and the liability for debts of the deceased and the limitation thereof available through "benefit of inventory" is explained.

Securities are the most common foreign assets to be found in Canadian estates today and the formalities to obtain transfer of those registered in France or otherwise within French jurisdiction are given in detail. The special problems relating to French real estate are also indicated.

A special chapter deals with death duties and outlines the

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procedure for settling them. It contains a summary of the rates of duty and the method of payment. In this connection I was interested to learn that since 1955 it has been possible in France to take out special life insurance policies for the payment of death duties the proceeds of which, to that extent, are exempt from such duties.

The work concludes with a review of French private international law as it affects the distribution of estates and the payment of death duties.

At the end of the last war I had to wind up the estate of a French national who married in England while retaining his domicile in France and subsequently emigrated to Canada. He left a widow and two children, one born in France and one in Canada. He was killed while serving abroad with the forces of Free France. He left assets in Canada, in France and elsewhere, and no will. It is unnecessary to describe the complications which ensued. I can only say that I wish that someone at that time had directed me to the third edition of this book. It would have been of great assistance and I recommend this fourth edition to anyone who may be similarly placed.

I would suggest that on its next edition the title might be amended to read "*Successions, Wills, Probate, Administration, etc.*", as the present one is slightly misleading as to the scope of the work which includes the field generally known to many of us as "Successions".

G. MILLER HYDE*

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Municipal Law. By CHARLES S. RHYNE, Member of the Bar of the District of Columbia. Washington, D.C.: National Institute of Municipal Law Officers. 1957. Pp. xxi, 1125. ($22.50 U.S.)

Lawyers in the United States engaged in municipal law are fortunate in now having an up-to-date textbook on that subject of a high degree of excellence. As the learned author says in his preface, the great increase within the last thirty years in municipal duties, services, responsibilities and activities has created a need for a current restatement of the basic principles of law applicable to the modern city. This book attempts the task of making a completely new approach and a completely new summary of the law as it exists today in the United States and, as far as this reviewer can judge, succeeds admirably. It is written in clear, precise language and expresses complex ideas and subtleties of meaning with an altogether admirable brevity. The result is that although thoroughly documented by reference to case law and to legal

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publications, almost all aspects of municipal law are covered in one handy volume.

Unfortunately, although a new text on municipal law is certainly as badly needed in Canada as it was in the United States, this book can be of little direct use to municipal lawyers in this country because of the divergent lines on which development of the law has taken place. Indeed, in reading this book, it is almost startling to see how often the courts in the United States and in the common-law provinces, applying similar basic principles, have in the course of time and by the accretion of new distinctions and concepts, reached entirely different conclusions.

The question of municipal tort liability provides a good example of this sort of development. In the common-law provinces of Canada a municipal corporation is on the same footing regarding tort liability as a private corporation. This was originally the case in the United States but, surprisingly enough, in the nineteenth century the maxim "the King can do no wrong" was applied to give municipalities immunity in the performance of what was called their "governmental", as opposed to their "proprietary", functions. The distinction between these types of functions is a difficult one to make and subject to many exceptions. It is not applied, for instance, in the case of liability for public nuisance or for non-repair of highways. Nevertheless, because of the immunity in their "governmental" functions, municipalities in the United States or their boards or commissions are rarely held liable for torts arising from the maintenance and operation of educational or health services, public parks or recreational areas, police forces and fire departments.

Another concept familiar enough in this country, but unfamiliar in its application to municipal torts, is the concept of *ultra vires*. Even if a particular function is "proprietary", a municipality in the United States may be immune from tort liability if it can show that it was acting beyond the scope of its lawful powers. It is strange indeed to read that "where the act complained of necessarily lies wholly outside the powers of the corporation, the corporation can in no way be liable to an action for damages, notwithstanding its governing body directly commanded the performance of the act". Still another concept applied by some, but not all, American courts and not familiar in this country is the distinction between what are called discretionary and ministerial functions. Where this distinction is made there is no municipal liability with respect to the granting, refusing or revoking of licences or with respect to the discharge of employees or officers.

Municipal liability for torts committed by employees of municipal boards or commissions likewise depends on different rules. In Canada a board or commission is looked upon as a sort of

statutory agent of the municipality even if incorporated and its employees are servants of the municipal corporation for whose acts within the scope of their employment the corporation is liable under the *respondeat superior* rule. The one exception to this is in the case of employees whose duties are statutory or of a public nature. In the United States the test in all cases is whether or not the municipal corporation could have exercised control over the employee.

It would not give a fair picture to suggest that municipal law differs in the United States over the whole field as much as it does in torts. For instance, the chapter on municipal contracts might apply almost word for word in the Canadian common-law provinces. Generally speaking, however, the law of the two countries differs so greatly that any textbook written for one could not be of practical use in the other, at least in areas where the law is well established.

In areas where the law is not well established a lead given by one jurisdiction may be of assistance in another. This reviewer accordingly looked to see what experience municipalities in the United States have had with the problems of planning and metropolitan government. It would appear, however, that the development of the law in these matters is no more advanced there than in Canada. There is no section in the book on metropolitan government and only a few pages on planning.

Mr. Rhyne, as President of the American Bar Association, 1958-59, was a guest speaker at the last annual meeting of the Canadian Bar Association. Those who met him on that occasion will not be surprised at the excellence of this work and will share this reviewer's regret that its use in this country must of necessity be limited.

A. P. G. JOY*

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Contribution a l'étude de la condition de la loi étrangère en droit international privé français. By IMRE ZAJTAY. With a Preface by HENRI BATIFFOL. Paris: Editions A. Pedone. 1958. Pp. ii, 218. (No price given)

Students of conflicts of laws will find much to interest them in this excellent study of the condition of foreign law in French conflicts of laws doctrines. The monograph is the work of Dr. Imre Zajtay, *Maître de Recherches* at the *Centre National de la Recherche Scientifique* in Paris, and it is enriched by a lucid and succinct Preface by Professor Henri Batiffol, *doyen* of modern French conflicts of laws jurists.

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Briefly, proof of foreign law, in French conflicts of laws as in English and Commonwealth conflicts of laws, is a question of fact. But there is this important consequence in French law that is not present in Commonwealth jurisdictions: since the appeal (*pourvoi en cassation*) in France is limited to questions of law, in theory the findings of the lower courts, in France, as to foreign law, cannot be disturbed by the *Cour de cassation* on appeal. Dr. Zajtay traces the historical origins of this particular French rule, and demonstrates the extent to which, as a matter of law-in-action, the superior courts in France have actually assumed a power of correcting the findings of lower courts as to foreign law—in the name, formally, of ensuring the unity of French law (strictly, uniformity of French decisions), or of preventing an express contravention of a French law. Actually, it seems reasonably clear, from Dr. Zajtay's detailed demonstration, that the intervention by the *Cour de cassation* has been influenced very strongly by a desire to do substantial justice in the individual case—see his discussion of the German (Jewish) nationality cases arising out of the Allied Control Commission for Germany's decree abrogating the Nazi nationality laws directed against Jews (pp. 143-150) —in spite of the damage done thereby to neat, conceptual distinction between "fact" and "law" on which the formal limits to the supervisory jurisdiction of the *Cour de cassation* are predicated. Dr. Zajtay who, on the whole, believes that the *Cour de cassation* should exercise restraint in making such interventions in regard to the work of the lower courts, nevertheless records his firm opposition to the recommendation (article 56) contained in the Advance-Project submitted by the Commission for Reform of the French Civil Code which would eliminate altogether the *pourvoi en cassation* in matters of interpretation of foreign law: Dr. Zajtay feels, and with this sentiment Professor Batiffol seems in full accord, that the proposal would establish an undesirable barrier to the evolution of French *jurisprudence*.

In the common-law countries, proof of foreign law, in conflicts of laws cases, is also a question of fact, with the consequence that a judicial finding as to a particular point of foreign law arising in one case is no authority or precedent as to the same or a similar point of foreign law arising in a subsequent case. The extra freedom of action that this rather anomalous situation gives the common-law judge may seem to be outweighed, at times, by the inelegance of absurdly inconsistent or contradictory judicial findings as to the same point of foreign law, and the uncertainty and confusion resulting therefrom for the practising bar. Proposals for reform of this area of common-law conflicts of laws—and the proposals have even included the setting up of a United Nations expert commission to make findings as to the state of foreign law—would

undoubtedly benefit from study of Dr. Zajtay's scholarly survey of French experience, which includes a very full survey of the French case-law.

EDWARD MCWHINNEY*

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Canadian Income Tax Appeal Board Practice. By R. S. W. FORDHAM, Q.C., LL.B. Second Edition. Toronto: C.C.H. Canadian Limited. 1958. Pp. xx, 220. ($4.00)

In the short time since the Income Tax Appeal Board heard its first case in April, 1949 it has become one of the most important tribunals in Canada. It has provided an expeditious and inexpensive means whereby any taxpayer may appeal from an income tax assessment. It has already heard well over 3,000 appeals, many of which have involved substantial sums of money and important principles of income-tax law. With the introduction of the Estate Tax Act the Board has been given the added responsibility of hearing appeals from assessments under that statute and its name has accordingly been changed to the "Tax Appeal Board".

The technical procedure involved in bringing a case before the Board differs considerably from that followed in the provincial courts. An appellant may be represented by an agent who is not a solicitor. However, the Board is a court of record and hears evidence. The members of the Board are all lawyers and have consistently made it clear that it follows judicial procedures and methods.

In 1953 the first edition of *Income Tax Appeal Board Practice* appeared. The author, Mr. R. S. W. Fordham, Q.C., has been a member of the Board since early in its history and is eminently qualified to write a book on the subject. His book received an enthusiastic reception when it was first published in 1953. The rapid change and development of income-tax law and practice in Canada has warranted a second edition and this has now been provided.

The first eight chapters deal mainly with procedural matters. Mr. Fordham has amplified these chapters by a discussion of many decisions and other developments which have occurred since the appearance of the first edition. Chapter VII which relates to appeals to the Supreme Court of Canada is new and had no counterpart in the first edition.

The diversity of the procedural questions covered will be seen from a list of some of the chapter headings—namely "Procedure"

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(consisting mainly of comments on the applicable statutory provisions), "Rules of Practice and Procedure", "Conduct of Appeals", "Effect of English Decisions", "Appeals to Exchequer Court of Canada", "Appeals to Supreme Court of Canada" and "Evidence". The chapter on appeals to the Exchequer Court throws into sharp focus some of the anomalous consequences of the decisions to the effect that an appeal to that court is a trial *de novo* and that a taxpayer who was successful before the Board but whose case is appealed by the Minister still has the onus of establishing in the Exchequer Court that he is not taxable.

These chapters contain not only a very complete exposition of the technical aspects of procedure on tax appeals but also many practical observations and suggestions. They are extremely valuable to counsel as a guide to the conduct of a tax appeal.

In the last three chapters of his book Mr. Fordham departs from procedural questions and deals with some of the most common problems arising under the income-tax law. Chapter X relating to "Expense Deductions" has been amplified in the second edition only with respect to a few specific points. However, Chapter IX which is entitled "Some Legal Principles" has been greatly expanded to cover many new subject matters. While this chapter does not have the scope of a textbook on income-tax law it contains a very concise and useful discussion of some tax problems which frequently arise.

The last chapter of the book, Chapter XI, relates to arbitrary assessments. It contains examples of net worth statements on which such assessments are based and suggests what may be the most effective means by which a taxpayer can challenge this type of assessment.

The first edition of Mr. Fordham's book has been extremely useful to the legal profession as well as to accountants and other persons dealing with tax questions. In the second edition it has been brought up to date and has been improved in many ways. It will be a very valuable addition to the library of any practitioner who is concerned with tax matters.

STANLEY E. EDWARDS*

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Evolving Canadian Federalism. By A. R. M. LOWER, F. R. SCOTT, J. A. CORRY, F. H. HOWARD, ALEXANDER BRADY. Durham, N.C.: Duke University Press. 1958. Pp. xvi, 187. (No price given)

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Legal Personality and Political Pluralism. Edited by LEICESTER C. WEBB. Melbourne: Melbourne University Press. Toronto: The Macmillan Company of Canada Limited. 1958. Pp. xvi, 200. ($5.00)

Strukturprobleme der modernen Demokratie. By GERHARD LEIBHOLZ. Karlsruhe: Verlag C. F. Müller. 1958. Pp. ix, 304. (DM 18.80)

A number of new works in the borderland area between law and political science—one Canadian, one Australian, and one German—deserve attention because of their concern with ultimate principles of constitutional law and government in the liberal democratic society. *Evolving Canadian Federalism* is another work in the excellent series being produced by the Duke University Commonwealth Studies Center. It is a symposium effort, and there are four essays on various aspects of Canadian federalism, by A. R. M. Lower, F. R. Scott, J. A. Corry, and F. H. Soward; with a fifth essay, devoted to a comparison of the Canadian and the new British West Indies federations, by Alexander Brady. Necessarily, with such a slim volume, and one designed at that primarily for non-Canadian readers, there is little in the way of new ground broken. I admired the dispassionate way in which Professor Scott discharged his assignment of discussing "French-Canada and Canadian Federalism", especially his treatment of the controversial Tremblay Report. All the same, it seems a pity that the editors could not have included at least one essay by a French-Canadian jurist, perhaps another from the pen of the indefatigable Mr. Pigeon, who carries on, simultaneously, a legal practice in Quebec City, and lectures in constitutional law at Laval University, and responds most generously to requests for writings for publication, where the full-time professors of public law in French-Canadian law schools remain strangely silent.

The surprise with *Legal Personality and Political Pluralism* is that it has been produced in Australia, and not in Canada. In Canada today the constitutional debate is still over monistic as opposed to pluralistic theories and conceptions of federalism, the latter approach being represented most signally in the constitutional case law by the "provincial rights" oriented opinions handed down by the Privy Council in the successive eras of Lord Watson and of his intellectual disciple Lord Haldane. In Australia, by contrast, there has never really been any major debate, in modern times, over theories of federalism, "states rights" to the extent that they have existed (other than as a purely political catch-cry) having been little more than a legal device for the preservation of economic laissez-faire. Perhaps this was inevitable, from the

outset of the Australian federation, in view of the basic ethnic and cultural homogeneity of the country. It is not surprising, in any case, that in the present volume, the discussion, where it is vibrant and absorbing, centres almost exclusively on English, and to a lesser extent American experience and source materials. Some of the essays are rather dry and musty and merely rake over old leaves once more, but three of them in particular will prove to be very stimulating to those with a background in nineteenth and twentieth century English political and legal theory, and especially to those with some passing acquaintance with the earlier, liberal pluralist phase of Harold Laski's political thinking, I refer to the excellent essay by Professor Webb on Church and State relationships; to the essay by S. J. Stoljar on legal control of private associations; and finally to the historically-based essay by R. M. Martin on the legal position of the trade union. There is, unfortunately, (and no doubt for the reasons mentioned earlier) no essay on ideas of pluralism and the Australian constitution.

Dr. Leibholz, who is currently a professor in the Faculty of Law at the University of Göttingen, and also a justice of the federal Constitutional Court (Bundesverfassungsgericht) of West Germany, has produced a valuable monograph which seeks to trace relationships of institutions and values in the modern state. The process of rebirth of democratic government in West Germany, after the perversions of the Nazi régime, has been a difficult and often painful experience. Dr. Leibholz, as a political exile from Hitler's Germany, became directly acquainted with English and American legal literature, and he has drawn on it very fully in the present works. Where German writings on public law, before the last world war, tended to be rather arid, abstract stuff—Kelsenism, for example—Dr. Leibholz reveals a very keen concern with the extent to which philosophic principles in the constitution can be made to work in real life. A great deal of his work is directed to what one might call the institutional and procedural bases of democracy, especially the measures, under the new West German public law, to ensure free elections and voting, and also the operation of judicial review as a legal device for the practical effectuation of constitutionally-defined rights. If Dr. Leibholz lacks the natural law inclinations that were so strongly manifest in German legal thinking in the immediate aftermath of the defeat of 1945, his ample rejection of positivism in favour of an empirically-based, pragmatist-type approach seems to offer far better prospects of building and maintaining a robust constitutionalism in Germany today than ever did the heavily formalistic jurisprudence-of-concepts of the old, Weimar era.

EDWARD MCWHINNEY*

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Early English Legal Literature. By T. F. T. PLUCKNETT, F.B.A. Cambridge: Cambridge University Press. 1958. Pp. vii, 120. ($3.15)

Potter's Outlines of English Legal History. By A. K. R. KIRALFY, Ph.D., L.L.M. Fifth Edition. London: Sweet & Maxwell, Limited. 1958. Pp. xvi, 285. ($4.75)

Potter's Historical Introduction to English Law and its Institutions. By A. K. R. KIRALFY, Ph.D., L.L.M. Fourth Edition. London: Sweet & Maxwell, Limited. 1958. Pp. xxxii, 675. (no price given)

Early English Legal Literature is based upon a series of lectures which Professor Plucknett gave in commemoration of the hundredth anniversary of the birth of F. W. Maitland. This is a book which Maitland might have written and if he were alive I think that he would be very pleased with it. It is a fascinating scholarly book which examines the development of English legal literature and the development of English law through its textbooks.

In no small measure the English legal textbooks have moulded the law. Today the law consists of principles and "we treat these principles as existing in the law itself and not merely in the speculative minds of text-writers". Our modern textbook Professor Plucknett explains "begins with a definition of its subject-matter, and proceeds by logical and systematic steps to cover the whole field. The result is to present the law in a strictly deductive framework, with the implication that in the beginning there were principles, and that in the end those principles were found to cover a large multitude of cases deducible from them. Needless to say, such a presentation of English Law was fundamentally false during most of its history. Historically, our law did not always proceed from principles to details, from the general to the particular. On the contrary, during most of its past, our law was a farrago of detailed instances which defied any scheme of arrangement, save perhaps the alphabetical". In discussing and comparing the state of legal literature and the law, Professor Plucknett assumes that at any time the state of our textbooks is an accurate index of the intellectual state of the law and a measure of its progress towards rationality. This is a convincing assumption which Professor Plucknett examines in some detail.

The chapter on Bracton reads like a superior detective story as the reader is introduced to Bracton and then by the use of the available clues and other evidence Professor Plucknett explains how Bracton's book came to be written, when it was written and how the text was altered from time to time. In the same manner the author examines the textbooks which followed Glanvill and

Bracton and discusses many of the teasing points surrounding the Year Books.

This is a work which can be recommended to the law student which cannot but help to make the study of legal history more interesting, and to most lawyers for leisure reading.

Potter's Outlines of English Legal History was first published in 1923. The following three editions were written by Professor Potter while the fifth and latest edition, being the first published since the death of Potter, has been prepared by Dr. A. K. R. Kiralfy, one of his former students. *Potter's Outlines* is in essence a pocket book of English legal history from Anglo-Saxon times to the present day designed as preliminary reading for students of legal history. The book briefly traces the evolution of our courts and judicial system and the origin, nature and growth of common law and equity. It is a readable book and yet covers a surprising amount of ground, perhaps too much for the size of it. On the other hand for an elementary book, it appears to be not so brief so as to be inaccurate, as far as it goes, which is not an inconsiderable feat. The changes which have been made in this edition consist primarily of added explanations and illustrations to the text. Dr. Kiralfy has also indicated in the preface that the new edition has provided an opportunity for considerable re-wording of many passages.

Potter's Outlines would seem to be a more useful book for a student who already knows some legal history. My only criticism of this book is to doubt the value of it as preliminary reading for students. This very likely is an invalid criticism considering that there have been five editions of it in a short time. Nevertheless, it has been said that if law is a difficult study to the beginner, the history of the law, with its different outlook and unfamiliar concepts, is apt to be more difficult still. It would seem, therefore, that the beginner in legal history, as a beginner in any other field, should be first exposed to a general treatment of some of the more interesting aspects of the subject with the object of arousing his interest in and to encourage a more intensive study of legal history. For the student who has never studied legal history, it would seem, for example, that a study of certain of Maitland's historical essays could constitute a more useful and more interesting introduction to legal history than reading a précis of a more advanced text. This could give the student with limited knowledge some idea of the setting in which the history of law should be placed and some of the intellectual influences which helped to shape its growth.

Potter's Historical Introduction to English Law and its Institutions grew out of his smaller *Outlines of English Legal History.* The present edition, also by Dr. Kiralfy, is the fourth edition, the first three being written by Professor Potter. This edition is not

greatly different from the earlier editions in its fundamental character. Some sections in the chapters on the forms of actions and the history of tort have been re-written as has also been the section on the Year Books. A new table of Year-Books cases has also been included which lists almost three hundred cases. Potter, in the three editions written by him, had treated tort and crime together as had Sir William Holdsworth. These subjects have now been treated separately by Dr. Kiralfy and brief accounts of the principal crimes have been added to the text.

Professor Potter used to say that the central facts of legal history do not change but they are clad from time to time in a new garment. Successive editions of a history of law cannot but help to treat subjects differently in the light of changing social conditions and new evidence available. One need look only at the seventy-odd volumes of the Selden Society publications to appreciate the substantial amount of source material which has become available to modern historians. One also appreciates how well qualified Dr. Kiralfy is to bring out these new editions of Potter's works when one considers in addition to his other qualifications as a legal historian, his association with the Selden Society. With the many new references to the Year Books added by Dr. Kiralfy, one cannot but speculate when the publication will be announced of the *General Guide to the Selden Society's Publications*, which is being prepared by him.

Generally, the *Historical Introduction to English Law* contains the same material, often in the same wording, as found in the *Outlines of English Legal History* with added references and greater detail and illustrations. Surprisingly some subjects are treated in greater detail and more clarity in the *Outlines of English Legal History*. For example, the text on barring an entail is substantially the same in both books but in the *Outlines of English Legal History* a reference to the chain of title of Blackacre is given as an illustration which makes the law much easier to understand. In the *Historical Introduction*, which has not this example, the reader is warned that the learning relating to this matter is not easy which is not untrue so far as reference is there made to it.

In any book, no matter what care the author takes, there are bound to be errors or misprints. This is much more likely to occur when the scope of the subject is as great as in these books. The errors in and discrepancies between the two books are, however, in general minor.

It is difficult to imagine how this book could be written better or differently and yet still cover the same ground so thoroughly and intelligently in the same space. Here we have a useful and valuable textbook for the student and a convenient reference book for the practising lawyer or general reader. It is not, however,

the type of history book one would ordinarily pick up and read for pleasure. When one considers what Ranke called the true function of the historian as "not to judge the past or to instruct the present but merely to show how things actually were", my only criticism of this book would be that in covering so much ground it is not "history" but a record of events. History must be understood and a record of events is not enough. In order to properly understand history, one must be supplied with a sufficient social background so that one can picture the events against the background and more nearly be able to think "the common background of our forefathers about common things". But the dispute on how to teach and write history still continues. There are at least two types of histories and there is a place for each. The *Historical Introduction to English Law* does not attempt to be a social history but a record of the institutions and outstanding events and persons — the milestones in the development of English law. It is one of the better books of this latter type.

J. D. HONSBERGER*

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Star Wormwood. By CURTIS BOK. New York: Alfred A. Knopf. Toronto: McClelland & Stewart Ltd. 1959. Pp. 228. ($4.50)

An eminent jurist presents a vigorous appeal for the serious study of penology, a complete appraisal of modern theories of punishment and enlightening suggestions for dealing with those accused of crime, that deserve the attention of the courts, the law enforcement agencies and the legal profession generally. The book is a three-part story of a seventeen-year-old boy who commits an act which, coming under the category of murder, undergoes trial leading to conviction and execution. Each section is followed by a commentary based on three William H. White lectures delivered by the author at the University of Virgina Law School in April, 1957.

Roger Haike was very much alone, his father and sister having died and his mother having remarried and left him. He was jobless and while he had a place to sleep in the basement of an apartment house in return for looking after the furnace, he had no money. His former school principal met him on the street one day and offered him the job of caretaker, the regular man having met with an accident. He would not be paid for a week and not having eaten for three days he managed to snare a rabbit in the woods and took it to the school to cook it over the furnace fire.

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A girl of thirteen, described as well-formed and evil, and incongruously named Angela, had dared her older brother to have intercourse with her. Once commenced, the incest continued merrily for a couple of months when Angela tired, not of the act but of Joe, and when she tried to discontinue the relationship Joe threatened to tell their parents. Angela fearing pregnancy left home suddenly without knowing where she was going but intent on self-destruction, full of hatred for Joe and for all mankind, and determined to avenge herself on someone. Approaching the school where she could at least keep warm while collecting her thoughts, she entered the furnace room and found Roger roasting the rabbit. She threatened to report him for a breach of a rule against cooking food on school premises and the startled Roger, having lost in the flames his first opportunity for sustenance in seventy-two hours, was overcome with fear of losing a paying job and anger at this brazen girl threatening him. He shook her but did not realize how tightly his fingers pressed on her throat. When she dropped lifeless to the floor he tried clumsily to burn her body. Roger made no attempt to run away, the community was righteously aroused, he drew a hanging judge and a jury bent on revenge. The discovery of sperm in Angela's uterus did not help Roger. Lawyers will appreciate the valiant but frustrating efforts of defence counsel appointed by the court.

The author uses this story to present in his comments an excellent exposure of the complete failure of punitive penology and a protest against a legal system founded on vengeance. While there is no doubt about the fact that Roger caused Angela's death, there is an absence of *mens rea* and therefore instead of revenge by society there should be treatment of the guilty party. It may be argued that some progress has been made when it is realized that in England 150 years ago over 200 offences were punishable by death. Limiting capital punishment to hanging may be some improvement over the emasculation and dismemberment that accompanied execution in the days of Elizabeth I, but it is still retribution and while such activities as murder, rape, robbery and assault were recognized as crimes in early civilizations, we have advanced little from the Old Testament tribal law of vengeance—an eye for an eye, a tooth for a tooth.

The author argues that crime is a disease of civilization and not an inevitable facet of human nature. Thus the greater need for the contributions that can be made by the psychiatrist, the psychologist and the sociologist. Lawyers and doctors have been at cross purposes for too long as the law presumes men sane while psychiatry presumes them mad, or at least ill. Roger may have been guilty of a crime, but psychiatrically innocent. Burning him in the electric chair would deter no one. The author feels, however,

that the gap between the legal and medical professions is slowly closing and this is evidenced by a greater degree of parole administration, a change from the fortress type of penitentiary to the minimum-security camp and guidance by teaching, both educative and vocational. There may still remain a problem in dealing with incorrigibles but psychiatrists seem to feel that most wrongdoers are susceptible to treatment.

Imprisonment is a vengeful form of punishment, hanging is a relic of mediaeval barbarism. I have sometimes wondered how much real and serious study of penology is made by our judges, our prosecutors and our law enforcement officers. How many have witnessed a hanging and heard the agonizing death rattle of a man being strangled? How many have seen the flayed back of a man flogged? These may be the results of judicial sentences, but the chances are good that even less is known about what is done to prisoners who commit even trivial and very natural breaches of prison rules. Let them enquire, better still, let them witness the treatment, if their stomachs can stand it.

While this book deals with situations in the United States, all of the comments and recommendations apply with equal force in Canada. We have had one Royal Commission after another on the subject of prison reform, but what happened? We still have the old refinements of torture—solitary confinement, deprivation of food, beatings. Incarceration generally does not improve a person, but embitters him. Corporal punishment is nothing but legalized sadism. "Vengeance does not save souls, restore minds, or mend consciences." (p. 186). And because so little is done for prisoners, so little guidance and training supplied, the recidivist rate is probably as high if not higher in Canada than elsewhere. At the risk of repeating something that has been said so often before, a complete review of our penal system is long overdue.

The author of this interesting book is a distinguished Justice of the Supreme Court of Pennsylvania. His writing is superb which may not be surprising as he probably inherits the facile pen of his famous father who wrote one of the most charming books in the English language—*The Americanization of Edward Bok.*

J. RAGNAR JOHNSON*

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Sober as a Judge. By HENRY CECIL. London: Michael Joseph Limited. 1958. Pp. 205. (13s 6d)

In *Rex* v. *Sussex Justices Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259, Lord Hewart said:

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> There is no doubt that it is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done.

In his latest volume, *Sober as a Judge,* Henry Cecil has in the opening lines paraphrased that dictum to read, "Judges in their private lives must not only be good; they must manifestly be seen to be good". This gives him the opening to pursue one of the minor themes in this little symphony in lighter vein based on the life and doings of Mr. Justice Thursby—especially the difficulties which the latter encounters from the care which so august a personage must exercise in his private life. For Roger Thursby, Q.C., whose legal activities amused us no end in *Brothers-in-law* and its sequel *Friends at Court* has now ascended to the High Court Bench where he finds that life in that rarified and lonely atmosphere has brought its own peculiar problems.

Why the author should have seized on the time worn adage of "Sober as a Judge" as the title of this opus is not quite clear. Undoubtedly he wished to indicate the restrictions and disabilities, as far as having fun is concerned, that accompany judicial office and to denote the endless renunciation that is expected of him who abandons the Bar to mount the three short steps to the Bench. And yet, other sayings were available to suggest that judicial life is not so austere after all—for instead of being sober as a judge, there is always the alternative of being drunk as a lord .... Be that as it may, since the author himself is now one of Her Majesty's Judges of the County Court in England, one can readily understand why he considered that the first mentioned precept was much more applicable than the latter.

This delightful little volume is by no means restricted to depicting what Sir Roger does when a pretty girl (in his wife's absence) sits on his knee and insists on embracing him once and even trying a second time. The major part of the book describes a series of amusing cases that pass before the court—cases which, though they may recall experiences familiar to many members of our profession, are never quite the same, for they have been transformed by Cecil's wit, humour and facile style into amusing instances of fun and frolic based on daily happenings in the court.

These cases involve an action about a pretentious hotel which charged luxury prices but did not give anything sufficient in return, a blackmailer, a professional debtor, a mowing machine, an unusual libel action where the libel consisted in an ice, an action about oranges which turned to orange juice before arrival, a fantasy about two ushers, a squabble between landlord and a tenant, a fraud on people who want something for nothing, and a case about the sale of a motor-car.

There is little doubt that Henry Cecil in *Sober as a Judge* has

added yet another instalment to his significant and welcome contribution to the literature on the lighter side of the law. To avoid getting overwhelmed by the more serious side of our calling, it is good to while away an hour with one of Cecil's little amusing books in hand.

HARRY BATSHAW*

*Hon. Harry Batshaw, of the Quebec Superior Court.

Books Received

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

Annuaire de Législation Française et Etrangère. Edited by CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE. Paris: Centre National de la Recherche Scientifique. 1958. Pp. vii, 590. (no price given)

Cabinet Government. By SIR IVOR JENNINGS, K.B.E., Q.C., Litt.D., LL.D., F.B.A., Master of Trinity Hall, Cambridge, Bencher of Gray's Inn. Third Edition. Cambridge: The University Press. Toronto: The Macmillan Company of Canada Limited. 1959. Pp. ix, 587. ($8.50)

Canadian Jurisprudence: The Civil Law and Common Law in Canada. Edited by EDWARD MCWHINNEY. Toronto: The Carswell Company Limited. Pp. xvi, 393. ($6.75)

Cases on Criminal Law. By J. W. C. TURNER and A. LL. ARMITAGE. Second Edition. Toronto: The Macmillan Company of Canada Limited. 1958. Pp. xxiii, 690. (no price given)

Conveyancing Counsel. By H. R. MEHTA, LL.M. advocate. Jullunder: Kailash Law Publishers. 1959. Pp. xii, 282. (No price given)

Councils in Modern Perspective. Issued by THE CANADIAN WELFARE COUNCIL. 1959. Pp. 64. ($1.00)

Crankshaw's Criminal Code of Canada. By A. E. POPPLE, LL.B. Seventh Edition. Toronto: The Carswell Company Limited. 1959. Pp. clx, 1473. (45.00 in limp leather, $42.50 in buckram)

Development of Australian Trade Union Law. By J. H. PORTUS, Commissioner under the Conciliation and Arbitration Act of the Commonwealth, Member of the English and South Australian Bars. Toronto: The Macmillan Company of Canada Limited. 1959. Pp. xxix, 267. (No price given)

Expropriation in Public and International Law. By C. A. WORTLEY, O.B.E., LL.D. Toronto: The Macmillan Company of Canada Limited. 1959. Pp. xviii, 169. ($5.00)

Law in Diplomacy. By PERCY E. CORBETT. Princetown: Princetown University Press. 1959. Pp. xii, 290. (No price given)

Law and Administration. Edited by HERBERT S. MARKS. New York: Pergamon Press. 1959. Pp. xiii, 994. ($26.50 U.S.)

Introduction to Perpetuities. By BERNARD JOSEPH RUBENSTEIN, Professor of Law. New York: Juris-Press. 1959. Pp. 288. ($12.00 U.S.)

Nehru, A Political Biography. By MICHAEL BRECHER, Associate Professor of Political Science at McGill University. Toronto: Oxford University Press. 1959. Pp. xvi, 682. ($8.95)

Ontario Succession Duties. By MICHAEL B. JAMESON, of the Ontario Bar and Solicitor of the Supreme Court of England. Toronto: Butterworth & Co. (Canada) Ltd. 1959. Pp. xliii, 449. ($15.00)

The Spirit of Liberty. Papers and addresses of Learned Hand. Edited by IRVING DILLARD. Toronto: McClelland & Stewart Limited. 1959. Pp. xxvi, 227. ($1.40)