BOOK REVIEWS
REVUE DES LIVRES

Securities Regulation in Canada. By J. PETER WILLIAMSON. Toronto: University of Toronto Press. 1960. Pp. xv, 463. ($18.50)

> The common well of everie realme is to have a good lawe, so that the subjects of the realme maie be justified by the same, and the more plaine and open that the lawe is, and the more knowledge and understanding that the subject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the lesse and the worse it is for the common well of the realme. But if the subjects of any realme shall be compelled to leave the lawe of the realme, and to be ordered by the discretion of one man, what thinge may be more unknowen or more uncertaine?
> And he [the chancellor] regardinge no lawe, but trustinge to his owne wit and wisdom, giveth judgment as it pleaseth himselfe, and thinketh that his judgment being in soche authoritie is farre better and more reasonable than judgments that be given by the king's justices according to the common lawe of the realme. . . . Even so it fareth by my lord chauncelour that is not learned in the lawes of the realme.
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> Serjaunte and Student[1]

Securities regulation in Canada is effected by ten provincial securities Acts, supplemented by extensive securities regulation in some fifteen companies Acts, investment contracts Acts and companies information Acts. Canada has no federal legislation regulating trading in securities. The multifarious provincial regulatory legislation is administered and enforced by independent administrators. The appalling consequence of these acts has been bluntly, forcefully and accurately described by Mr. Williamson in his Preface:

> It becomes clear after only a brief study of the subject that Canadian securities regulation is unnecessarily complicated, that lack of uniformity is a real stumbling block to a grasp of the law on a national scale, and that there are many deficiencies, both in substantive and procedural law.

In the first detailed analysis of securities regulation in Canada which has ever been published, the author has approached his difficult subject in a scholarly and impartial fashion. His declared

[1] Reprinted from a sixteenth century manuscript in Hargrave, A Collection of Tracts Relative to the Law of England (1787), Vol. 1, pp. 325-26.

purpose was to write a book "intended to serve the needs of both lawyers and those in the securities industry". Despite the great obstacles placed in his path by our hodge-podge legislation, he has achieved this purpose and has provided the legal profession in Canada with an authoritative text and manual which has been accurately described by Harvard's Professor Louis Loss as "a reliable discussion of the Canadian statutes and precedents".[2] The book also constitutes an admirable manual of practice and procedure for those in the securities industry who are concerned with and affected by securities regulation in Canada.

Problems confronting both the Canadian legal profession and the Canadian securities industry, which stem from the incontestable fact that our securities regulation is far from being "a good lawe, plaine and open", are aggravated by the fact that Canadian securities administrators, some of whom are not "learned in the lawes of the realme", are in a position to compel the "subjects of the realme to leave the lawe of the realme, and to be ordered by the discretion of one man". Upon the dismal record of protection afforded to the investing public of Canada and of the United States by the Canadian securities administrators during the last decade, there has been an insufficient display of "wit and wisdom" on the part of the administrators. It is submitted that our multifarious regulatory legislation has constituted a "real stumbling block" to the legitimate securities industry, while failing to achieve its basic purpose of protecting the investing public from stock frauds and abuses in the realm of investment in Canadian speculative securities and, withal, sabotaging our national economy, due to deserved loss of public confidence in these securities among the people of both Canada and the United States, our principal postwar financier.

Mr. Williamson's book is exceptionally well organized and indexed. Chapter I reviews the development of Canadian securities law, historically, analyzes the present statutory framework of securities regulation in Canada and offers a résumé of the functions of the various securities Acts in force in Canada. In this chapter special attention is given to the private company, a creature unknown to American law. The author also considers the prospects for legislative uniformity and connected problems as well as co-operation, both interprovincial and international, in securities administration. Chapters II and III, respectively, provide the lawyer with a detailed examination, province by province, of the legislative requirements for licensing of those who trade in securities or advise upon purchase and sale of securities and of the legislative requirements concerning filing and delivery of a

[2] Foreword. Professor Loss was at one time Associate General Counsel to the Securities and Exchange Commission of the United States.

prospectus. In the latter chapter, too, brief consideration is given to sections in the securities Acts of the various provinces prohibiting the making of certain types of selling representations which are deemed to constitute abuses of the investing public. Chapter IV is concerned with the exceptionally important interpretation sections in our ten provincial securities Acts and with the not less important exemptions, which are scattered through these Acts in an astonishingly obscure fashion. Chapter V is directed to civil liability, a topic to which the legal profession in Canada has, it is suggested, devoted less attention than the best interests of the investing public merit. Chapter VI, dealing with criminal liability and with violations of penal provisions in the securities Acts, is of less concern to the legal profession than to persons and companies in the securities industry. Chapter VII is directed to that which may fairly be said to be the least "plaine and open" aspect of securities regulation, namely, its constitutional aspect. Conflicts of laws, in the realm of securities regulation, are the subject of Chapter VIII and are considered by the author both civilly and penally and both interprovincially and internationally. In the realm of conflicts of laws, in securities regulation, Canadian and American securities administrators have encountered one of their greatest difficulties and, as might be expected, malefactors have found therein their greatest comfort and safest refuge. The last chapter in the book which is of great value and importance to the legal profession in general is Chapter IX, in which administrative action by securities administrators and the pitifully limited rôle of the "Queen's justices" in controlling the securities administrators of Canada in their will to "order the subjects of [this] realme by the discretion of one man" are carefully examined by the author. This chapter is also, of course, of immense value and importance to those in the securities industry. Chapters X and XI deal, respectively, with the regulation of trading in securities and with underwriting in Canada. It is suggested that their value to the legal profession is limited, except for lawyers practising at that which is commonly referred to as the "Securities Bars" of the various provinces. An entire chapter, Chapter XII, is devoted to selling securities in the United States and this chapter will be invaluable to Canadian lawyers with clients interested in seeking financing in that country. The last chapter, Chapter XIII, reviews the history of international trading and of extradition between Canada and the United States and is of value to the legal profession chiefly, it is suggested, as a source of study of international problems in trading in securities between Canada and the United States.

It is submitted that *Securities Regulation in Canada* indicates that, for the economic weal of our people, we have an urgent need

for "a good lawe, plaine and open", subject to the judgments of the Queen's justices. That good law can only be a federal securities Act, regionally administered. Concurrently with the enactment of such good law, our ten provincial securities Acts and the securities regulatory sections of the fifteen companies Acts, investment contracts Acts and companies information Acts must be repealed. While there is a constitutional problem attaching to enactment of federal regulatory legislation, it cannot be disputed that a sovereign state can legislate that which its eighteen million people will. When Canada's desperate need for federal securities regulation is recognized and understood by our people, their will to have it and to repeal our present hodge-podge of statutes and regulations, which harass honest issuers and distributors of securities while failing, in some provinces, to deter and control intending malefactors, will resolve the constitutional problem by way of constitutional amendment, should the Supreme Court of Canada hold that any federal legislation hereafter enacted under our present constitution is *ultra vires* the Government of Canada. None has ever been enacted, so there is room for doubt as to whether a constitutional amendment would be a condition precedent to federal securities regulation. Speculative securities issued in and distributed in and from Canada, to Canadians and Americans alike, have deservedly, during the long post-war years of securities frauds and abuses perpetrated upon both peoples, lost much of the confidence of the investing public of both countries. With it, also deservedly, has developed a belief, in both peoples, that the rule of law is not in force in certain parts of Canada, in so far as the speculative securities industry is concerned. For the development of our country, we Canadians need the speculative capital of both nations. For the citizens of both nations speculative investment in the development of this conservative, non-revolutionary democracy is potentially, perhaps, the most promising speculative investment available. It will become so in actuality only when, it is submitted, we enact a single federal securities Act. In the interim Americans and Canadians investing in Canadian speculative securities accept unreasonable, excessive and unnecessary hazards, except in cases where the securities law enforcement team of a particular province has, by determined and strict enforcement, succeeded in bringing the rule of law into force in that province.

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Bankruptcy Law of Canada. By L. W. HOULDEN and C. H. MORAWETZ. Toronto: The Carswell Co. Ltd. 1960. Pp. xxxiv, 510. ($21.00)

Bankruptcy in Canada. By LEWIS DUNCAN and JOHN D. HONSBERGER. Third Edition. Toronto: Canadian Legal Authors Limited. 1961. Pp. civ, 1118. ($35.00)

Although the present Bankruptcy Act[1] has been in force for over ten years, there has, until recently, been no Canadian text dealing with it.[2] It is almost an embarrassment of riches now to have available two expensive volumes on the subject. These two books are quite different in scope and purpose so that direct comparison would be, for the most part, inappropriate. One, indeed, is addressed not only to lawyers, but also to "accountants, trustees in bankruptcy and credit managers",[3] groups for whom I cannot speak. It is, however, a fair conclusion that Canadian lawyers remain debtors to the late Mr. Lewis Duncan, because the analysis to which we must turn when we seek to improve our understanding of bankruptcy law remains, essentially, his.

Houlden and Morawetz is the successor to *Bradford and Greenberg*,[4] an "annotated Act" which had its third and last edition in 1951. *Houlden and Morawetz* is a substantial improvement. It embodies the Act, the Rules and the Forms together with a set of precedents prepared by the authors.[5] Commentary on the Act and Rules is developed around each section or group of sections and the longer comments are subdivided with the heads of discussion summarized at the beginning. There are cross-references to the Act and Rules and to corresponding sections of the former Act. Unfortunately there is no table of concordance from the old Act to the present, to assist in the use of older cases. There is a substantial index. References, which are set out in the body of the text, are for the most part only to the *Canadian Bankruptcy Reports*[6]; indeed there are few citations of cases other than those

[1] R.S.C., 1952, c. 11.

[2] Bradford and Greenberg, Canadian Bankruptcy Act (1951), not a "text" in this sense, was published in its third edition in 1951 and the Canadian Encyclopedic Digest (Ontario) article on bankruptcy in 1949.

[3] Houlden and Morawetz, Preface.

[4] Bradford and Greenberg, *op. cit.*, *supra*, footnote 2.

[5] Both books contain sets of precedents prepared by the present editors. In Houlden and Morawetz there are forty-four, in Duncan and Honsberger, forty-nine, of which six are for use in Quebec. They are not entirely coincident with respect to the situations covered nor are the precedents for a given situation always completely alike. In his form for a proposal guarantee, Mr. Honsberger includes a clause negativing any requirement of notice of default, a precaution omitted by Messrs. Houlden and Morawetz, who, however, fully aware of the decision in *Cloutier* v. *Dumas* (1954), 34 C.B.R. 178, include a clause making the guarantee payable notwithstanding the annulment of the proposal.

[6] Alternative references are given in the Table of Cases.

contained in that series. Very few English decisions are referred to.[7] The work is set out in a variety of rather bold typefaces which make it very legible and easy to use.

Messrs. Houlden and Morawetz are editors of the *Canadian Bankruptcy Reports* and in preparing the present work they have made full use of articles and comments prepared for those reports. Duplication such as this, in fact, occurs even within the covers of the new book. The three paragraphs headed "Conflict between Assignment and Petition" appearing in the discussion of receiving orders[8] are identical with the three paragraphs under the same heading appearing in the discussion of assignments[9] and the whole thing simply reproduces, with the addition of a reference to a subsequent case, a note appearing in the *Bankruptcy Reports.*[10] The style of the work is in general that of the *Canadian Encyclopedic Digest*—the recitation of a general principle or the statement of the result of a case followed by citation of the authority from which the statement was drawn. This is essentially annotation rather than analysis, and while it is of great assistance to one's research (provided it is accurate and exhaustive), it is no substitute for it. Consider, to take a simple illustration, the question of "calculation of compensation", which is dealt with in the discussion following section 17 of the Act.[11] Here one might expect to find explained the basis of calculating compensation in different sorts of circumstances. Instead we are given bare statements of the decisions in four particular cases, and nothing more. This procedure, whatever its merits, is not always accurately carried out. The case of *In re Stokes*[12] is, I think, quite misleadingly stated,[13] and the cases of *Pelletier* v. *Cloutier*[14] and *Firestone Tire & Rubber Co.* v. *Douglas*[15] appear to have been misread.[16] The point of the latter cases was

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[7] The authors state that at the present time ". . . there is a sufficient body of Canadian law to satisfy the requirements of our courts. Excellent texts exist based on English law, and the authors have consequently resorted only to Canadian jurisprudence and practice except in a few instances where amplification was felt necessary" (Preface). Such amplification is quite feeble in the few places where it occurs. There are, for instance, some English cases mentioned in the section on preferences, but there is no mention of *Sharp* v. *Jackson*, [1899] A.C. 419, which still has a lesson for some Canadian courts. The material on after-acquired property could well have stood the amplification of a reference to *Re Pascoe*, [1944] Ch. 219 (C.A.).

[8] Pp. 72-3. [9] Pp. 84-5.

[10] Vol. 36. [11] *Supra*, footnote 1.

[12] [1919] 2 K.B. 256 referred to on p. 163. Although this is an English decision, only the Canadian Bankruptcy Reports citation appears.

[13] It is properly handled in Duncan and Honsberger, although there is a mistake in the Table of Cases. The point of the case was that the bankrupt purchased the policy with what was in effect the trustee's money and without his knowledge.

[14] (1960), 38 C.B.R. 132.

[15] (1940), 21 C.B.R. 343, [1940] O.W.N. 143.

[16] P. 280.

that the claims involved arose during bankruptcy, that is before the discharge of the bankrupt. They do not belong under the heading "Effect of Order of Discharge".[17] Frequently, however, the book goes beyond the mere compilation of "it-was-helds" and becomes a good practical manual, outlining procedures in an orderly and usable way. The materials dealing with "Meetings of Creditors", "Distribution of the Estate" and "Landlord and Tenant" are particularly successful.

Discussion of *Duncan and Honsberger* must begin with praise of its typography. It is not merely that the text is legible or that the arrangement of the work is instantly made clear. It is a delight to the eye, a book which it will be a pleasure, as well as a help, to use. *Duncan and Honsberger* is the third edition of what was originally *Duncan on Bankruptcy*, published in 1922. The second, rather bulky edition, *Duncan and Reilley*, was published in 1933. Although the present edition contains more material than the last, it is more compact and easier to handle and read. It consists again of Act, Rules, Forms and precedents. Discussion follows each section or group of sections, and it is amply cross-referenced and indexed. Tables of concordance facilitate reference to the former Bankruptcy Act[18] and to the English Act[19] and also to the Rules made under the former Bankruptcy Act and to the 1949 and 1954 Rules made under the present Act. There is ample reference to English cases relevant to discussion of the provisions of our Act, and in some cases American material is referred to. References are contained in footnotes, and alternative citations are given.

Duncan and Honsberger follows closely the second edition of the parent work. It has, of course, been re-arranged to follow the outline of the new Act, but the discussion remains for the most part, I believe, the work of Mr. Duncan, amended where necessary and with the addition of new cases. The introductory and historical material, for instance, has been increased by an account of pre-confederation legislation in Newfoundland. The introductory portion in a work of this scope would have been improved, I think, by more adequate discussion of provisions of the Winding-up Act[20] and related statutes. Mr. Honsberger's revision has for the most part involved the appending of citations and of statements of cases—an important enough task, considering the twenty-eight year gap between the second and third editions. In some places, the work has been substantially re-cast. To mention a few of the changes, the section on "After-acquired Property" has been enlarged; a note on the jurisdiction of the Bankruptcy Court added;

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[17] Also p. 280, it should be observed that the note given in *Lanctot* v. *Longtin* (1954), 34 C.B.R. 208 was *not* enforceable.

[18] R.S.C., 1927, c. 11.

[19] (1914), 4 & 5 Geo. 5, c. 59.

[20] R.S.C., 1952, c. 296.

the section on "Life Insurance and Annuities" completely rewritten and substantially expanded. I should say too, to be fair, that the material on "Meetings of Creditors", "Distribution of the Estate" and "Landlord and Tenant" is excellent and set out in a very lucid and practical fashion. One point, however, at which *Duncan and Honsberger* fails to surpass *Houlden and Morawetz* is in the discussion of trust fund provisions of Mechanics' Lien Acts which Mr. Honsberger has tacked on to a passage headed "a contract is not necessarily terminated by bankruptcy". [21]

In bringing the references up to date not all of the relevant English cases have been included. In particular, the discussion of section 67 ("After-acquired Property"), which gives statutory recognition to *Cohen* v. *Mitchell*[22] should have included a reference to *Re Pascoe*,[23] which held that after-acquired property vested automatically in the trustee upon its acquisition by the bankrupt. This case, which has been cited by at least one Canadian court,[24] and which drew the criticism of the Committee on Bankruptcy Law,[25] should certainly be considered in any discussion which purports to go beyond mere annotation. Again, reference to English cases dealing with the effect of the order of discharge could have been made complete by the citation of *John* v. *Mendoza*.[26] None of this, however, affects the conclusion that in its third edition *Duncan and Honsberger* remains a Canadian classic.

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General Principles of Criminal Law. By JEROME HALL. Second Edition. 1960. Indianapolis, Indiana: The Bobbs Merrill Company Inc. 1960. Pp. xii, 621, xx. ($9.50 U.S.)

The first edition of this work, which appeared in 1947, was reviewed in the *Canadian Bar Review* by Stanley G. Remnant in 1950.[1] The present edition is largely rewritten and incorporates material from a number of later articles written by the author, some of which were published in 1958 in his *Studies in Jurisprudence and Criminal Theory*. While there is no substantial difference in principle between the first and second editions, the latter introduces modifications of view in several particulars along

[21] P. 333.
[22] (1890), 25 Q.B.D. 262.
[23] *Supra*, footnote 7.
[24] *Re Bomasuit*, [1951] O.W.N. 667, 31 C.B.R. 212.
[25] Report of the Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment (1957), Cmd. 221, p. 36.
[26] [1939] 1 K.B. 141. The case is referred to elsewhere in the text in another connection.

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[1] (1950), 28 Can. Bar Rev. 236.

with improvements in arrangement and presentation. It is based on even more comprehensive studies of historical, philosophical, sociological, psychological and psychiatric, as well as legal materials, than the former edition.

The author continues to develop his theory within a structure framed by the classification of penal law into three types of proposition, of increasing degrees of abstraction. *Rules*, combined with *doctrines*, define particular crimes and fix respective procedures, punishments and treatment. *Doctrines* relating to infancy, insanity, mistake, intoxication and the like, express the legally essential parts of the definitions of the specific crimes, and, although not usually expressed, are assumed in the formal definitions of each. *Principles* are the ultimate notions of criminal law. They are: (1) *mens rea*, (2) act (effort), (3) fusion (concurrence) of *mens rea* and act, (4) harm, (5) causation, (6) punishment, and (7) legality. Their combined meaning is: "The harm forbidden in a penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment."[2] Although the penal law may in a sense be fully stated when the doctrines are added to the rules, the principles are derived from the rules, and may be viewed as the ultimate norms of penal law. They provide a complete general definition of crime.

In the new edition, the general theory and principles are discussed in Chapters I to IX. Strict liability is criticized and substitutes are recommended in Chapter X. Discussion of the doctrines of ignorance and mistake, necessity and coercion, mental disease, intoxication and criminal attempt takes up Chapters XI to XV. The final chapter consists of a re-appraisal of the relations between criminology and penal theory.

The differentiation between principles and doctrines and the construction out of the principles of a comprehensive, coherent and consistent theory of penal law distinguishes Hall's work from that of other writers in the field of criminal science. His thesis requires him to divide penal offences into two classes: true crimes and formal penal offences. Conformity to the principles is the mark of offences of the first class. *Mens rea* is limited to intentional or reckless conduct, consciously and voluntarily causing a prescribed harm, and is determined subjectively with relation to the harm in question and not some lesser or intermediate harm. Objective theories of criminal responsibility based on strict responsibility, inadvertent negligence, or an implied intent to achieve or an implied awareness of the probability of the "natural consequences" of conduct are excluded. The actor's actual state of mind is to be judged in the light of the state of facts which he believed to exist,

[2] P. 18.

accurately or erroneously and whether any error was reasonable or not. Legality requires clear definitions of all elements of each offence and procedures that protect suspected persons from oppression and ensure fair trials. It is opposed to purely arbitrary punishments and purely indeterminate treatment limited only by the "dangerousness" of the offender. A true penal offence involves immoral conduct and morally justifies punishment. Penal offences in the formal class involve the employment of penal procedures and sanctions in situations where one or more of the principles is absent. In such cases, the ethical foundation for punishment is lacking and the sanction most likely fails to achieve its purpose. Many so-called "welfare offences" and other petty offences, trade regulations, zoning and building by-laws, and similar legislation can be better enforced by education, licences and permits, inspection, notice, "cease and desist" orders and injunctions, cancellation of licences in cases of persistent contravention and similar measures. Legislators should be guided by the principles in enacting and revising penal laws, in order to avoid improper use of penal sanctions. The principles also furnish guidance in interpreting existing laws, where the language of a statute does not expressly and clearly enforce departure from them.

Hall's theory requires him to attribute harm to the consequences of unsuccessful attempts and to abortive counselling and conspiracies. Although Mr. Remnant found this proposition objectionable, it is respectfully submitted that it is sound. Hall's definition of harm is "social disvalue" or "loss of a value", an incorporeal complex of fact, valuation and interpersonal relations, without any necessary physical consequence. Since *mens rea* has ethical significance, the end sought or hazarded is a harm that is measured in part by the actor's state of mind. Death caused by recklessness is a less serious harm than death caused by deliberate murder. Harm may consist of or include a dangerous condition involving fear or probability of other harm. Thus harm results from an attempt, a conspiracy, an unlawful assembly, possession of burglar's tools and so on. We would say the same of criminal negligence under section 221(1) of the Criminal Code. Hall finds the principle of harm essential in distinguishing the ethics of criminal law from "pure" ethics. The law is not concerned with a sinful or immoral state of mind unless it produces harmful external consequences. Harm provides a rational basis for punishment and for differentiation of punishments, and is important in corrective treatment. He criticizes the use of the phrase *actus reus*, and particularly its employment by Glanville Williams.[3] He considers that greater accuracy and clarity are achieved through use of his principles.

[3] Pp. 222-231.

Chapter IX is new, dealing with past and present theories of punishment and pointing out a number of commonly neglected aspects of penal and civil sanctions and various non-penal measures intended to protect society or individuals. An inclusive theory of punishment is accepted, based upon retribution, deterrence and reformation, subject to the principle of legality. There is no proof that punishment of inadvertent or innocent harm-doers improves the standard of performance of the persons punished or of others. Non-penal sanctions are appropriate for such harm-doing.

In repeating the demonstration of moral justification for refusing to excuse the intentional or reckless causing of a serious harm in ignorance or mistake of the penal law, since such conduct must be morally wrong, the author again insists that even "unreasonable" ignorance or mistake of civil law leading to a *bona fide* claim of right properly excuses conduct that would otherwise constitute theft, bigamy and certain other offences, since *mens rea* is lacking. At the same time, certain offences, chiefly petty, involve conduct that would not be recognized as morally wrong, unless forbidden by statute. Knowingly and wilfully to contravene any penal statute is morally wrong, but the same conduct could be morally innocent if committed in excusable ignorance of the statute. In such cases, ignorance of the penal statute should be an excuse.

Necessity is divided into "physical causation", permitting no personal power of choice (where automatism is classified), and "teleological necessity" where the actor causes harm under pressure of physical forces that compel him to decide that one value or another must be sacrificed. In the latter class, the author prefers the *ratio* of *U.S.* v. *Holmes*[4] to that of *Reg.* v. *Dudley & Stephens*,[5] arguing that a very high probability of complete destruction of a group by physical forces is a justification for sacrifice of some to save some, if the method of selection is fair. Analysis of a number of cases shows that coercion is narrowly defined by the courts. Although generally approving section 17 (miscalled 20) of our Criminal Code, the author finds it hard to be dogmatic and suggests that there should be some rare exceptions to this Draconian rule.

The extensively re-written Chapter XIII on Mental Disease differs little in result from the first edition. A strong attack is made on deterministic non-moral psychological theories and on current psychiatric criticisms of the McNaghten Rules.[6] The author relies on an integrative theory of personality, involving the interrelation of intellectual, emotional and volitional aspects, combined

[4] (1842), 26 Fed. Cas. 360, No. 15,383 (E.D. Pa.).
[5] (1884), 14 Q.B.D. 273.
[6] *The Queen* v. *McNaghten* (1843), 10 Cl. & Fin. 200, 4 St. Tr. 847.

in a problem-solving, value-making individual with a moral sense. A strong counter-attack is directed against some of the pretensions of psychiatry as a profession, coupled, however, with recognition of the value of psychiatry as a handmaid of penal law. The doctrine of irresistible impulse, the New Hampshire[7] and the Durham[8] rules, and both recommendations of the English Gowers Report[9] are all rejected. The conclusions of the majority of the Canadian McRuer Commission[10] are approved in general. Although the author professes to defend the McNaghten Rules, interpreted more or less as the McRuer Commission has interpreted section 16 of our Criminal Code, as applied not only to the intellectual but also to the "volitional and affective" aspects of the personality, this support is based on the hypothesis that the "so-called legal definition of insanity is a *social* definition of psychosis relevant to the criteria of criminal responsibility".[11] The proposed amendment to the McNaghten Rules presaged in the first edition is now set out:

> A sound rule of criminal responsibility must (1) retain irrationality as a criterion of insanity, (2) be consistent with the theory of the integration of all the principal functions of the personality, (3) be stated in terms that are understandable to laymen, and (4) facilitate psychiatric testimony. Accordingly the following is suggested:
> . . . a crime is not committed by anyone who, because of mental disease, is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by the criminal law . . . the trier of fact should decide (1) whether, because of mental disease, the defendant lacked the opportunity to understand the nature and consequences of his conduct, and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question.[12]

Although the chapter contains a valuable criticism of competing theories, the argument is not always consistent and the conclusion is not completely satisfying. It appears that something more than the author's solution will be necessary to ensure that his theory becomes generally adopted. Not all psychiatrists, judges and lawyers can be counted on to be able to bring all psychotics within the scope of his proposed rule.

The present doctrine relating to intoxication is shown to be inadequate and a strong plea is made for acceptance of the lessons we can learn from medicine and psychiatry about alcohol and its effects, leading to a recommendation of differential treatment of different kinds of cases involving intoxication. An inexperienced

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[7] *State* v. *Pike* (1870), 49 N.H. 399.
[8] *Durham* v. *U.S.* (1954), 214. F. 2d. 862, at p. 874 (C.A.D.C.)
[9] Report of Royal Commission on Capital Punishment 1949-1953, Cmd. 8932.
[10] Report of Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1956).
[11] P. 527. [12] P. 521.

inebriate should not be held criminally responsible for harm committed during and as a result of his intoxication. Experienced normal inebriates should be severely punished for voluntarily becoming intoxicated or perhaps for recklessly risking the doing of harm in that condition. Alcoholic addicts should be treated for their disease. Alcoholically induced insanity should be an excuse on the same basis as any other kind of insanity. The author apparently overlooks the recognition of such insanity in the *Beard* case[13] which he finds objectionable on all grounds.

The study of attempt originally led the author to his general theory, and the subject was discussed early and at considerable length in the first edition. In this edition, while adequately treated, attempt has been dealt with more concisely. Attention is centred on the distinction between "preparation" and "initiation of attempt". Although preparation logically satisfies the requirement of external conduct embodying the *mens rea*, the common law requires something more—but what? The theories of requirement of an independent criminal act, or of an independently unequivocal act, or of acts involving everything in the power of the actor are all rejected. No universally valid formula for the distinction is found; each case must to some degree turn on its own facts.

In the last chapter, the author calls for a criminology that does not cleave to the dogma that only observable behaviour is the proper subject matter of social science, and regrets the specialization which separates criminologists and lawyers, who should be working together since criminology and penal theory are interdependent phases of a single body of knowledge. The distinction between the norms of the state and those of sub-groups does not appear to him to be as clear as it did when he was writing the first edition. The rules of criminal law are among the most important social norms, appearing to be practically universal and having also rational, normal inter-relations with economic and political institutions and changes. While these norms are the primary subjects of criminology, it is concerned also with public attitudes (*mores*) and conduct, and the norms of sub-groups. Penal theory, by careful analysis and accurate definition, can save criminologists and sociologists from serious errors such as even leaders like Edwin Sutherland have made through ignorance of the principles of penal law.[14] On the other hand, current penal law is defective in ignoring the sociological aspects of certain crimes, for instance, in failing to distinguish the professional criminal receiver of stolen goods, who may conduct a very large business, from the occasional one who buys for his own use.[15]

[13] *R.* v. *Beard*, [1920] A.C. 479, 14 Cr. App. R. 159.

[14] Sutherland, White Collar Crime (1949), pp. 38-9.

[15] In this type of study, one may add, the author has shown the way in his Theft, Law and Society (1955).

It is no disparagement of the works of others to suggest, with respect, that this is perhaps the most important current work on criminal law theory in the common-law world. A broad base in many disciplines and a synthesis of theoretical analysis and criticism of hypotheses in the light of the phenomena of social conduct have enabled the author to produce a general theory of penal law by which the true scope of the operation of any doctrine and rule may be defined and the validity of any penal statute may be tested.

Although Mr. Remnant, in 1950,[16] could not accept parts of the author's theory of *mens rea* relating to the rejection of strict liability and the "objective standard", the trend of thought in Canada in the meantime has been towards adoption of much of the author's teaching on that subject. The direct influences giving direction to that trend, however, have been mainly English, particularly through the works of Glanville Williams. The latter, although he has enunciated a theory of *mens rea* substantially the same as Hall's, accepts objective liability based on inadvertent negligence for manslaughter and certain other offences, while J. Edwards LL.J., whose work on "statutory offences"[17] is beginning to be appreciated, accepts negligence, for some purposes in relation to such offences, within his concept of *mens rea*. These views are more in accord with the present stage of Canadian thinking. Our legislation lags behind, since, where an unlawful purpose is present, we retain inadvertent negligence and in some cases strict liability without negligence, not necessarily accompanied by intent to commit bodily harm, as a basis for guilt of capital murder, and we have restored objective criminal liability in traffic matters by re-creating the offence of dangerous driving.

Hall's work is well known in our law schools. It should be studied also by everybody concerned with the policy and drafting of penal legislation and with the administration of criminal justice, including the Departments of Justice and of the provincial Attorneys General, and judges, magistrates, counsel and correctional officials. The author's views will not necessarily gain universal acceptance, but he who rejects any of them after studying this work must overcome some very powerful reasoning. Much of the legislation and case law discussed in the work is derived from the United States. We may, in certain instances, flatter ourselves that our legislation and jurisprudence are free of some of the defects he criticizes, but the most important English cases and legislation and a few interesting Canadian decisions and statutory provisions are considered, and the mirror that is held up to us thereby and in

[16] *Supra*, footnote 1.

[17] Mens Rea in Statutory Offences (1955), Vol. VIII. English Studies in Criminal Science.

general discussion reveals some of our own faults. It is a pity that the book was published before the House of Lords decided *D.P.P.* v. *Smith*.[18] The author would have found in its reasons for judgment adequate material for exercise of his critical faculties.

STUART RYAN*

* * *

Evidence in Criminal Cases—A Basic Guide. By J. D. MORTON, M.A., LL.B. Toronto: Butterworth & Co. (Canada) Ltd. 1961. Pp. viii, 62. ($2.25)

This is a fine little book for the purpose for which it is intended. It sets out in very clear and concise terms the main principles of the rules of evidence for the primary use of police officers. Part I discusses the "rules"—admissibility, character evidence, hearsay and the like. Part II is concerned with proof, dealing mainly with competency and compellability, privilege and real evidence. Part III deals with the burden of proof and corroboration. The only criticism of the contents I have is that, although the author states that he intends to "explain not only how they [the rules] work, but why they exist", there is not a great deal of information on the rationale behind several rules which the layman (and perhaps lawyer) must find illogical and restricting.

The real accolade that Professor Morton should receive is for taking the time and trouble to explain in ordinary language this difficult area of the law. It is of the utmost importance—as Professor Morton well realizes—for our police force to become educated in the principles and purposes of the law they are trying to enforce. Our present force is totally inadequate in this respect and the fault lies—at least to a large extent—upon the shoulders of the legal profession. The present antagonism which exists between the policeman and the citizen is inevitable if the policeman has to enforce a law he neither understands nor appreciates. For him, anyone who has committed a crime must be found guilty (which is not true) and for the criminal (or citizen), the evasion of the law, the commission of a crime, is the delightfully fair game of being one up on the cops. Any society which encourages this is sick.

Anything which enables the policeman to be an honest, understanding enforcer of the criminal law is a sign in the right direction. Unfortunately, of all academics, Professor Morton seems to be shouldering the burden alone.

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[18] [1960] 3 W.L.R. 546, [1960] 3 All E.R. 161.

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Copyright and Antitrust. By JOSEPH TAUBMAN. New York: Federal Legal Publications, Inc. 1960. Pp. 217. ($8.50 U.S.)

This relatively short and easy-to-read book makes a special plea for the exemption of the performing arts from the application of the antitrust laws in the United States. Dr. Taubman believes that subjecting the entertainment industries to the Sherman[1] and Clayton[2] Acts is committing cultural suicide. He has in mind, in particular, the effects of the *Paramount* case[3] and civil treble damages suits on the film industry.

As an alternative, the author suggests that there should be a federal Department of the Arts which would guide, encourage and regulate the performing arts. Until now, he relates:[4]

> . . . the Department of Justice has been America's Ministry of Culture. Except for a recent nexus of the State Department with the American National Theatre and Academy for the presentation of artists abroad, the main connection of the federal government with the performing arts has been by way of the regulatory function of the antitrust laws.

The book does not deal extensively with copyright law. It presents a picture of the regulation of competition in those industries where the prime function is the commercial exploitation of copyright. In the past, the chief target of the Department of Justice in this field has been "filmdom" but the live theatre and the music world have also received the attentions of the Attorney General.

It appears likely that there will be a run of cases in the television industry and Dr. Taubman is fearful that the courts will apply the "cinematic yardsticks" of the *Paramount* case to an industry which he believes deserves special treatment of its own.

RICHARD GOSSE*

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Legal Theory. By W. FRIEDMANN, Professor of Law and Director of International Legal Research, Columbia University. Fourth Edition. Toronto: The Carswell Company Limited. 1960. Pp. xx, 564. ($7.75)

In the seventeen years since its first publication, Professor Friedmann's *Legal Theory* has gained such well-merited fame that it is no longer necessary or even appropriate for a reviewer to in-

[1] 1890, c. 647, 26 Stat. 209, as am.
[2] 1914, c. 323, 38 Stat. 730, as am.
[3] *United States* v. *Paramount Pictures* (1946), 66 F. Supp. 323; (1948), 334 U.S. 131; (1949), 85 F. Supp. 881; (1950), 339 U.S. 974.
[4] P. 114.

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troduce it to the public or to give a detailed description of its contents. What is of some importance, however, is a comparison of this new fourth edition with the previous one.

The changes have all been improvements and so the new edition is in many respects a better book than the third edition. A minor improvement, but one for which every reader will be grateful, is the larger type used. More importantly, Professor Friedmann has largely revised the logical structure of chapters and parts. Now, instead of the former seven parts, there are only three: a relatively brief introductory part of four chapters, which is concerned with the nature of legal theory; a second part consisting of twenty-two chapters which is a critical survey of historical legal theories; and a final part of nine chapters on legal theory in confrontation with contemporary problems. It will probably be Part III, and especially the chapters on the legal values of modern democracy and on judicial law-making, which will most catch the fancy of the reader, but the survey of jurisprudential theories in Part II provides a clear, though sometimes oversimplified, account of all the main jurisprudential figures and most of the minor ones. The rearranging of chapters and parts makes for a much more logical whole, and, aside from the fact that the chapters on Marxist, Fascist, and modern Catholic theories would seem to fit into Part II just as easily as into their assigned place in Part III, it would now be hard to suggest a more logical arrangement.

Though there are only a comparatively small number of additional pages in the new edition, these new pages are quite significant. For one thing, there is a new section on the Scandinavian Realists—Hägerström, Olivecrona, Lundstedt and Ross—who have assumed a new importance in the English-speaking world during the last decade. An even more important addition is the entirely new chapter "Positivism and the Analysis of Legal Concepts", in which Professor Friedmann takes the measure of H. L. A. Hart and the English analysts. In view of the fact that this school has recently been much to the fore in the jurisprudential world, it is perhaps unfortunate that Professor Friedmann did not see fit to devote more than seven pages to it, but on the other hand, it must be admitted that the school is still too new for us to deal with it in proper perspective.

Besides the discussion of these two new schools of legal thought, the fourth edition also boasts a completely rewritten section on legal positivism. Not all of this group of five chapters is new, but the whole section has been rearranged and revised. Also considerably expanded is the chapter on modern value philosophies, which includes the various phenomenological schools and the relativism with which the author himself feels so much sympathy.

Legal Theory is comprehensive, lucid and often highly stimu-

lating. It is no denunciation of the third edition to say that the fourth is a considerable improvement, because Professor Friedmann has undertaken so monumental a task that there will always be some room for improvement. The one chapter which is now disproportionately weak and badly in need of revision is the one entitled "Neo-Scholastic Doctrine and Modern Catholic Legal Philosophy". Besides some errors of detail, Professor Friedmann's principal error in this chapter is in looking to Church documents to provide what the Church can never provide, a complete and consistent philosophy of law. There is no one Catholic jurisprudence; rather, there are many Catholic jurisprudences, almost as many as there are Catholic jurisprudents. Besides this chapter, which becomes more unsatisfactory the more often it is read, Professor Friedmann's book has stood the test of time very well, and in the fourth edition shows signs of becoming an even finer work.

MARK R. MACGUIGAN*

* * *

Justices Black and Frankfurter. Conflict in the Court. By WALLACE MENDELSON. Chicago: University of Chicago Press. 1961. Pp. 151. ($4.00 U.S.)

The title of the book is misleading, for no real conflict in the court is revealed but rather two methods of approach to the interpretation of the United States Constitution.

The views of Justices Black and Frankfurter, as expressed in cases decided by the Supreme Court of the United States, are compared in three main fields: the separation of powers, democracy and federalism. It is pointed out that they have been and are spokesmen for two contending traditions and disagree as to the nature of the judge's role in American government.

The two justices differ in both approach and technique. Black "draws no subtle distinctions. The niceties of the skilled technician are not for him. His target is the heart not the mind. His forte is heroic simplicity".

Frankfurter, on the other hand, "is a pragmatist. His wisdom is the wisdom of experience. His forte is reason, not hallowed bias or noble sentiment".

Between 1941 and 1959 Justice Black voted pro-labor in all but four cases involving employee claims under the Fair Labor Standards Act[1] while his colleague favored the workman in thirty two and the employer in twenty seven of the same cases.

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[1] (1938), 52 Stat. 1060, 29 U.S.C. ss. 201-219.

Black's sensitivity to workman's claim under Fair Labor Standards Act[2] cases is exceeded only by his consumer sensitivity in antitrust legislation. For him, the essence of law is Justice, while for Frankfurter, what is important is the basic distinction between legislative and judicial functions.

The views of the two justices in cases involving freedom of expression and association, freedom of religion, fair trial procedure, and freedom from racial discrimination are compared in some detail. Frankfurter tends to intervene as little as possible in state governmental processes while Black ascribes to states' rights little weight as against civil liberty.

In the *Terminiello* case[3] the court, by a majority judgment in which Justice Black participated, ordered a new trial on the ground of error in the judge's charge to the jury. Mr. Justice Frankfurter and two of his colleagues observed that "for the first time in... 130 years . . . this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below and that was explicitly disclaimed on behalf of the petitioner at the bar of this Court".

In cases involving alleged incompatibility of state legislation with federal law, Black generally is against the state and Frankfurter usually on the side of local government.

The author sums up the basic difference between the two jurists by expressing the opinion that Black is a judicial activist, for whom judicial legislation is the heart of the judicial process; while Frankfurter believes that the court's chief concern is justice under law and its "special function to preserve a constitutional balance between the several elements in a common enterprise".

To derive full advantage from this book requires a more dedetailed knowledge of United States jurisprudence in constitutional matters than a Canadian reader is likely to have. Nonetheless it may be read with pleasure and profit.

GEORGE S. CHALLIES*

* * *

F. E., The Life of F. E. Smith, First Earl of Birkenhead. By His Son, the Second Earl of Birkenhead. London: Eyre & Spottiswoode. Toronto: The Ryerson Press. 1960. Pp. 572. ($12.50)

It may be appropriate to state at the outset that a biography of F. E. Smith, first Earl of Birkenhead, written by his son, was originally published in two volumes in 1933 and 1935 respectively. Since that time fresh material was obtained and this edition has

[2] *Ibid.*
[3] *Terminiello* v. *Chicago* (1948), 337 U.S. 1.
*The Hon. George S. Challies, Montreal.

been revised to include these together with a more candid and objective approach to the subject's character and career.

This is an admirable study of a man, who, from humble origins, born in 1872, swiftly rose to prominence in both legal and political fields, to become Lord Chancellor of England. Birkenhead's greatest triumph was when he became the Vinerian Law Scholar, winning the blue ribbon of Oxford Law defeating the eminent W. S. Holdsworth. After his call to the Bar in 1899, he practised law in Liverpool and London. In court his forensic style, quiet, unemotional and deadly in cross-examination, and his native intelligence quickly gained him an excellent reputation for advocacy.

In politics, after his election in 1906, Smith immediately showed himself as an eloquent platform speaker and formidable opponent. He astounded the House with his daring, insolent and flamboyant maiden speech, often described as one of the greatest maiden speeches of all times. His brilliant mind, extrovert personality, biting wit and his mastery of words contributed to his rapid success and enabled him to join the ranks of leading politicians. He fought for what he believed was right and just, even though it might cause him personal hardships, such as supporting and promoting the Irish Treaty of 1922, which had appeared to most people to be a complete reversal of his early support of Ulster and opposition to Home Rule. This book also gives its readers an insight into the political atmosphere of the time and into the attitudes and opinions of the men who formed the governments during this tense era for England which saw political storm in Ireland, World War I, and the stirrings of socialism.

During the war, F. E. Smith was given the difficult and thankless job as director of the Press Bureau, and afterwards was sent to the front as an Intelligence and Recording Officer to the Indian Corps. From his letters to his family, we get a glimpse of the fighting arena. Returning to England in 1915, he became Solicitor General and afterwards was appointed Attorney General with a seat in the cabinet. In 1919, Smith was appointed Lord Chancellor and was made Viscount Birkenhead. This appointment was subject to considerable comment and criticism not only because of his age—(he was forty-six and one of the youngest men to be appointed) but chiefly because of his notorious tongue and active partisanship in earlier years. However, he had a deep love of the law and regarded it with reverence guarding it against political mutilation even to the point of angering Lloyd George in differences over legal appointments. His legal genius culminated in the judicial work of his Lord Chancellorship and while in this position, he conducted himself with dignity and decorum. His judicial achievements lie embodied in the judgments which he delivered, sometimes verbatim, and they illustrate not only his literary style,

clarity of thought and spare, austere language but also deliberate, unequivocal effort to arrive at the truth. Some of Lord Birkenhead's notable judgments are *D.P.P.* v. *Beard*,[1] dealing with drunkenness as an excuse for crime, the case of Archdeacon of Wakeford,[2] who was charged with certain offences against the ecclesiastical law, the *Rhondda Peerage Case*,[3] laying down that a woman could not sit in the House of Lords by right of peerage and *Admiralty* v. *S.S. "Volute"*,[4] a judgment on the law of negligence in collision cases of which Lord Finlay said, when concurring: ". . . I regard the judgment . . . as a great and permanent contribution to our law on contributory negligence and to the science of jurisprudence."[5]

Among Lord Birkenhead's legislative achievements during this term of office was the Law of Property Act, 1922, which revolutionized the system of holding land.[6]

A further discussion of Lord Birkenhead's career would appear almost anti-climactic. In 1922, he received his Earldom, and resigned his office as Lord Chancellor upon the fall of the Coalition government, although as an ex-Lord Chancellor he sat occasionally on Appeals in the House of Lords. Baldwin, when he became prime minister, invited Birkenhead to sit in his cabinet as Secretary of State for India, which position Birkenhead occupied until 1928. At this time, and until his death in 1930, Birkenhead resumed his interest in journalism and wrote several books.

As a man who once said, "The world continues to offer glittering prizes to those who have stout hearts and sharp swords",[7] Birkenhead's life was certainly well-spiced with glittering prizes. It is, however, the biographer's duty not only to record the life and achievements of his subject, extolling his virtues where necessary, but also to give his readers a true character analysis. Presenting a logical arrangement of material with references from many sources, he writes with taste, and humour and almost with affection, spicing his narrative with vivid descriptions of the setting in which Birkenhead and his family lived and moved.

The brilliant, self-confident F. E. Smith, a man capable of intense and sustained effort, was not without his faults. As a sensitive man, he failed to appreciate sensitivity in others; because of his overbearing arrogance and sarcasm, he made bitter enemies. As his biographer points out, "this lamentable deficiency remained a constant impediment in his political life and almost certainly ruined his chances of becoming Prime Minister." However, to those whom he espoused as friends, he remained loyal. He lived

[1] [1920] A.C. 479.
[2] [1921] 1 A.C. 813
[3] [1922] 2 A.C. 339.
[4] [1922] 1 A.C. 129.
[5] [1922] 1 A.C. 129, at p. 145.
[6] Law of Property Act (1922), 12 & 13 Geo. 5, c. 16.
[7] Birkenhead, Rectorial Address, Glasgow University, 7th Nov. 1923.

extravagantly, often indifferent to his financial situation and yet he was a generous, kindly family man.

For a fascinating study of an outstanding advocate and politician, or just for informative, enjoyable reading, this book is an excellent choice.

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