BOOK REVIEWS
REVUE DES LIVRES

The Declaratory Judgment. By I. ZAMIR. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1962. Pp. xxii, 337. ($10.80)

This book is the first one devoted to the declaratory judgment in English law. American lawyers have had an earlier work on this topic by the late Professor E. Borchard.[1] That study is detailed and authoritative, but is now somewhat dated, and deals with the remedy in the United States, where it seems to have a rather wider application than in England or in Canada. The declaration has not been carefully explored in England or Canada, and its potentialities do not yet seem to be fully realized. Dr. Zamir's book, which is based on a Ph.D. thesis submitted at the University of London is, therefore, a most welcome exposition of an expanding remedy. It is all the more valuable in that it is not a mere compilation of the case law on the subject, but is a thorough examination which devotes considerable attention to suggested changes, expansion and improvement.

Perhaps a better title for the book would have been *The Declaratory Judgment in England* because, although the author acknowledges that the declaratory judgment has passed to a number of countries in the Commonwealth, and the United States and Israel, he makes no attempt to compare English usage with that of these countries. He does not even refer to them except for a very few footnote references to articles published in the United States. At a time when increasing emphasis is placed on comparative study, and especially when dealing with a concept that is common to a number of jurisdictions, some of which have restricted its scope, and some of which, such as Australia and South Africa, have made fruitful extensions of it, a comparative study would seem to be essential. However, it is expedient to consider this work for illustrations that could be applied in Canada.

The book begins with a brief survey of the history of the declaration and indicates its relatively recent origin. Although there were cases before the mid-nineteenth century in which a declaratory judgment could be granted along with other relief, Dr. Zamir

[1] Declaratory Judgments (2nd ed., 1941).

shows that it became available without consequential relief only in 1850 in the Chancery Act[2] of that year, and more particularly in the Chancery Procedure Act of 1852.[3] The legal basis of the contemporary remedy is to be found in the Rules of the Supreme Court made under the Judicature Act of 1875.[4] Of these, the most important is Order 25, rule 5, which provides:

> No action or proceeding shall be open to objection, on the ground that merely a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Identical, or nearly identical, provisions have been adopted by all the common-law provinces in Canada.[5]

One of the greatest difficulties in the study and use of declaratory judgments has been the lack of clear guidance from the legislatures or the courts as to the availability of the remedy. The discretionary aspect of declaratory relief has always been emphasized, and the courts have shown some reluctance in using it. However, not always have they indicated the grounds for their refusal to grant such relief in any particular case. An important contribution of Dr. Zamir's book is its drawing of guide-lines, so far barely recognizable, on the factual bases of cases decided, of the grounds for granting or refusing a declaratory judgment. The author distinguishes between cases where it is refused on the basis of lack of jurisdiction, of statutory preclusion, of lack of *locus standi*, or cases of pure discretion on the facts of the case, such as refusal of a declaration in hypothetical cases, or cases where it would be of no practical advantage to grant it.

The declaratory judgment has been resorted to much less in Canada than it has been in England. It is worthwhile to note some instances where the scope of the remedy has been narrower here than in England to see whether anything can be learned from their experience which might expand its usage here.

In *Smith* v. *Attorney-General for Ontario*,[6] one John Smith had asked for a declaration that the Ontario Temperance Act was invalid. He had attempted to purchase some whiskey from a Montreal dealer, but the latter had refused to sell it to him in violation of the Act. Although Smith could not show that he had been subjected to any actual threat or risk of being penalized under the Act, he contended that a private citizen should be able to have the validity of such a statute determined by a declaratory judgment.

[2] Court of Chancery, England, Act, 13 & 14 Vict., c. 35, ss. 1 and 14.
[3] Court of Chancery Procedure Act, 15 & 16 Vict., c. 86, s. 50.
[4] Supreme Court of Judicature (Consolidation) Act, 38 & 39 Vict., c. 77, s. 17.
[5] See, for instance, in Ontario, The Judicature Act, R.S.O., 1960, c. 197, s. 15, ch. 2; in Newfoundland, Rules of the Supreme Court, Order XXIV (5).
[6] [1924] S.C.R. 331.

The Supreme Court seemed to imply that such a declaration could be given, but it refused to do so because it felt that Smith did not have *locus standi*, and this for two inter-related reasons:

1) If his request were granted "virtually every resident of Ontario could maintain a similar action".[7]

2) An individual "has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act".[8] Mignault J. used the words "without shewing any special interest".[9]

As Dr. Zamir demonstrates, the fact that many persons are or could be aggrieved by the same Act, far from being a consideration detrimental to the plaintiff, may enhance the importance of the issue, and thus induce the court to decide it by a declaration. He gives as an illustration the leading decision in *Dyson* v. *Attorney-General*[10] where the alleged wrong could have affected some eight million people. As far as the requirement of "special damage" or "exceptional interest" is concerned, the book shows that this test has now been replaced by the less stringent requirement of "sufficient" or "substantial" interest.

There is a far wider use of the declaratory judgment in declarations as to status in England than in Canada. The author lists decisions with reference to nationality, decisions which have not yet been made in Canada. An important aspect of this function of the declaration is shown to be with reference to the rights of membership in local or professional organizations and private clubs (cases that lie somewhere between status and contract). It would seem that this practice could well be followed here.

Perhaps the greatest potential service of the declaratory judgment is in public law. Dr. Zamir states: "Review of administrative action by way of declaratory proceedings has been the main device developed by the courts to overcome the deficiencies of the traditional supervisory remedies, i.e., the prerogative orders."[11] If this is so in England, it is certainly very much less so in Canada where a number of cases have held that the supervisory authority of a superior court was exercisable through the prerogative orders of prohibition, mandamus and certiorari, and not by way of a declaration or a declaration and an injunction.[12] Evidence is given that in England the use of the declaration as a supervisory remedy can be excluded by specific statutory provisions, but that otherwise it has

[7] *Ibid.*, *per* Duff J., at p. 337. [8] *Ibid.*
[9] *Ibid.*, at p. 347. [10] [1911] 1 K.B. 410.
[11] P. 149.
[12] *Crédit Foncier Franco-Canadien* v. *Board of Review under Farmers' Creditors' Arrangement Act, 1934, et al.*, [1940] 1 D.L.R. 182 (Sask.); *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood et al., (No. 2)*, [1940] 3 W.W.R. 650 (B.C.) *per* O'Halloran J.A.; *Hollinger Bus Lines* v. *Ontario Labour Relations Board*, [1951] O.R. 562, affd. [1952] O.R. 366.

a very wide acceptance, and that its scope is increasing. In a number of recent cases this remedy was employed even though some of the prerogative orders were or could have been available.

The author compares the remedy of the declaration with that of the prerogative orders and contends that there are many advantages to the former. Two of these are not important in Canada. He points out that the procedure in an application for a prerogative order is detailed and complicated and the application for certiorari and prohibition is made to the Divisional Court. An application for declaratory relief is simpler and made to a single judge. Moreover, the time limit for certiorari or prohibition is six months, whereas the time limit for a declaration is the usual three years. In Canada the prerogative writs are granted by a single judge, the procedure has been simplified, and the six months' time limit does not apply.

Other advantages of the declaratory judgment which the author lists apply equally to Canada. A declaratory judgment, unlike certiorari, or prohibition, can be given along with other consequential relief, such as damages. Also, unlike certiorari or prohibition, it can be given with reference to administrative actions whether judicial or not and is available not only against statutory bodies but against non-statutory ones as well. Declaratory relief may be used so as to substitute the decision of the superior court for that of the lower tribunal, whereas certiorari merely quashes it. Although certiorari and prohibition may be directed to inferior tribunals only, the declaratory judgment may be employed to impugn a judgment of a superior court, as for example, where it is null and void as having been made against a non-existent defendant. It has an advantage over mandamus in that it can lie against the Crown, while mandamus cannot. Mandamus will not issue to compel the performance of a duty which is not of a public nature, whereas the declaration is not so limited. For these many reasons, the statement of the Chief Justice of the High Court of Ontario with respect to the declaratory judgment is very pertinent.[13]

> This peculiar right of recourse to the Courts is a valuable safeguard for the subject against any arbitrary attempt to exercise administrative power not authorized by statute, and judges ought not to be reluctant to exercise the discretion vested in them where a declaration of the Court will afford some protection to the subject against the invasion of his rights by unlawful administrative action.

The declaratory judgment has been given a wide application in Canada in civil cases. The special usefulness of the declaration in allowing parties to have their rights and obligations determined before incurring serious loss or severe penalties, in being available where certain other remedies are not, and in being of a less an-

[13] *Gruen Watch Company* v. *Attorney-General for Canada*, [1950] O.R. 429, at p. 450.

tagonistic nature, seems to have been recognized. Some criticism can be made of the brevity of that part of the book which deals with the scope of the declaratory remedy in civil cases. The only discussion of the resort to the declaratory judgment, in such matters as the construction of wills and deeds, mortgages, leases, memoranda of association and articles of association, is to be found in part of the chapter dealing with legislative provision for declarations. The examples of the recourse to the declaration in the field of contract and property are too few. However, even in these areas some of the author's illustrations of the wider function of this remedy in England, and some of his suggestions for its extended use, deserve careful consideration.

One could perhaps find fault with the extent to which the author discusses cases in the body of the text. Some of this discussion is repetitious, and could well have been included in the footnotes. On the other hand, perhaps this approach is a salutary change from that of writers that devote more space to footnotes than to text. In any case, this is not a serious fault in an otherwise well conceived and executed work. It is to be hoped that the author's stated purpose of encouraging "practitioners to resort more intensively to declaratory relief, and thus widen even more its vast field of operation", will be achieved.

WALTER S. TARNOPOLSKY*

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The Lawyer and Litigant in England. Hamlyn Lectures 14th Series. By R. E. MEGARRY, Q.C. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1962. Pp. x, 205. ($4.70)

Canadian lawyers who had the opportunity of meeting, at the Empire and Commonwealth Law Conference at Ottawa, R. E. Megarry, Q.C., and his more numerous friends who trace their acquaintance with him through his writings, will be pleased to hear of his latest book *The Lawyer and Litigant in England.*

This is the text of the fourteenth series of the Hamlyn Lectures delivered in 1962 under the provisions of the Hamlyn Trust.

Established by a testamentary gift of the late Emma Warburton Hamlyn, the object of the Trust as finally settled by the Chancery Division of the High Court on the 29th November, 1948 is as follows:

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> The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

Dr. Megarry's lectures faithfully echo the spirit of the Trust: they contain, in language understandable by laymen, an exposition of the constitution and operation of the courts in England and a description of the respective functions of the two branches of the legal profession; his treatment is frank and his appraisal of the merits and demerits searching; but there is in it reassurance of suitability of the prevailing system for meeting the public needs.

Directed primarily to a non-professional audience and designed to create an understanding of the law in its operations, the legally trained reader will not fail to find in this book much of interest to him.

The unique relationship of the two professions, one to the other, and of each to the courts, the place and function of the barrister's clerk and a description of life within chambers are dealt with so as to establish for the reader the atmosphere in which the course of the litigant's cause proceeds to a hearing before and a decision by the courts.

Logically the treatment of these subjects leads to an examination of the system of legal education which antedates and leads up to admission to practice. This should appeal with particular force to law teachers and those concerned with the rapidly growing law schools in the English-speaking world.

The treatment of the courts from the point of view of the average citizen forced to go to law and of the counsel of his selection who places his case before the court is constructive and merits study in other jurisdictions where concern is evinced as to the development of administrative procedure. Some comfort may be drawn elsewhere from the fact that even the extensive studies of the Evershed Committee and its recommendations for a "new approach" have not removed the bogy of delays in the course of litigation.

If the reader of this review has gathered the impression that Dr. Megarry has produced a volume which will be referred to only by those engaged in legal research, justice has not been done. This is excellent and pleasant reading in the course of which one is scarcely aware of how much he is being educated. As a factual

study of how lawyers and courts serve litigants in the second half of the twentieth century, Dr. Megarry's volume should be regarded as a valuable addition to the library of any forward-looking member of the bar.

ARTHUR KELLY*

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Extradition To and From Canada. By G. V. LAFOREST, of the Faculty of Law, University of New Brunswick. New Orleans, La.: The Hauser Press. 1961. Pp. vii, 200. ($6.50 U.S.)

Extradition is the surrender by one state at the request of another of a person who is accused, or has been convicted of a crime committed within the jurisdiction of the requesting state. It is thus a specialized subject, so narrow that it finds no place in the curriculum of law schools and is outside the knowledge of most lawyers. In such circumstances, a good up to date textbook on it is most useful.

Since the latest English book on extradition was published in 1910 and Canada has never had one of its own, Professor LaForest's book is timely and fills an important gap. It is largely based on work done by the author when he was employed by the Department of Justice of Canada to prepare an outline of the Canadian law of extradition. It is composed of that outline, brought up to date; of three appendices setting out relevant legislation, treaties and a list of extradition crimes; and of an index. And it is published with the permission of the Department of Justice.

It is a cause of satisfaction that the Canadian government should thus in effect have subsidized this piece of legal research and writing and have encouraged its publication. It would seem, however, that there may be an undesirable aspect to this particular method of promoting legal research, for it led the author to limit the scope of his study. In his preface, he tells us: "Since the work was originally prepared for official purposes, I have refrained from criticising the legislation. Those seeking the reform of the law would do well to refer to a Supplement to volume 26 of the American Journal of International Law published in 1932." One cannot believe that there is any substance to the implied charge that the Department of Justice is not interested in constructive criticism of the law or in law reform.

Fortunately, the author's self-imposed limitation has not impaired the value of his work. Although he has refrained from

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criticism of legislation, he has freely discussed a large number of cases and has given a balanced view of the law. For example, when the cases are in conflict, as they often are, being mainly decisions of trial judges, he has examined both views and suggested the better one. And he has pleaded for a liberal interpretation of extradition treaties, at the same time cautioning that extradition may be used to make inroads on the liberty of an innocent person. Furthermore, copious footnotes also make the book an extremely useful tool to one who wishes to explore any aspect of the subject deeply.

In addition to extradition between Canada and foreign states, the book deals with "rendition" to and from Commonwealth countries. Rendition is substantially the same as extradition but, being an inter-Commonwealth matter, it rests solely on legislation and not on treaty arrangements. In Canada, it is governed by the Fugitive Offenders Act.[1] Generally speaking, the rules for rendition are more liberal than those for extradition. For example, there is no need to make a formal requisition for the handing over of a fugitive from justice, or to show that the offence with which he is charged is a crime in Canada as well as in the country to which he is to be returned. Moreover, once a person is returned to a Commonwealth country, he may be tried for any offence, whereas under an extradition proceeding he may be tried only for the offence for which he is extradited.

The history of extradition is of special interest, because Canada and the United States were pioneers in this field. The long undefended border between these two countries made it easy for fugitives from justice to escape from one country to the other and this soon led to problems of law enforcement. Even before legislation or treaties dealing with the matter, the practice of surrendering fugitives to each other was begun. When it was thought that this practice violated the provisions of the Habeas Corpus Act of 1679, the Legislature of Upper Canada in 1833 passed the first Canadian Act providing for extradition.[2] By contrast, similar legislation was not passed in England until 1870.[3]

Canadian experience with extradition is, therefore, a long and rich one. It is the particular value of this book that it records and examines that experience in a clear and orderly manner.

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[1] R.S.C., 1952, c. 127. [2] (1833), 3 Will. IV, c. 6 (U.C.).
[3] (1870), 33 and 34 Vict., c. 52 (Imp.).
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Statistics of Criminal and Other Offences, 1960. Prepared by the Dominion Bureau of Statistics, Health and Welfare Division, Judicial Section. Ottawa: The Queen's Printer. 1962. Pp. 239. ($2.00)

The eighty-fifth annual report of statistics of criminal offences for the period January 1st, 1960 to December 31st, 1960, is now obtainable from the Queen's Printer in Ottawa. There are 239 pages in the report consisting of twenty-seven complex tables breaking down the data, collected throughout Canada, into such variables as offence, territory, age, length of sentence, previous record, and so on. It is an immense undertaking. I would not be surprised if the annual cost of producing this book was equal to or greater than the total sum spent each year on criminological research throughout Canada. The Judicial Section of the Dominion Bureau of Statistics employs over thirty full-time personnel.

All will agree that the availability of accurate data concerning the administration of criminal justice is an indispensable tool to an intelligent appraisal of the effectiveness of our criminal law, procedure and treatment of offenders. Although the usefulness of statistical inferences depends on the accuracy of the data from which those inferences are drawn, it is not proposed here to canvass the question whether the reports submitted to the Dominion Bureau of Statistics are negligently prepared or wilfully falsified. But even assuming for present purposes that those reports are honest and accurate, there are none the less aspects of the volume that are very disturbing. The following five particular problems will suffice as illustrations.

1. One wonders why our volume of 1960 figures (published in October, 1962) should not be available until twenty-two months after the end of the time period analyzed. The British figures are normally available within seven months. Thus their 1960 figures were available fifteen months before ours.

2. Statistics become more significant if the figures can be compared with those published in previous years. The 1960 volume includes some of the 1959 figures for comparison. For example: 31,092 persons were convicted for indictable offences in 1959, compared with the higher number of 35,443 in 1960, and the number of actual convictions for indictable offences (counts, not persons) rose from 56,204 in 1959 to 64,707 in 1960. Does this mean that there was a serious upsurge in crime in Canada in 1960? This would be the obvious interpretation. But what it probably means, and what the 1960 volume does not tell us, is that the 1959 statistics were incomplete. In my copy of the volume of the 1959 statistics there is a small mimeographed note glued into the inside cover of the book pointing out that although the 1959 figures show an

apparent decrease from the 1958 figures, this variation "may be partially explained by the failure of several courts, including that of a large urban centre, to submit returns to the Dominion Bureau of Statistics". This note is not mentioned in the 1960 volume. Persons using the 1960 volume should hesitate before drawing any conclusions on the basis of a comparison with the 1959 figures.

Under the Statistics Act,[1] the duty of compiling and transmitting the data falls on the clerk of the court or, if there is no clerk, the judge or other functionary presiding over the court. Thus the duty would fall in almost every case on a person who is not a federal employee. The sanctions available to the Bureau, such as mandamus or a prosecution for refusal or neglect to file forms, are too cumbersome and severe to be utilized. Provincial governments informally assume responsibility for compliance with the Statistics Act. But there are obvious drawbacks in leaving the enforcement of a Dominion responsibility to provincial governments in cases where (a) there is no financial advantage to the provinces, (b) there is no provincial legislation with appropriate financial sanctions imposing this duty on provincial courts and (c) many of the officials who are responsible for making up the forms, particularly in the larger cities, are municipal and not provincial employees. Apart from enacting provincial legislation which could be used to ensure compliance with the Statistics Act, other techniques might be to use Dominion employees, trained by the Bureau, for the collection of the data in the larger cities, or Dominion legislation could provide that in the event that proper returns were not forthcoming, the Dominion could use its own employees to make up the returns and the cost could be charged to the municipality. There are, of course, constitutional problems, but these are not insurmountable. Some scheme could be worked out to ensure that every court files its returns.

3. On the basis of the 1960 figures one would conclude that approximately nine out of ten persons charged with criminal offences were actually convicted. It is stated in the report[2] that "in 1960 there were 73,411 charges of indictable offences of which 64,707 resulted in convictions". This works out to a conviction rate of slightly above eighty-eight per cent. It is dangerous to draw any conclusions from this figure because no record is kept of withdrawals. A charge which was eventually withdrawn would not be noted as an offence charged. Without these figures the number of charges shown is substantially lower than it actually is and thus the conviction rate is artificially higher. In many areas the number of withdrawals (that is, withdrawals of all charges based on the transaction involved) is as large or larger than the

[1] R.S.C., 1952, c. 257. [2] P. 12.

number of acquittals. A withdrawal often means the same as an acquittal for lack of evidence and so should be recorded with the acquittals as they are in the English statistics. To say that approximately ninety per cent of all suspects before the courts for indictable offences are adjudged guilty is seriously misleading. (This was the conclusion drawn by the Dominion Bureau of Statistics in their *Canada Year Book 1961*, based on the 1959 figures.)

4. There is a chart in the report[3] showing that of the 35,443 persons convicted of indictable offences in 1960, 10,759, or approximately thirty per cent, had no previous convictions, whereas seventy per cent of those convicted had previous convictions. This is a very significant figure, because it can be argued on the basis of these figures that our criminal process is not particularly effective, as there are so many recidivists before the courts. But one should be cautious in using these figures because of the curious way the Dominion Bureau of Statistics treats multiple count indictments. If a person who has never been in trouble before writes two bad cheques, is then charged in one indictment with two counts of false pretences and is convicted on both, he will show up in the statistics as a person with one previous conviction at the time of the present convictions. Apparently this is done on the theory that when the accused was convicted or pleaded guilty to the second count, he already had a previous conviction on the first count. Very few persons consulting the statistics, though, would draw any conclusion but that the number of first offenders before the courts charged with indictable offences in 1960 was about thirty per cent. It is difficult to say what the true figure should be. One would have to add to the thirty per cent the number of first offenders who were convicted on multiple count indictments. The number of prosecutions involving multiple count indictments is not insignificant. If the Bureau's method of handling multiple count indictments were set out in an explanatory note, the error would be less significant, but as it is now, it is hidden in departmental practice.

5. The last query also deals with previous convictions. Apparently there is no policy laid down as to the meaning of previous convictions. The Dominion Bureau of Statistics leaves it to each court official to fill in this figure in one of a number of ways. The clerk can include only indictable offences or both summary and indictable offences; he can put down conviction on a multiple count indictment as one previous conviction or he can say that conviction on each count is a separate conviction. When we see in the report[4] that in 1960 there were 119 persons who were convicted of over twenty offences, we have no idea whether these persons

[3] P. 26. [4] P. 18.

were before the court on over twenty separate occasions, or were only before the court on one occasion and were found guilty on over twenty counts.

Undoubtedly tremendous strides have been taken by the Dominion Bureau of Statistics in the past number of years to give us a better collection of statistics. They have recently revised their Police Statistics and are considering revising the Criminal Statistics. But until the present methods of collection and computation are given a complete re-analysis and revision, those working with the figures would be wise to be cautious.

MARTIN L. FRIEDLAND*

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Nationalisation of Foreign Property. By GILLIAN WHITE, LL.B., Ph.D., of Gray's Inn, Barrister-at-Law. London: Stevens & Sons Ltd. Toronto: The Carswell Company Limited. 1961. Pp. xxvi, 283. ($13.75)

The international legal problems arising out of the taking of foreign-owned private property by the government of the state in which it is located, through the processes of expropriation, confiscation or nationalization, have received an increasing amount of attention since the end of the Second World War. A great number of studies have appeared, many of which deal with the problems which arise in this connection under public international law. The book under review is the latest contribution to this particular field. The continuing concern of legal scholars with this topic reflects not only its difficulties but also its importance in the international economic and political affairs of our day.

The book under review deals almost wholly with postwar developments. The author has evidently given much attention to the organization of her study and has succeeded in providing a systematic and consistent treatment of the topic. The book is divided in four parts. The first part is introductory in character and deals briefly with the legal, economic and historical background of the problem. It is followed by a more detailed discussion of the two basic concepts of nationalization and of foreign ownership. The third part studies in detail the limitations imposed by international law on the exercise of a state's "sovereign right" to nationalize property. The concluding section consists of two chapters, the one studying exhaustively the recent state practice with respect to compensation of the foreign owners of nationalized

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property, and the other reviewing the protective measures and remedies available to the foreign owner.

This outline gives some idea of the thoroughness of the coverage of the study under review. Sometimes, it is true, the author's attempt to organize and subdivide the topic is carried a little too far. The discussion of the political, economic and nationalistic motives for nationalization, though based on solid comparative study of the relevant legislation, is hampered by the artificial character of the distinction between these kinds of motives, as the author herself acknowledges.[1] Similarly, the discussion of the legal problems of state measures affecting concessionary rights granted to aliens does not seem to benefit from the division of the topic in two unequal parts, one dealing with the foreign concessionaire, and the other with the effects of nationalization in breach of a concession.

The discussion of the concept of nationalization itself is not open to the same objections. Following the more or less accepted general usage, Miss White distinguishes expropriation and nationalization from confiscation, the latter term being used to refer only to those takings where no compensation is paid to the dispossessed owner. The distinction between nationalization and expropriation is more difficult to make with any precision. Dr. White uses the term "expropriation" to refer to the traditional type of state taking of specific property for reasons of public utility. Since in this type of taking ownership over the particular property is often transferred to the state, it is evident that the test of eventual state ownership alone does not suffice to distinguish the two concepts. Dr. White also rejects the test of the scope of the measures (general or individual), chiefly on the strength of the Suez Canal case, which was a nationalization though it involved a single specific company. (The Iranian oil nationalization which she also cites in this connection was, in form, at least, a general measure affecting the entire petroleum industry of the country.) This leaves no definite single criterion of distinction; and so the author states that the classification of measures in borderline cases will depend "upon an objective appraisal of the various features of the measure in an attempt to discover which of the two concepts it more closely resembles".[2]

When considering the types of property which are subject to nationalization, the author points out that the term property is understood in this connection in a very broad sense. She then discusses in detail the problems which arise in connection with the nationality of the owner, sometimes a natural person but, in most of the important cases, a company. This is one of the best and most complete discussions of this very important topic; as in

[1] Pp. 18, 19. [2] P. 50.

the rest of her book, Dr. White does not lose sight of the concrete problems that have arisen or may arise. She is equally successful, though less exhaustive, in her discussion of the effects of nationalization on the legal personality of corporate bodies.

The central part of the study is devoted to a discussion of the limitations imposed by international law upon a state's right to nationalize foreign property. Four principles are usually mentioned in this connection: the state's action must be non-discriminatory, it must be taken for purposes of public utility, it must not violate the state's international commitments and the foreign owner should be properly compensated. Dr. White examines all four of these principles and adds a fifth one, often taken for granted in public international law studies, that of territoriality. After examining in detail the provisions of municipal enactments and international agreements, the author concludes that the rule according to which nationalization measures will normally have effect only with respect to property situate within the nationalizing state is upheld in practice and constitutes a real and important limitation on the state's rights.

The principles of non-discrimination and public utility are in practice closely related. In spite of the frequent assertions as to the existence of an obligation on the part of every state not to discriminate against aliens with respect to the taking of property, there is little concrete evidence that this rule is accepted in state practice in such an unqualified form. Dr. White has gathered all the evidence which may be adduced in support of this rule and, though she appears persuaded of its validity, the evidence itself is not wholly convincing. International law has allowed in the past, with respect to other matters—especially trade and commercial activities—a certain degree of "not unjust" discrimination and, vague though it is, this appears to be the rule accepted in state practice with respect to takings of property, as well. What are the precise qualifications to this rule is, of course, a matter of great importance and difficulty. The presence or lack of discrimination may also be of some relevance to the measure of compensation to be paid to the alien. Moreover, the alien may be protected to a limited extent by the operation of the second principle here considered, that of public utility. Dr. White suggests that this principle is of doubtful applicability to problems of nationalization and that it can safely be discarded. It may be, however, that this principle is useful in bringing into play the more basic general principle of law according to which states should not abuse the rights (or, better, competences) attributed to them by international law. Cases of obvious bad faith would then come under this principle rather than that of non-discrimination.

There is little doubt or dispute as to the validity of the third

(or fourth) limitation to the state's right to nationalize. Nationalization of foreign property in breach of express treaty provisions gives rise to the international responsibility of the nationalizing state, which may thus be liable for more than mere compensation of the alien (it may, for instance, be bound to restore the property taken to the alien owner). At the time of both the Iranian and the Egyptian nationalizations, it had been said that they constituted violations of treaty commitments. In an excellent discussion, Dr. White points out that in neither case was there any violation of an international treaty. In this connection, another question has been raised recently with increasing force, namely, whether a comparable rule of international law exists with respect to measures violating, or more generally affecting, commitments made by a state to aliens by means of a contract, most commonly a concession. After a survey of the few relevant cases, Dr. White concludes that such measures are not in themselves internationally unlawful, though they give rise to a claim for compensation. Her conclusion is solidly based on state practice and on well accepted principles of international law. She further argues, however, that when a nationalization occurs in breach of a specific contractual provision prohibiting its premature termination, such nationalization would be internationally unlawful. She offers rather slender evidence in support of her position in this respect; it is by no means clear why such promises should be given such an exceptional legal force.

The final and certainly the most important of the limitations imposed by international law is the nationalizing state's obligation to compensate the alien whose interests have been affected by its measures. Dr. White devotes a long chapter of her book to a discussion of the related problems.[3] This is by far the best part of her study as well as the most original. She examines in detail the state practice of the postwar years, reviewing first the provisions on compensation of the nationalization statutes and then studying at length the contents of the international agreements relating to compensation which have been concluded since the late 'forties. She points out that most of the early postwar agreements did not provide for the actual transfer of sums for compensation but rather established procedures and, sometimes, special commissions to deal with the matter. The general lack of success of such agreements led to the conclusion of lump-sum agreements, through which most of the related disputes have been settled by now. Her study of these agreements is exhaustive. She sets out the various forms that compensation has taken, pointing out that in almost all cases it was paid in instalments and that in many cases the final settlement occurred several years after the nationalization. The author shows clearly the close relationship between the lump-sum compensation

[3] Pp. 183-243.

agreements and various commercial arrangements between the states involved. Wherever such figures are available, she compares the sums paid in compensation with the amount of the damages suffered because of the nationalization.[4] She emphasizes the difficulties which are caused by the lack of precise information as to the value of the claims of a state's nationals and describes some of the methods that have been used to overcome this obstacle. Her conclusion from the discussion of postwar developments is that it is now established in public international law that some compensation is to be paid for the taking of foreign-owned property in cases of nationalization as well as in cases of expropriation of the more traditional type. Though the author does not reject expressly the view that fair compensation is a precondition for the legality of the nationalization, her whole discussion is consistent with acceptance of the view that liability to pay compensation is a consequence of the nationalization rather than a condition of its legality. As to the measure of compensation, she does not appear to consider that the postwar agreements are of great value as precedents, but neither does she accept the traditional formula of "prompt, adequate and effective" compensation as a valid technical rule for assessing compensation. This traditional formula, she argues, should be considered as providing "a useful guide for States desirous of concluding such agreements, and a context for the interpretation and assessment of the agreement when concluded".[5]

In a concluding chapter, the author reviews the various measures which states have taken or may take to protect the investments of their nationals abroad (treaties, multilateral conventions and investment guaranties) and the remedies available to the foreign owner of nationalized property. She discusses in this connection the present function of the local remedies rule as well as the role and importance of municipal remedies outside the nationalizing state. She examines further the available international remedies and some of the recent proposals for the creation of an international claims tribunal.

The book is well printed and well presented, with full indexes of cases, treaties and subjects, and a bibliography. A considerable number of misprints have escaped the proofreader's attention, but fortunately they affect in no way the meaning of the text.

Nationalisation of Foreign Property is a very useful and instructive book. In its treatment of the postwar developments of the international law of nationalization, it is the most complete and up to date of the studies available up to now. The author is not concerned with proving a preconceived thesis but with finding out what is the actual practice of states at the present moment,

[4] See, *e.g.*, p. 210. [5] P. 243.

which of the traditional rules are held valid and obeyed, and which have fallen into disuse. The study is a legal one and does not venture into the field of economics or foreign policy. But the author's approach is realistic and she has succeeded in her attempt to analyze fully the available material, starting with the municipal nationalization statutes, and moving to the intergovernmental lump-sum agreements and the *sui generis* instruments settling the Iranian oil dispute and the Suez Canal Company nationalization. Though the main part of the study must have been written before 1960, the author has kept it fully up to date with respect to recently concluded compensation agreements (even if this leads, in one instance, to an incorrect statement, contradicted a few pages later).[6] It is true that Dr. White's analysis of recent state practice does not lead to any startling policy conclusions or to a statement of definite legal rules, but this is surely due to the fact that such rules have not crystallized as yet and such conclusions cannot be drawn on the basis of legal considerations alone. Perhaps the jurist of 1981 will be able to state precise and well-defined rules of law and policy. For the time being, Dr. White's book is of great value to anyone interested in modern international law; to those more particularly concerned with the legal regulation of economic relations between nations, it is indispensable.

A. A. FATOUROS*

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The Medieval Coroner. By R. F. HUNNISETT. Cambridge Studies in English Legal History. Cambridge: Cambridge University Press. Toronto: The Macmillan Company of Canada. 1961. Pp. xiii, 217. ($5.00)

The powers of the sheriff in the twelfth century were very considerable, and the Inquest of Sheriffs of 1170 revealed that the Crown was already suspicious of these powers. To put an official by the side of the sheriff to check his powers and to safeguard the interests of the Crown was a politic move. Because of his perennial continental wars and the need to pay his ransom, Richard I was desperate for money and he could not afford to lose any of the financial issues of Crown pleas. It was therefore necessary to appoint a full-time local official to wait upon the general eyre, to ensure that all Crown pleas were presented to the justices, however long before the eyre they had arisen and although they might

[6] Compare p. 202 with pp. 221-222.

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result in financial loss to the presenting jurors. The sheriff was already overburdened, over powerful, and frequently suspected of corruption, so that he could not perform these duties successfully. Hubert Walter is credited with the creation in 1194 of the office of coroner and the only instructions issued at that time were that they should keep the pleas of the Crown. Not until Bracton wrote over fifty years later was any attempt made to define clearly the obligations and functions of the office of coroner: a result of this late definition is shown by the immense gap between the theoretical implications of the title keeper of the pleas of the Crown and the few pleas with which he actually came to be concerned by virtue of his office. Not only was the coroner never concerned *ex officio* with Crown pleas other than felonies and unnatural deaths, but homicide and suicide were the only felonies with which he was invariably concerned. Other felonies only entered his orbit when they resulted in homicides, abjurations, appeals, confessions or exactions, or if he were specially commissioned to inquire about them. In the early years of the thirteenth century felonies provided the vast majority of presentment to the general eyre, and practically every felony resulted in an appeal because the procedure of jury presentment was comparatively new. As the century continued the number of appeals fell considerably, and the number and variety of Crown pleas equally increased. The coroner's duties were not extended with the result that the coroner, who when first appointed in 1194 was supposed to keep all pleas of the Crown, no longer played a dominant role during the visitation of the eyre, because of the limits of his jurisdiction.

The author has shown that thirteenth century law books and statutes portrayed a false picture of the coroner which was continued by later writers. Once again it was Bracton, who, basing his treatise on cases collected from early thirteenth century plea rolls in which most cases of wounding and housebreaking were prosecuted by appeals and were therefore attested in court by coroners, was responsible for the misconception as to the extent of the coroner's jurisdiction. The section in Bracton concerning the coroner, being the first description of the office, was extracted, and came to be regarded as a statute and consequently any misconceptions contained therein became firmly established. Many examples of such misconceptions are cited in this study: that the coroner had the duty of appraising the chattels of felons of all kinds; that the medieval coroner could pass judgment on felons caught in the act; that the coroner held preliminary inquiries concerning treasure trove and wrecks of the sea; that the sheriff and county coroners together attached persons who broke the assizes of bread and ale and measures. Although there might be the occasional instance in which a coroner in certain areas per-

formed some of these functions, in general they were not exercised by coroners. The rolls, the author assures us, prove beyond question that the medieval coroner had fewer duties and was to that extent less important than has usually been thought, although he was still second only to the sheriff in the local governmental hierarchy.

Much of the time of the medieval coroner was spent holding inquests upon bodies. A coroner could only hold such an inquest if there was a body, and if no body was found the matter had to be presented at the sheriff's tourn or later before the justices of the peace. In times of plague or famine when so many died and the coroners were unable to view them all, permission was granted for the bodies to be viewed and buried by the men of the neighbourhood without the coroner, unless a wound was found, or there was suspicion of homicide.

In the chapter entitled "The Coroner's Inquest", the author discusses such matters as the duties and liabilities of a "first finder", the raising of the hue and cry, the summoning of a jury, the examining of the body—a sort of primitive *post mortem*—the inquiry into the weapon used, the seeking out of any felon, the appraisal of lands and chattels of homicides and suicides and the forfeiture of any deodands. The deodands caused the coroner much trouble, for, by 1194, the practice was to regard them as just another source of royal revenue. Later they were sometimes granted to lords of liberties who often made strenuous efforts not to forfeit deodands belonging to them, whilst the men of the townships or hundred often did their utmost to shield their unfortunate fellows who owned deodands.

Sanctuary was an important right in medieval England, for every consecrated monastery, church or chapel with its graveyard could provide sanctuary for a limited period of forty days. The great majority of those who sought such sanctuary were either robbers or homicides, and many of them took refuge either when pursued by the hue and cry immediately after committing a felony, or after breaking out of prison which was not an infrequent occurrence. The coroner had to be summoned whenever a sanctuary seeker asked for him, and although abjurations cannot compare with inquests on dead bodies in the amount of trouble which they caused a coroner, they still added considerably to his burden and necessitated much travelling, especially in large counties. The abjuration was sufficiently colourful and entertaining to ensure a good attendance and fines for failure to attend were incomparably fewer than for failure to attend inquests. When the coroner arrived at the church he gave the felon in sanctuary the choice of either surrendering to the law or abjuring the realm, and, if he chose the latter alternative, the felon was given the further choice

either of abjuring at once or remaining in the church for a further period not exceeding forty days from his first arrival in the church. If the felon refused to abjure or surrender to justice at the end of his forty days in sanctuary his privileged position came to an end, for although he could not be forcibly removed it became an offence to provide him with food and drink, whilst previously such provision had amounted to a duty. If abjuration was chosen, the felon had first of all before the coroner to confess to a felony and then take the oath of abjuration by swearing on the Gospels to leave the realm of England and never return except with the express permission of the king or his heirs; to hasten by direct road to his port, not leaving the king's highway, under pain of arrest as a felon, nor staying at any one place for more than one night; on arriving at the port to seek diligently for passage across the sea, delaying only one tide if possible; if he could not secure a passage, to walk into the sea up to his knees every day as a token of his desire to cross it, and if he was still unsuccessful at the end of forty days, to take sanctuary again at the port. The abjuror had to undertake his journey in distinctive dress, originally a single garment of sack cloth, carrying a wooden cross in his hand, as a sign of the Church's protection. The coroner was involved in all stages of these matters, including the appraisal of abjurors' chattels which were forfeited to the king and also the inquiry concerning the goods and lands of those sanctuary seekers who surrendered and were sent to gaol and of those who refused both to confess and surrender, although of course, few of these people had any lands and not many had chattels worth more than a few pence. Legislation introduced by Henry VIII caused abjuring felons to be branded in the thumb with the letter A. Finally the privilege of abjuration was completely abolished by a statute of James I in 1623-1624.

The coroner was concerned with all appeals when they reached the county court in the first half of the thirteenth century, and he was concerned with many of them at an earlier stage, such as the raising of the hue and cry and the inspection of injuries in appeals of rape, mayhem and wounding. A characteristic feature of the medieval legal system was the great difficulty in getting men to stand their trial, and it was common for exactions or public demands to be made at four successive county courts that the man concerned appear and surrender to justice, and if he still absented himself on the fourth exaction he was outlawed. The county coroners had to attend all exactions and outlawries to legalize record and promulgate such outlawries. Even with the promulgation and recording of the outlawry, the coroners' duties were not complete, for they had to inquire in whose tithing or mainpast the outlaw had been and enrol it in order that it might

be amerced at the eyre for his flight and also to appraise his lands and chattels prior to forfeiture.

The medieval coroner is generally thought to have been of a far higher character, and less extortionate than the sheriff, but he nevertheless practised extortion regularly (if moderately), the inevitable result of his office being unpaid and generally having no legitimate perquisites attached to it. The fact that the coroners had originally been created to act as a check upon the sheriff, especially in financial matters, made the matter of malpractices a serious one; but it was to some extent corrected by the two officials being jointly associated in certain tasks, and in other cases by the coroners obtaining greater control by acting in place of the sheriff. Collusion seems not to have been a very serious problem, and, therefore, generally speaking the administration in the counties and townships was probably more inefficient than harsh.

During the thirteenth century most coroners were knights, and the onerous and unpaid office was not much sought after because many knights regarded the office as socially inferior to that of sheriff and less dignified than military or other service with the king. By the end of the century it was clear that there were not enough knights to go round, and, although the first Statute of Westminister ordered that coroners should be chosen "of the most wise and discreet knights", it became, after 1300, the exception, rather than the rule, for coroners to be knights. The gradual waiving of the knighthood qualification made the office of coroner open to more persons, on some of whom it clearly conferred a status which they sought and might otherwise not have attained. Unlike his modern counterpart, the medieval coroner was required to have neither legal nor medical qualification but he was required to have land worth at least a hundred shillings a year in order to support himself in his unpaid office and also so that he could be made responsible to account, by distraint if necessary, to the king and the people.

The office of coroner gradually declined from the fourteenth century onwards because of the decrease in the number of appeals, the abolition of the murdrum fine with the consequent loss of revenue, and, more particularly, because of the cessation of the general eyre. Probably the most serious challenge for the coroners was the appointment of justices of the peace which prevented the coroners from taking over preliminary inquiries into all felonies. The fifteenth century saw the justices of the peace become much more important than the coroner, but the latter retained an important public office which still exists today and which has taken root in almost all English speaking jurisdictions.

Many legal historians when discussing the office of coroner have glossed over the details and claimed that so much is lost in

the mists of antiquity. No longer will this excuse be accepted, because Mr. Hunnisett has revealed by this study the functions, activities and human frailties of the medieval coroners. Although this book is full of detail, it is very readable, and it represents a major contribution to scholarship in the too often neglected field of legal history.

D. COLWYN WILLIAMS*

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The Life and Times of Confederation. By P. B. WAITE. Toronto: University of Toronto Press. 1962. Pp. vii, 379. ($8.50)

There has long been a need for a book which would help students of Canadian constitutional law to understand the social and political forces which moulded Confederation. Professor Waite's book, though not written with law students in mind, fills this need admirably.

The Life and Times of Confederation is a history of the crucial period between 1864 and 1867, based primarily on the accounts of the many robust newspapers of the day. The role of newspapers in historical research is unique. Skilfully employed, they can provide insights into the climate of the times which add a third dimension to our understanding of historical events. But they must be used carefully. For one thing, their accuracy is often open to question. For another, great skill is required to prevent a book based on press clippings from becoming a hopelessly impenetrable jungle of quotation. Professor Waite has recognized, and succeeded in overcoming, both of these difficulties; the first by a consistently skeptical attitude, and frequent reference to supplementary research sources (which he lists in a useful bibliography), and the second by a discerning eye for apt quotation, an imaginative and wonderfully visual prose style, and a talent for generalization. The result is an absorbing account of the conception, gestation and birth of a nation.

Much of the three-dimensional quality of the book may be attributed to an attention to details which other writers have overlooked, or perhaps regarded as trivia. Much is made, for example, of the relation between the rainy weather and the mood of gloom which seemed to prevail during the opening days of the Quebec Conference:

> And with the windows streaked with rain, the grey distant view of the

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> Lower Town and the St. Lawrence beyond, surely the problems that faced the Conference seemed the more urgent.[1]

And the significance of the social functions which attended the various negotiations is explored fully. After describing a sumptuous luncheon given by the Canadian delegates aboard the ship which brought them to the Charlottetown Conference, an occasion on which food, liquor and eloquence interacted to produce a feeling of fellowship among the delegates, the author states:

> This luncheon on the *Queen Victoria* in Charlottetown harbour was, in a significant sense, the beginning of Confederation .... Perhaps the greatest single achievement of the Conference was the messianic fervour that the converts to Confederation were endowed with, and the luncheon aboard the *Queen Victoria* visibly marked a stage in that conversion.[2]

There are two characteristics of the book, both probably inherent in its format, that slightly reduce its usefulness for the student of constitutional law. Occasionally the author assumes a more thorough knowledge of Canadian history on the part of the reader than the average law student is likely to possess. This is a minor matter, however. More important is the failure to deal with the negotiations in London between December, 1866 and March, 1867, which resulted in the transformation of the Quebec Resolutions into the British North America Act. But not even this limitation seriously detracts from the book's value as an adjunct to a course in Canadian constitutional law.

R. D. GIBSON*

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[1] P. 87. [2] P. 78.

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