BOOK REVIEWS
REVUE DES LIVRES

The Courts and the Canadian Constitution. Edited by W. R. LEDERMAN. Toronto: McClelland and Stewart Limited. 1964. Pp. 248. ($2.95)

This book is another useful addition to the Carleton Library series of Canadian source materials. It collects under one cover a variety of articles and addresses on constitutional development through judicial review. These items are reprinted from numerous publications—many of them non-legal—stretching over a period of the last twenty years. As a result much valuable material is put into readily accessible form.

Dean Lederman commences with a short introduction of his own concerning the role of judicial review in our constitutional structure. He then assembles the materials under three main headings: "General Nature of the British North America Act as a Federal Consitution", "Judicial Review of the British North America Act", and "The Process of Interpretation".

A pleasant variety makes this collection enjoyable reading. In discussions of the nature of the constitution, the pro-centralist views of Professor F. R. Scott are followed immediately by Mr. L.-P. Pigeon's defence of provincial autonomy. One passes from Professor Laskin's frontal attack on the Judicial Committee in " 'Peace, Order and Good Government' Re-Examined" to Professor Scott's poetic *Coup de grâce* in "Some Privy Counsel". Political scientists such as Professor Brady and Dr. MacKinnon are put in company with a judge (the late Mr. Justice V. C. MacDonald) and several lawyer-contributors.

One can think of other essays which could usefully have been added to this collection. Some of Mr. Justice MacDonald's other writings, such as his 1939 *Canadian Bar Review* article on evidence in constitutional cases[1] might have been of more lasting interest than his summary of recent decisions in "Legislative Power and The Supreme Court in the Fifties". A few excerpts from the 1954-55 Laskin-Mundell debate in the *Canadian Bar Review* and the *University of Toronto Law Journal* over techniques of con-

[1] Constitutional Interpretation and Extrinsic Evidence (1939), 17 Can. Bar Rev. 77.

stitutional adjudication could have added a touch of direct controversy.[2] But limitations of space apparently were severe, and it would be difficult to suggest which of the essays included could readily be omitted from a collection of this sort.

This book will be valuable for anyone interested in constitutional law. Those already acquainted with these articles will appreciate having them collected in a convenient form. Others, particularly law students, will profit from it because in this small volume they can have available material from which the major issues of constitutional law can be put in new and interesting perspectives.

B. L. STRAYER*

* * *

Peace, Order and Good Government: A New Constitution for Canada. By PETER J. T. O'HEARN, Q.C. Toronto: The MacMillan Company of Canada, Limited. 1964. Pp. 325. ($6.50)

Peace, Order and Good Government is a thoughtful and thought-provoking book whose author has been for many years a distinguished counsel, crown attorney and law school lecturer in Halifax, Nova Scotia. (Since the book was published, Mr. O'Hearn has become the County Court Judge for Halifax.) It is a good thing indeed to have this book at this time, ranging as it does over all the issues concerning the Constitution of Canada that are critical for our country. The author considers first the form and nature of constitutions in general, and then presents a complete draft of a new constitution for Canada to replace the present British North America Act and related statutes. The twelve articles of his proposed new constitution contain much that is familiar, but also they involve a thorough re-casting of the written constitution and considerable innovation. These things take the first fifty-five pages of the book and the remaining two hundred and fifty pages are explanation of and argument for the proposed new constitutional articles.

The spirit of the book is best conveyed by the author himself in the following passages, taken respectively from the first and the last chapters.

> But this does not purport to be a scholarly restatement of Canadian

[2] D. W. Mundell, Tests for Validity of Legislation under the British North America Act (1954), 32 Can. Bar Rev. 813; Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin (1955), 33 Can. Bar Rev. 915. Bora Laskin, Tests for the Validity of Legislation: What's the "Matter"? (1955), 11 U. of T. L. J. 114.

*B. L. Strayer, of the College of Law, University of Saskatchewan, Saskatoon.

> constitutional law; it is propaganda in favour of certain specific reforms. Any apparatus of reference is designed to let the non-legal reader consult the sources if he wishes, and may also serve as some slight shield against the experts. The book should not be judged as a contribution to learning but to life and politics.[1]
>
> . . . the author has addressed too many judges and juries with adverse results to feel any confidence that the Articles will gain uncontested and universal approval. He is even inclined to doubt that they are the perfect expression of what he has in mind or that they are best suited to give Canada what it needs. Something like them is wanted, but the precise form and content of the constitution should, no doubt, be the product of discussion and criticism by a representative group. The Articles would serve as a useful framework for the discussion.[2]

So, the author's purpose is primarily polemical—to stimulate public consideration and debate of constitutional issues. But he is too modest when he disclaims learning in favour of life and politics. Whether or not one agrees with Judge O'Hearn on particular issues, his book reveals him as a learned man in moral, political and legal philosophy, and moreover as one whose learning is tempered by life and in particular by the realism of a practising barrister and crown attorney.

In this spirit and tone then, and in simple attractive English prose, the book ranges over every feature of government and law that should find expression in a basic, comprehensive constitutional document. With a sweep this wide, the author necessarily exposes himself in many ways to critical comment by a reviewer, both favourable and adverse. I found much to agree with and much to disagree with, but of course every point cannot be dealt with here or the review would become another book.

Accordingly, comment will be limited here to the author's main proposal, which happens to be of special interest to students of constitutional law and federalism.

Judge O'Hearn himself says that his most important innovation would be a change in the manner of distributing legislative powers between the federal parliament and the provincial legislatures, so his proposals in this regard certainly command some detailed attention. At present sections 91, 92 and 93 of the British North America Act confer on the federal parliament and the provincial legislatures respectively separate lists of mutually exclusive powers. The words "exclusive" or "exclusively" are statutory words modifying both lists. By way of contrast and exception, section 95 says that federal and provincial powers over agriculture and immigration are concurrent, but that in the event of conflict, the federal laws are of overriding effect. Section 94A says that federal and provincial powers over old age pensions are concurrent, but that

[1] P. 1. [2] P. 286.

in the event of conflict, the provincial laws on the subject are of over-riding effect. (Section 95 is an original section dating from 1867, and section 94A was added by constitutional amendment in 1951) What Judge O'Hearn proposes is to generalize the ideas of sections 95 and 94A over the whole range of legislative action. He would have legislative powers on all subjects concurrent, so that either the federal parliament or a provincial legislature could enact any law on any subject.

But of course this raises the likelihood of conflict between federal and provincial statutes on the same subject, so that the paramountcy problem must be faced under this new system. Judge O'Hearn would still have a list of federal legislative subjects, but the list would simply have the function of designating the fields where federal statutes are paramount and are to prevail over provincial ones in the event of conflict. Likewise, he would have a contrasting or competing list of provincial subjects, and in the event of conflicting federal and provincial statutes on one of these subjects, the provincial statute would prevail over the federal one.

The author claims that this new plan for distribution of law-making powers would do away with much of the "rigidity, conflict and confusion" of the past and, in effect, confer much new freedom on both the federal parliament and the provincial legislatures to get on with needed legislation. The author considers also that the difficulties of applying his new system would be much less than the complications of past constitutional interpretation. He says:[3]

> The simplicity of the solution need not blind us to the fact that the new traffic rules, the rules of paramountcy, conceal problems of their own. Whatever frustrations those problems may bring, they can hardly compare with those inherent in the doctrine of exclusiveness.

I am simply not persuaded that this is so, and in fact believe that the O'Hearn system might well be more complex, frustrating and productive of federal-provincial collisions than is the present system. The present system actually accomplishes considerable mutual exclusion, and there is some truth in the old saying that good fences make good neighbours.

One example may help to make my criticism clear. The Unconscionable Transactions Relief Act of Ontario,[4] provides that, if in all the circumstances the cost of a loan is excessive and the transaction harsh and unconscionable, the court may order the contract reformed so as to make its terms fair and reasonable. Clearly this statute concerns "contract" and so logically falls within the provincial category of "Property and Civil Rights" under the British North America Act. Also, it is equally obvious that it

[3] P. 155.

[4] R.S.O., 1960, c. 410.

falls within the federal category of "interest" under the British North America Act. Thus the statute in question has both its federal and its provincial aspects, and its validity depends, under the present system of interpretation, on determining whether one of these aspects is primary, or whether the two aspects are equivalent in their relative importance. If the federal aspect of "interest" is primary, only the federal parliament can enact the law in question and the provincial statute is null and void. On the other hand if the provincial aspect is primary, then the statute is exclusively within the legislative power of the province. Under the present system of interpretation the courts attempt to find the leading feature, the pith and substance, the main theme of the challenged statute in order to assign *exclusive* power to enact it one way or the other. Only if one aspect cannot be characterized as primary does it follow that the federal and provincial aspects are of equivalent importance. In this latter event, under the present system, the courts find that federal and provincial powers are concurrent respecting this particular type of law so that either the federal parliament or a provincial legislature may enact it. However, in this event also, if there are two statutes and they conflict, the federal statute over-rides and prevails. When concurrency is judicially implied in this way and conflict occurs, present doctrine is that dominion paramountcy is automatic. This latter reasoning was applied to the Ontario Unconscionable Transactions Relief Act and the statute was held valid even with respect to interest charges, since the federal statute on the subject did not contain inconsistent provisions.[5] Under the present system of judicial interpretation then there is some limited implication of concurrency going on, but only in very particular terms and only after the attempt to establish mutual exclusion has failed.

How would Judge O'Hearn's system differ from this? "Contract" is in his list of paramount provincial subjects and "interest" is in his list of paramount federal subjects. Let us suppose that we have a provincial Unconscionable Transactions Act and a federal Interest Act that *are* in conflict when one compares their terms. One statute must then over-ride and prevail. Under the O'Hearn system, which one is it to be? The provincial statute has both its contract and interest aspects, but so too has the federal statute. Now one must search for "pith and substance" or "leading feature" just as under the present system. One must ask—When you have a law that empowers a judge to reform or alter contractual terms on interest, is the leading feature of such a law "contract" or "interest"? Under the O'Hearn system, if you choose "contract", the provincial statute is paramount, and if you say "interest", the federal statute is paramount. What becomes clear then is that

[5] The Interest Act, R.S.C., 1952, c. 156.

Judge O'Hearn by his new system has simply not exorcized the old devil of "pith and substance" at all. Indeed, in every case of conflicting federal and provincial legislation, he *must* be able to single out a leading feature among the competing aspects, or his system will not work at the crucial point of determining priorities in the event of conflict. In other words, Judge O'Hearn's system of complete concurrency depends just as much on all the refinements and niceties of the old aspect theory as does the system of the present British North America Act, in any situation where conflict between federal and provincial statutes can be alleged. He should not then disparage the old aspect theory as he does.

Moreover the O'Hearn system is like the present system in another way. If you cannot find a leading aspect as a matter of reason and social fact among the competing aspects, then the federal and provincial aspects are of equivalent importance. This means that your respective lists of federal and provincial subjects have let you down so far as establishing a priority is concerned. *You cannot then base either mutual exclusion under the present system or paramountcy under the O'Hearn system on these lists.* You simply have to say that when the competing aspects of conflicting statutes are equal, automatically the federal statute enjoys paramountcy and prevails over the provincial one. This seems to rest on a principle outside the two lists of particular subjects, namely that, when all else is evenly balanced, Canada is still greater than the sum of its provincial parts and so the legislation of the federal parliament is paramount and over-rides that of a provincial legislature.

Judge O'Hearn seems to sense that he has this final dilemma of concurrency on his hands, though he never really faces it squarely. Speaking of his federal and provincial lists of paramount subjects, he says:[6]

> . . . the central government will be absolutely dominant in relation to its specific powers and . . ., subject to that dominance, the provinces will be relatively paramount in relation to their specified powers.

This seems to mean that, every time conflicting statutes have equivalent federal and provincial aspects, and this could be quite often, the federal power is paramount. In any event, it is surely superfluous to call paramountcy "absolute" and contradictory to call it "relative". Relative paramountcy is not paramountcy at all. Anyway, I conclude that automatic dominion paramountcy as a final resort to resolve conflict is just as much a part of the O'Hearn system for the distribution of legislative powers as it is of the present system under the British North America Act.

Accordingly, as the foregoing implies, I am opposed to the

[6] P. 160.

O'Hearn system of complete concurrency. It would not be (as the author claims) simpler and better than the present system under the British North America Act. Indeed, I think the opposite is true. As a matter of necessary interpretative technique, the O'Hearn system would in my view be the more complex of the two. The issues of what amounts to conflict in a concurrent field, or occupation of the field by the paramount authority, are very difficult issues indeed. Judge O'Hearn would expose us to them over the whole range of actual and potential legislative subjects. At least the present system under the British North America Act establishes quite a number of mutually exclusive fields of legislative power, by the pith and substance test, where the issues of conflict and occupation between competing statutes do not arise at all. The present system permits a useful amount of concurrency to be judicially implied where necessary, but these implied concurrent fields are limited in number and very particular in definition.

In short my view is that, the problems of maintaining a proper balance in Canada between the federal parliament and the provincial legislatures being what they are, the present system is better suited to maintain this balance than Judge O'Hearn's system would be. It is difficult to see where a sweeping principle of complete concurrency might lead. I suspect for one thing that the autonomy of the provinces would suffer severely from it. We have to use the full aspect theory anyway under either system, so I would continue to base exclusive power on the pith and substance test, accepting along with it only the quite limited amount of concurrency that the courts are prepared to imply where necessary, as explained above.

There is of course room for improvement in our federal system for the distribution of powers, but it lies elsewhere than in the direction Judge O'Hearn is pointing. In my view the real prospect for improvement lies in more intensive and extensive judicial appreciation of the social, political, economic and cultural facts that give the various aspects of challenged laws their qualities of relative importance. In other words, I think our courts in Canada should be more ready to accept the "Brandeis Brief" than they have been to date. That is, they should be more ready to accept evidence of the social, economic, political and cultural facts that bear on the issues of distribution of legislative powers. This, and not complete concurrency, is the way to improvement in the distribution of legislative powers.

As I pointed out at the beginning of this review, Judge O'Hearn covers a great range of constitutional issues, and concurrency in the distribution of legislative powers is only one of these. He makes a great many other proposals covering, for example, the composition and role of the Senate, the amendment of the Constitution,

changes in the method of judicial appointments in provincial courts, protection of human rights and fundamental freedoms by specially entrenched constitutional clauses, new joint institutions for fiscal control and taxation, and so on. On all these subjects he is as stimulating as I found him to be on the system for the distribution of legislative powers. Though in the end I disagreed with him respecting his proposals on the latter subject, nevertheless he compelled me to think more thoroughly about exclusiveness and concurrency than ever I had done previously.

So, as I said at the beginning, I have found this to be a thoughtful and thought-provoking book. The author has not only stimulated debate and discussion on the constitution, he has also made a distinguished contribution to the substance of the debate. I would not want him to prevail on every change he proposes, but then, as he himself says, he does not expect this.

W. R. LEDERMAN*

* * *

Les aspects généraux du droit public dans la Province de Québec. By LOUIS BAUDOUIN, Professor of Law, McGill University. Paris: Librarie Dalloz. Montreal: L. B., 54-51 Durocher. 1965. Pp. 432. ($10.00)

Professor Baudouin's book contains the first comprehensive analysis of the general aspects of the public law of the Province of Quebec ever to be published. A book on this subject was long overdue and it is fortunate that it is appearing at a very crucial time in the political history of Canada.

The fact that this study is written by a Frenchman, who has been a Professor of Law at McGill University for almost two decades and a keen observer of Quebec political events, enhances its value as the author's views can be more objective than if they had been those of a Canadian.

It must also be noted that the book was published in France with the financial assistance of the French "Centre National de la Recherche Scientifique" as volume XVII of the famous series entitled "Les systèmes de droit contemporain".

Les aspects généraux du droit public dans la Province de Québec is only volume one of a series prepared by Professor Baudouin that will include the general aspects of the private law of the Province of Quebec (vol. two) and the general principles of Canadian constitutional law (vol. three).

The book is divided into four parts. The author presents the

*W. R. Lederman, of the Faculty of Law, Queen's University, Kingston.

constitutional framework of the Province of Quebec, proposes a general theory of statute law in the province, describes Quebec jurists and analyses the implications for Quebec of the general classification of public and private law that prevails in France. The first part is probably the most interesting one as it contains a wealth of information not readily available elsewhere. Professor Baudouin very carefully analyses the executive power in Quebec, particularly the role of the Lieutenant Governor, as he believes that it is impossible to understand the sphere of application of the law without having a thorough grasp of the governmental and administrative structures of the province. His study of the civil service leads him to advocate the creation of a special programme for the training of civil servants.[1] The legislative and judicial powers are analysed in turn. A fascinating and most important chapter on the role of the Roman Catholic Church in the Province of Quebec ends this part of the book. After noting that in principle Church and State are separated, Professor Baudouin points out that: "Cependant, si l'on descend dans la réalité et même si l'on se fie simplement aux apparences, on peut constater que, tant sur le terrain du droit civil que le terrain du droit public, l'Eglise Catholique Romaine s'est vue conférer de véritables privilèges juridiques et s'est taillée une place de choix."[2]

The part of the book devoted to the general aspects of statute law[3] contains a most instructive chapter on the problem of the retroactive effect of laws.[4] Professor Baudouin deplores the poor draftmanship involved in the preparation of the French version of Quebec laws which he says is due to the English origin of most of them. The style is clumsy and the syntax very poor. He opposes a literal translation of legal texts from one language into another.[5]

Part III contains a survey of the legal profession and of law schools. The chapter on notaries should be of particular interest to common law lawyers. As for the law schools the author notes that:[6] "Les Facultés de Droit sont en passe de devenir des centres de culture générale et non plus seulement des écoles supérieures techniques dispensant le droit comme de la science en boîte ou même en comprimé. . . ." Let us hope that this evolution will soon be complete although for the moment there are still too few visible signs of it. The author also feels very strongly that law schools and their programmes should be freed from the control

[1] P. 65.
[2] Pp. 133-134.
[3] Preparation of statutes, enactment, coming into force, retroactivity, amendments.
[4] P. 187 *et seq.*
[5] Pp. 181-183. See also John D. Honsberger, Bi-Lingualism in Canadian Statutes (1965), 43 Can. Bar Rev. 314.
[6] P. 426.

of the Bar in order to become centres of legal culture and research exclusively.

The last part is devoted mostly to some aspects of administrative law and especially municipal law and labour law. As Professor Baudouin indicates:[7] "Il nous semble que tant qu'il n'y aura pas de tribunaux administratifs autonomes, il ne saurait être question d'un droit administratif véritable. Aucune science juridique administrative ne pourra être établie au Canada français tant que ces éléments se dilueront dans un milieu étranger à son esprit ou à sa finalité suprême."

The author concludes by the observation that:[8]

"Dans les limites qui lui sont assignées par l'Acte de l'Amérique du Nord britannique, la Province de Québec se réorganise comme un Etat. Il s'agit d'un Etat au sens où l'entend la science politique, et non d'un Etat souverain puisqu'il est encore enrobé dans le fédéralisme canadien." He also emphasizes that economic planification to enable the people of Quebec to be "maître chez nous" and develop their tremendous natural resources will require a complete reorganization of all sectors of government, a true "planification administrative".[9]

Lawyers and political scientists in Canada and particularly those living in the Province of Quebec should be grateful to Professor Baudouin for his interesting and highly informative pioneer work. This is not the first time that he has contributed to the development of legal science in the Province of Quebec.[10] The quality of the first volume augurs well for the two others that will follow under the same authorship.

Professor Baudouin's general thesis is that the public law of the Province of Quebec has been influenced by English law for too long and that it is high time to do away with Anglo-Saxon legal tradition and methods of thinking to bring Quebec public law in line with the major tenets of French legal tradition, especially in the field of administrative law. There is, however, no definite evidence that the people of the Province of Quebec are prepared to adopt the French system wholly or even in a slightly modified form. The historical development of public institutions in this province, her economic structure as well as the outlook of her people would not, I believe, be conducive to such a change. It must be recognised, however, that French administrative law is highly sophisticated and that parts thereof could be used profitably in both Quebec and the common law provinces.

Professor Baudouin analyses many problems that are not necessarily peculiar to the Province of Quebec and explores many

[7] P. 382. [8] P. 425. [9] P. 426.

[10] See for instance, Le droit civil de la Province de Québec, modèle vivant de droit comparé (1950).

avenues. Some of his suggestions for improvements of the present system deserve careful study.

To sum up he has succeeded in presenting an excellent synthesis, "une vue d'ensemble" of the public law of the Province of Quebec.

J.-G. CASTEL*

* * *

Comparative Federalism, A Study in Judicial Interpretation. Par VICTOR S. MACKINNON. The Hague: Martinus Nijhoff. 1964. Pp. 188. ($5.95)

Le fédéralisme intéresse maintenant les Ecossais, ça devient inquiétant. . . . Mais le professeur Mackinnon prône la vertu d'une constitution souple et malléable, car il conclut: "The enduring greatness of a constitution lies in its flexibility of adaptation to changing circumstances. It must be matched by an equivalent flexibility of mind in the judges who interpret it."[1]

L'auteur de cette étude très fouillée—particulièrement au point de vue jurisprudence—procède à une comparaison entre les fédéralismes américain, australien et canadien. Cette tâche l'a amené à dépouiller environ 370 décisions des tribunaux de ces trois pays, comme le déclare le préfacier Arthur E. Sutherland du Harvard Law School dont l'auteur est un gradué. Et le point majeur que ce dernier entend démontrer est à l'effet que règle générale, du moment que des buts constitutionnels identiques sont recherchés dans plusieurs pays, les mêmes problèmes seront soulevés et les mêmes solutions adoptées en pratique, et cela indépendamment des différences de structures et de fonctionnement de ces divers systèmes et de la terminologie des textes constitutionnels.

Les recherches du professeur Mackinnon portent sur deux points particuliers: la règlementation et la taxation du commerce interprovincial. La première partie de son oeuvre est intitulée: "The regulation of interstate commerce". L'auteur rappelle d'abord la définition du "commerce interprovincial" acceptée par les cours des trois pays, puis il s'attaque à quatre problèmes majeurs: 1. différence entre règlementation et prohibition; 2. différence entre le commerce interprovincial et intraprovincial; 3. règlementation et discrimination; 4. règlementation de certaines activités commerciales (interprovinciales) particularisées. En lisant cette partie, l'on se rappelle que le sujet est à ce point important qu'un autre livre y a été consacré en 1963 par Alexander Smith, *The Commerce Power in Canada and the United States.*

*J.-G. Castel, of Osgoode Hall Law School, Toronto.

[1] P. 180.

La deuxième partie, titrée "The Taxation of Interstate Commerce" compte trois chapitres. D'abord, qu'est-ce qu'une taxe? L'auteur écrit: "The essential nature of a tax for the purposes of the constitutional law of the systems studied here consists in its being a compulsory exaction, enforceable by law, imposed under legislative authority, and made for a public purpose, the broad objective of which may be stated as being support of the processes of government".[2] Suivent un autre chapitre qui a pour objet de distinguer la taxation de la règlementation et un troisième qui décrit les taxes directes et indirectes. L'auteur, en ce qui concerne le Canada, revoit entre autres les arrêts *Bank of Toronto* v. *Lambe*,[3] *Atlantic Smoke Shops Ltd.* v. *Conlon*,[4] *Cairns Construction Ltd.* v. *Government of Saskatchewan*[5] et *A.G. for B.C.* v. *Esquimault and Nanaimo Ry Co.*[6] Il affirme ensuite qu'au pays: ". . . a Province, where it is the province of *destination* of a commodity which has been the subject of an inter-provincial transaction, may levy a 'sales' or 'use' or 'consumption' tax on that transaction, provided it takes care to draw its statute in such a way that in its application the tax is 'borne' by a person who may be deemed to be the ultimate user or consumer as far as the inter-provincial aspect of the transaction is concerned", alors que: "A sales tax or a tax on production or turnover by a Province where it is the Province of *origin* of a commodity entering an inter-provincial transaction is, however, most likely to be invalid as being an 'indirect' tax capable of being passed on in a traceable form".[7]

La troisième partie du volume traite de certaines théories d'importance primordiale dans tout système fédéral: les pouvoirs déclarés existant par voie de déduction et les pouvoirs ancillaires, la théorie de l'aspect, de la substance, de l'incompatibilité, etc. . . . Toutes ces théories sont bien résumées, jurisprudence à l'appui, et ceci est un apport fort utile vu le peu de doctrine canadienne sur le sujet.

La quatrième partie, d'une dizaine de pages, contient les conclusions de l'auteur.

Dans sa préface, M. Sutherland écrit que l'oeuvre est "a prediction of things to come". Et il enchaîne: "The philosopher of political organization will do well to read the lessons implicit in his scholarly exposition." Peut-être serait-il opportun d'inviter le professeur Mackinnon à séjourner au Canada!

RENÉ HURTUBISE*

---

[2] P. 83.
[3] (1887), 12 App. Cas. 575.
[4] [1943] A.C. 550, [1943] 4 D.L.R. 81.
[5] (1958), 16 D.L.R. (2d) 465 (Sask. C.A.).
[6] [1950] A.C. 87, [1950] 1 D.L.R. 305.
[7] P. 110.

*René Hurtubise, Professeur à la Faculté de droit, de l'Université de Montréal.

Introduction to the Constitution of India. Troisième édition. Par DURGA DAS BASU. Calcutta: S. C. Sarkar & Sons Private Ltd. 1964. Pp. xiv, 251. (Prix non indiqué)

M. Basu est un auteur prolifique. Par exemple, il a publié un commentaire sur la Constitution des Indes (*Commentary on the Constitution of India*), un Recueil d'arrêts (*Cases on the Constitution of India*), une constitution annotée (*Annotated Constitution of India*), une étude des amendements à la Constitution (*Constitution Amendment Acts* [I - XVII]), un volume sur la constitution de divers pays (*Select Constitutions of the World*), etc., et en outre, M. Basu trouve le temps de reviser une autre de ses oeuvres, *Introduction to the Constitution of India*, dont la maison Sarkar & Sons a lancé la troisième édition.

La deuxième édition datait de 1962 seulement. Pourquoi alors revenir si tôt à la charge? Parce que, ainsi qu'on le lit dans la préface, la Constitution a depuis cette date été amendée à six reprises.[1] Il devenait alors fort utile de mettre à jour cette oeuvre, d'autant plus qu'il s'agit d'un ouvrage de base, d'un manuel employé dans diverses universités du pays.

L'on doit souligner que l'auteur a ajouté un chapitre—fort bref, il est vrai—intitulé "How the Constitution has worked". Il rappelle d'abord que la Constitution indienne a subi dix-sept amendements formels en quatorze ans. Ceci, précise-t-il, parce que la procédure d'amendement est assez souple et que cette tâche a été confiée au Législateur et non au pouvoir judiciare. C'est au Législateur qu'incombe cette responsibilité de voir à ce que la Constitution corresponde aux exigences du progrès social et économique. Il note aussi l'importance croissante du pouvoir central et l'affirme en ces termes: "In the federal sphere, it may be stated that most of the formal and informal changes which have taken place since the commencement of the Constitution tend to strengthen central control over the States more and more".[2] Est-ce là une évolution normale, sinon inévitable? Wheare le croyait.[3]

Si l'on poursuit rapidement cette recherche des additions et soustractions existant entre les troisième et deuxième éditions, l'on note encore que M. Basu a supprimé le seizième tableau de l'appendice du volume, tableau qui expliquait d'où provenaient les revenus tant du gouvernement central que des gouvernements locaux. L'index a aussi subi plusieurs modifications, soit qu'on y ajoute certains titres, par exemple "Proportional representation, why not adopted for House of the People and Legislative Assembly", ou "Multiple amendment of the Constitution", ou

[1] Pp. 120-121. [2] P. 214.
[3] Federal Government (3e éd., 1956).

"trends towards the unitary systems", soit que l'on en retranche d'autres, tels "Commission for (Backward Classes)", "conditions necessary for issue of (certiorari)", "custody of (Consolidated Fund)", "Loan, rights and duties of States and Union", etc. A noter, enfin, une erreur mineure due à l'éditeur: après la première partie, la numérotation des pages recommence au numéro un, ce qui n'est pas le cas après les autres parties. L'inconvénient naît du fait que les références de l'index ne précisent pas si elles renvoient, par exemple, à la première ou à la seconde partie.

Par ailleurs, quant au fond, les mérites de ce manuel ne sauraient être trop vantés. C'est bref, concis, mais tous les points majeurs du droit constitutionnel (et à l'occasion du droit administratif) sont expliqués d'une façon correcte, bien que parfois sommaire comme c'est d'ailleurs le but de l'ouvrage: introduction à la Constitution des Indes. Divisé en sept parties et trente-deux chapitres, l'oeuvre traite de la nature de la constitution, du gouvernement central, des gouvernements locaux, de l'administration des territoires ayant un statut particulier, du pouvoir judiciaire, du système fédéral indien et de points divers comme la responsabilité de l'Etat et des fonctionnaires, la fonction publique et les langues.

Tout comme le Canada, l'Inde est un Etat fédéral. Il peut, conséquemment, être intéressant de faire certaines comparaisons entre les deux constitutions:

1) Les droits fondamentaux: aux Indes, ces droits sont garantis par le partie III de la Constitution, et le Parlement central et les législatures locales ne peuvent porter atteinte à ceux-ci sous peine de voir leurs législations déclarées ultra vires par les tribunaux. Ces droits sont divisés en sept catégories: "a) Right to equality; b) Right to particular freedoms; c) Right against exploitation; d) Right to freedom of religion; e) Cultural and educational rights; f) Right to property; g) Right to constitutional remedies".[4] Toutefois, la protection de ces droits n'est pas sacrée puisque le Parlement de l'Union peut facilement amender la Constitution sur ce point.[5]

2) Contrairement à l'Acte de l'Amérique du Nord Britannique, 1867, la Constitution indienne prévoit une formule d'amendement et en confie la responsabilité au Parlement central: a) certains points mineurs peuvent être modifiés par simple voix majoritaire, comme s'il ne s'agissait pas d'amendements constitutionnels; b) d'autres, jugés d'importance moyenne, requièrent l'approbation de la majorité des membres de chaque Chambre et celle des deux tiers des membres présents et votant; c) enfin, les réformes susceptibles d'affecter la structure fédérale exigent en

[4] Pp. 65-66.

[5] *Cf.* ch. 8 et table III de l'appendice.

plus l'approbation ou la ratification d'au moins la moitié des Etats-membres de l'Union.[6]

3) En dernier lieu, en ce qui concerne la répartition des pouvoirs législatifs et exécutifs, la Constitution contient trois listes. Les deux premières énumèrent les compétences exclusives du Parlement central et des Législatures locales. La troisième mentionne les sujets sur lesquels la juridiction est concurrente. En cas d'incompatibilité, la législation fédérale l'emporte. Les pouvoirs résiduaires sont confiés aux gouvernements locaux.[7] Le chapitre suivant complète le tableau en expliquant la répartition des pouvoirs fiscaux.

Est-il besoin de l'écrire en concluant: voilà un travail très bien fait. Instrument fort utile lorsque l'on s'intéresse au droit constitutionnel, et encore plus au droit constitutionnel comparé. A quand un tel manuel consacré au droit constitutionnel Canadien?

RENÉ HURTUBISE*

* * *

Les métamorphoses économiques et sociales du droit civil d'aujourd'hui (première série: panorama des mutations). Troisième édition par M. RENÉ SAVATIER, professeur à la Faculté de droit de Poitiers, doyen honoraire. Paris: Librairie Dalloz. 1964. Pp. vi, 454. (Fr. 40)

On doit penser qu'un tel livre intéressera au plus haut point les juristes du Canada; et cela, fait assez rare, quel que soit le système auquel ils se rattachent; droit civil ou *Common Law*. Les civilistes du Québec y verront, en effet, illustrée d'une façon admirable, l'évolution du droit civil contemporain dans tous les pays du monde. Quant aux adeptes du *Common Law*, ils seront sans aucun doute extrêmement intéressés d'apprendre que le droit civil évolue, et même évolue très rapidement à notre époque. Ce serait un tort de croire que, pris dans le corset de fer des textes, le droit civil est stationnaire et marque le pas à une époque de bouleversements économiques, techniques et sociaux intenses. On peut aisément constater, en lisant ce livre, que le législateur des pays de droit civil écrit, mis au défi par les circonstances, s'est éveillé d'un sommeil que l'on a si souvent déploré: son oeuvre dépasse en profondeur, en étendue et en rapidité le phénomène qui se produit parallèlement dans les pays de droit coutumier.

[6] *Cf.* ch. 10. [7] *Cf.* ch. 21 et table 15 de l'appendice.

*René Hurtubise, Professeur à la Faculté de droit de l'Université de Montréal.

L'étude porte essentiellement sur l'évolution du droit civil dans les contrats, dans la famille et dans le droit du patrimoine. Dans les contrats, suivant l'expression imagée de l'auteur, on assiste à un véritable "éclatement" de la notion traditionnelle de contrat, sous l'influence impérieuse des exigences du monde contemporain: ce qui conduit à bien des formes nouvelles—contractuelles, paracontractuelles et institutionnelles. En ce qui concerne la famille, son organisation s'affirme, en même temps que le contrôle de sa direction se fait plus exigeant et précis. Plus complexe encore et plus varié apparaît enfin le processus des métamorphoses sociales du droit des biens: qu'il s'agisse de l'obligation alimentaire, du fermage et du métayage, du contrat de travail, ou de la responsabilité civile, de la concurrence en matière de professions. Le lecteur reste saisi devant un tel panorama, où la vue de l'esprit couvre un champ considérable, où l'analyse fouille avec une très grande précision des domaines parfaitement situés et définis par la synthèse.

Dans cette nouvelle édition d'une oeuvre très célèbre, le Doyen Savatier affirme les qualités de juriste et de penseur qui en font un maître de la science juridique de réputation mondiale. Ceux qui n'ont pas encore eu l'occasion de goûter sa pensée comprendront certainement encore mieux, en lisant l'ouvrage qui fait l'objet du présent compte rendu, pourquoi une pléiade de juristes contemporains viennent d'écrire en l'honneur du Doyen Savatier des *Mélanges* dont l'importance et la variété sont un reflet de l'oeuvre de celui à qui ils ont été dédiés.

Fort intéressé lui-même par le droit civil du Québec, qu'il connaît très bien, et par le *Common Law* dont le principe et les méthodes ont toujours eu toute son attention, le Doyen Savatier est un guide naturel et particulièrement recommandable pour les juristes canadiens désireux de mieux comprendre la formidable et bouleversante évolution du droit à notre époque, époque "d'accélération brutale de l'histoire".

PIERRE AZARD*

* * *

The Law and Mental Disorder—One: Hospitals and Patient Care. By F. C. R. CHALKE, M.D.; J. DEWAN, M.D.; F. S. LAWSON, M.D.; CLYDE MARSHALL, M.D.; BARRY B. SWADRON, LL.M.; F. K. TURNER, LL.M.; J. D. GRIFFIN, M.D. Toronto: The Canadian Mental Health Association. 1964. Pp. xi, 39. ($1.00)

*Pierre Azard, ancien Doyen de la Faculté de droit de l'Université d'Ottawa (Section de Droit civil) Ottawa; Avocat à la Cour d'appel de Paris.

This is the first part of a report of a Committee on Legislation and Psychiatric Disorder appointed in March, 1962, on the recommendation of the National Scientific Planning Council of the Canadian Mental Health Association "for the purpose of examining laws, both federal and provincial, as they affect mental illness and mental health".

The Committee is composed of psychiatrists, directors of Mental Health Services and lawyers. Inasmuch as the Committee is charged with making recommendations concerning the rights of the public, it may be queried whether there should not be representatives of the public on the Committee.

The Committee determined that it could fulfil its function most effectively by preparing a report that was a "readable guide . . . equally comprehensible to the lawyer, physician, legislator, and interested layman". Furthermore, the Committee decided that rather than propose revolutionary changes which might be resisted or rejected out-of-hand, it would point out those areas where existing legislation fails to meet existing problems or prevents advance towards ultimate goals. The report is therefore sound rather than exciting, and indeed in the Province of Saskatchewan many of the Committee's recommendations have been law since the passage of The Mental Health Act, 1961.[1]

The Committee's recommendations are stated in the form of twenty-five principles, a large majority of which are quite specific statements of desired procedure for the admission and discharge of patients to and from psychiatric facilities. These principles are generally eminently sound, assuring easy admission, but at the same time providing an easy appeal procedure to an independent Review Board in the event that a patient, his next-of-kin (or other responsible person) wishes to contest certification. An ultimate appeal to the courts on the questions of certification and detention is also recommended.

Also of interest to the lawyer are the recommendations concerning competency and capacity. The Committee finds that mental disorder and business incompetence are not synonymous, and the certification of incompetence should be a separate act from certification for the purposes of admission to a psychiatric facility. The Committee quotes figures to show that of approximately 1000 admissions to three Canadian mental hospitals the treating physicians found only approximately one-third of the patients incapable of handling their business affairs. It also refers to another psychiatric hospital which treats only certified acutely ill patients where the superintendent has found no patient to lack business competence in the last 1500 admissions.

---

[1] S.S., 1961, c. 68, as am. 1963, c. 36.

While the recommendation has obvious merit, I wonder whether specialization in psychiatry qualifies a physician to determine whether a patient has business competence. In Saskatchewan, where this distinction between mental disorder and business incompetence has been drawn as a matter of law since 1961, the result has not been entirely satisfactory. Whether due to incurable optimism or woeful ignorance of the facts of life, doctors seem to have remarkable expectations of the capacity of their patients. As a result, a patient's business affairs frequently go by default simply because no matter how competent a person is he is labouring under a tremendous handicap when he is confined to a hospital which may be more than 200 miles from home. In an agricultural community a matter of two or three days' delay during seeding or harvesting can spell the difference between profit and disaster—yet these are the times when the farmer is most likely to require treatment in a psychiatric facility.

The Committee and the Canadian Mental Health Association are to be commended for their efforts in producing this first report. A combined investigation by the medical and legal professions on subjects such as this cannot help but clear away much of the fog which tends to obscure the terminology and aims of legislation pertaining to health care.

E. A. TOLLEFSON*

* * *

The Canadian Yearbook of International Law. Volume II. Edited by C. B. BOURNE. Vancouver: The University of British Columbia. 1964. Pp. 354. ($10.00)

The Canadian Yearbook of International Law again contains articles of local and general interest, while some of the contributors continue theses they have already propounded in the first volume. Examples of the latter are Professor Mcwhinney's note on "Soviet Bloc Publicists and the East-West Legal Dispute"[1] and that by Mr. Fitzgerald on the Tokyo Convention relating to offences committed on board aircraft.[2]

Papers that are primarily of Canadian interest tend to deal with maritime matters. Both Mr. Gotlieb and Professor Morin are concerned with Canadian fisheries. The former's paper is devoted to "The Canadian Contribution to the Concept of a Fishing Zone in International Law"[3] and is mostly concerned

*E. A. Tollefson, of the College of Law, University of Saskatchewan, Saskatoon.

[1] P. 172. [2] P. 191. [3] P. 55.

with the 1964 statute on Territorial Sea and Fishing Zones.[4] He points out that Canada was the first State to propose a definite fishing zone as one of the means for settling the controversies relating to the extent of the territorial sea, a principle which now seems to have achieved general acceptance. Professor Morin states that this statute seeks an equilibrium between the necessity of protecting the interest of coastal fisheries and the interests of the international community.[5] He reminds us that every decision to monopolise fisheries is an extension, for this purpose, of the territorial sea, and that every unilateral act runs the risk of unilateral protest, unless it accords with accepted international law. In his view, the statute represents an adaptation of traditional law to modern needs. Mr. Bédard's paper on "Les armements sur les Grands Lacs"[6] illustrates the way in which the original Agreement has been modified in practice so as to achieve the same purpose.

Professor Pourcelet's paper "Vers une nouvelle limite de responsabilité dans le transport aérien international"[7] also illustrates the impact of his Canadian experience. He maintains that the compensation provided under The Warsaw Convention of 1929 and The Hague Protocol of 1955 is completely inadequate, pointing out that in Canada the carrier's liability is tortious and unlimited. This leads him to call for the acceptance of the principle of objective responsibility, even if this involves the rejection of Warsaw, together with the introduction of a scheme of compulsory insurance borne by the carrier.

Of both local and general interest is Professor Head's paper on "The Stranger in our Midst: A Sketch of the Legal Status of the Alien in Canada".[8] After looking at problems arising from the American "influx" into Canada after the American Revolution, the immigration of Asians in the nineteenth and twentieth centuries, and claims by litigants from Communist countries after 1945, he concludes that, although the Alien Labour Act[9] is still in force, there is unlikely to be any discriminatory legislation against Asians in the absence of widespread unemployment. On the other hand, he points out that demands for further proofs by the courts, for example, that the plaintiff will in fact personally benefit if successful, frequently result in the withdrawal of the case. This leads him to appeal for a more liberal approach by the Canadian courts, for "in thirteenth century England, aliens were often denied all protection of the law because they were assumed to be guilty of the mortal sin of usury. It would be unfortunate if in twentieth century Canada certain aliens are

[4] S.C., 1964, c. 22. [5] P. 77. [6] P. 141.
[7] P. 3. [8] P. 107. [9] R.S.C., 1952, c. 7.

to be deprived of benefits because they are regarded as guilty of the contemporary sin—adherence to communism."[10]

The paper of widest interest is that by Professor Macdonald on "The Developing Relationship between Superior and Subordinate Political Bodies at the International Level: A Note on the Experience of the United Nations and the Organization of American States".[11] Having discussed a number of cases beginning with the Guatemalan crisis of 1954 and finishing with the Panama dispute of 1964, he is of opinion that the Security Council is still of higher authority than a regional organization and he supports the continued right of an individual State to approach the executive organ of the United Nations. He shows how, in order to evade taking over from the Organisation of American States, the members of the Security Council have tended to say that there has been no application of "enforcement measures" in the absence of an application of force, and that the imposition of an arms embargo or exclusion from the Organisation of American States is therefore compatible with peaceful activities. Professor Macdonald comments that "it cannot be pretended that the Charter intended regional organisations to wield this sort of coercion. An enforcement action after all is a measure which seeks to carry out an institutional rather than a unilateral decision. Its constitutional authority is to be found ultimately in the formally organised institutional setting from whence springs the directive in question. Thus the origin and purpose of the coecion rather than its particular form is the hallmark of an enforcement measure. Such action includes economic and diplomatic as well as military pressures, and it is clear that the history and structure of the Charter originally intended the control of all these collective measures to be lodged with the Security Council, whatever the precise form of the coercion in question".[12] On the other hand, "the Council is a political body which is free to pick and choose, on an *ad hoc* basis, between interpretations which emphasise regional values. And that is precisely what it has been doing in these article 53 situations. The Council has quite properly rejected black-letter interpretations in favour of broad, teleological constructions that are everywhere recognised as appropriate to constitutional exposition".[13]

The remaining paper is by Mr. Erler who examines some of the characteristics of "International Legislation".[14] In addition to notes, including one by Judge Read on the World Court[15] and another by Dr. Bloomfield[16] on the Jordan Waters, the volume includes the first of a series of summaries on "Canadian

[10] P. 137. [11] P. 21. [12] P. 48.
[13] P. 49. [14] P. 153. [15] P. 164.
[16] P. 184.

Practice in International Law".[17] This covers 1963 and it is announced that arrangements have been tentatively made with the Department of External Affairs to cover the next ten years. Perhaps the wish may be expressed that, in due course, this section will grow in size and warrant separate publication.

The two volumes of the *Canadian Yearbook of International Law* so far published clearly indicate the value of this new collection of papers on international law and suggest that other countries may well find it useful to follow the example of France and Canada, whose annuals, unlike the older *American Journal* and *British Yearbook*, tend to place emphasis on local problems and a local approach.

L. C. GREEN*

* * *

Treasury of Law. Edited by RICHARD W. NICE. New York: Philosophical Library Inc. 1964. Pp. xii, 553. ($10.00)

This book is just what its title says—a treasury of law. The value of such a book, though it may not be the best of its kind, is that it makes us, not content, but more satisfied, with the present state of the law, by giving us standards by which to compare what is with what has been; by illustrating how the past has cast its shadow over the present; by confirming that the present (the best of it, as it is carried to the top, by the forward movement of time) can help to shape a better future. "There is no accepted test of civilization," once said Sir John Macdonell. "It is not wealth, or the degree of comfort, or the average duration of life, or the increase of knowledge. All such tests would be disputed. In default of any other measure, may it not be suggested that as good a measure as any is the degree to which justice is carried out, the degree to which men are sensitive as to wrong doing and desirous to right it?"[1] By this test, our civilization need not blush by comparison with any that has gone before. This is not to say that we have cause for complacency. Perfection is still a distant goal. With a beginning made in extending the rule of law to the international plane, we know, at least, the direction in which that goal lies. If time remains—if man does not have to give up dominion of the earth to some lower form of life, less susceptible to the effects of his new diabolic means of destroying himself—we shall come a great deal closer to the goal than we are today.

[17] P. 271.

*L. C. Green, of the Department of Political Science, University of Alberta, Edmonton.

[1] Historical Trials (1927), p. 148.

Mr. Nice's book is a miscellany of legal documents, snippets from judgments of other times, excerpts from ancient legal codes, and musings of philosophers and religious leaders on legal themes. Some of his selections are mere scraps and pieces, but they all help to contribute to his composite picture of the gradual development of legal order.

His opening section deals with the laws of ancient China. He quotes Confucius, who "when asked if there were not one word which would serve as a rule of practice for one's life, he said, 'Is not reciprocity such a word? What you do not like when done to yourself do not do to others.'"[2] If this rule was ever universally accepted as a practical rule of conduct, nothing else, but commentary on the text, would be needed. Unfortunately, the earth has never been peopled by men who were content to pattern their lives on the heroic example of the few saints, or philosopher kings, of history; and this rule of reciprocity has become perverted to read: do unto the other fellow as he would do unto you—but do it first.

Mr. Nice comes to the Code of Hammurabi, King of Babylon from 2125 to 2080 B.C., which was discovered by French archaeologists, in 1901, while conducting extensive excavations in Persia. This is the most advanced of the primitive codes. It reflects a fairly high degree of civilization. The punishments which it prescribes for offences are based on the principle of an-eye-for-an-eye, but the code does strike a faint note of humanitarianism. Though Hammurabi, in giving his laws to the Babylonians, invoked the blessing of Shamash, the Sun-god, "the judge of heaven and earth," as Dr. A. S. Diamond points out, his code is a code of law. "Thoughout the whole of this Code there is no rule of morality and no trace of any such rule," says Dr. Diamond.[3] The fact that this early code did not attempt "to freeze into immobility the morality (then) dominant",[4] is of some significance in the light of the current controversy, raging over the role of law in the enforcement of morals.

From Hammurabi, we pass over some sixteen hundred years, and come to the Greeks. Mr. Nice's treatment of this remarkable race is quite inadequate. He dismisses Greek law in less than three pages. The wonder still grows how a handful of people could make the small city—state of Athens the marvel of the ancient world and set the patterns which civilization has followed ever since. Sir Henry Maine was not being rhetorical when he said: "To one small people, covering in its original seat no more than a handsbreadth of territory, it was given to create the principle of

[2] P. 7.
[3] Primitive Law (2nd ed., 1950), p. 55.
[4] H. L. A. Hart, Law, Liberty and Morality (1963), p. 72.

Progress, of movement onwards and not backwards or downwards, of destruction tending to construction. That people was the Greek. Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin."[5]

Mr. Nice mentions Solon in his brief introductory note, but neglects him in his text. This great law-giver, elected archon of Athens in 594 B.C., ("the rich consenting because he was wealthy, the poor because he was honest")[6] who introduced a measure of democracy into Greek life, deserves a prominent place in any Treasury of Law. Thanks to him, the Greeks were the first people who were privileged to live under a government of laws, not of men.

In Solon's day, as in our own day, justice was the target at which the law aimed. Well did the Greeks know the value of this celestial gift. In a poem, in which he eulogized justice, Solon wrote:[7]

> Beneath her rule all things throughout the world
> Are tuned to wisdom and to harmony.

These words are highly charged with emotion, but the Greeks understood them at their true value. They were prepared, as Heraclitus admonished them, to fight for their laws as for their city walls.[8]

Socrates best exemplifies the respect of the Greeks for their laws. Convicted on prejudice, not evidence, of a charge of corrupting the youth of Athens, he was sentenced to drink hemlock. This sentence could not be carried out until a sacred ship returned to Athens. Meantime, he was held in prison, under a very casual restraint. His friends urged him to escape to Thessaly, and, indeed, the authorities would have been delighted if he had taken his friends' advice. But Socrates had too much respect for the law. He told his friend Crito that he seemed to hear the voice of the laws "murmuring in my ears, like the sound of the flute in the ears of the mystic".[9] He obeyed the law and drank the cup of hemlock.

In what other country, except, perhaps, in England could this have happened? "I deem an Englishman a Greek grown old", said the poet. The Greeks and the English join hands across the centuries because of their regard for that characteristic which Sir Frederick Pollock calls the quality of law-abidingness.[10]

Dr. Carleton Stanley begins one of the most interesting ar-

[5] Village-Communities in the East and West (1876), p. 238.
[6] Plutarch's Lives, Modern Library Edition, p. 104.
[7] Quoted Dr. Kathleen Freeman, The Paths of Justice (1954), p. 22.
[8] Quoted Dr. Max Hamburger, The Awakening of Western Legal Thought (1942), p. 10.
[9] Dr. Coleman Phillipson, The Trial of Socrates (1928), p. 389.
[10] Jurisprudence and Legal Essays (1961), p. 196.

ticles in the forty three volumes of the *Canadian Bar Review* with this arresting statement: "It may be that the greatest contribution to thought made by the ancient Greeks was their conception of law".[11] It may well be.

We cannot go to the Greeks, as Dr. W. Friedmann points out, for knowledge of the modern law of contract, or tort, or property, but "all the main issues of legal theory have been formulated by Greek thinkers".[12] The Greeks did not build firm foundations under their theories. This task was left for the Romans. The Romans early found the world a noisy place and, to make themselves heard throughout the world, learned to shout and to shout with the borrowed voice of the Greeks. They brought the legal philosophy of the Greeks down to earth. They imposed system on the law and established courts, and a professional class of lawyers, by which their laws could be interpreted and enforced. The Greek may be said to have drawn the plans and started work on the legal temple. When he laid down his tools, the Roman picked them up and completed the building.

Roman law begins, as it ends, with a code.[13] From the Twelve Tables drawn up in 451-450 B.C. to the Justinian Code of 529-535 stretches a thousand years of history. From that time until the present another fourteen centuries have passed and Roman law still retains its vitality. Typical of the many bold claims made for the laws of the Romans is this statement of Gilbert Highet: "In law it would be easy to show how the central pillars of American and British law, French law, Dutch law, Spanish and Italian and Latin-American law, and the law of the Catholic Church, were hewn out by the Romans."[14] This statement, as it applies to American and British law, must be challenged.

Roman jurists held court in Britain, after it became a province of Imperial Rome, until the disintegration of the empire. Their law never succeeded in entering the living stream of life in Britain, as it did in most of the countries, to which Roman dominion extended. "Eyes, carefully trained", once said the great Maitland, "have minutely scrutinised the Anglo-Saxon legal texts without finding the least trace of a Roman rule outside the ecclesiastical sphere".[15] When the foundations of the common law were being laid, the builders of that law did not draw heavily upon the great legal system that now survives as its only rival in the Western world. It is true, of course, that, in the centuries which followed, creative judges like Sir John Holt and Lord Mansfield (some-

[11] The Greek Conception of Law and its Later Influence (1950), 28 Can. Bar Rev. 367.
[12] Legal Theory (2nd ed., 1949), p. 5.
[13] Opening sentence, Sir Henry Maine, Ancient Law (1861).
[14] The Classical Tradition (1949), p. 2.
[15] Historical Essays (1957), p. 100.

one once said that he was the first English judge learned enough to have sat in a Roman court of law), did import several features of Roman law into the common law to its great enrichment.

But to return to Mr. Nice. A review can only hint at the ground covered by him in his interesting book. He goes from the Romans to sections on Mediaeval Acts, Celtic judgments and Gothic laws "not nearly so barbarous as our curiosity might wish them to be" [16] and comes to a chapter which he calls "Philosophies of Crime and Morality". In this chapter, one of the most absorbing in the book, we hear briefly from Grotius, Beccaria and Jeremy Bentham.

Mr. Nice's pages on the Soviet Constitution sent me back to an article by Dr. W. Friedmann from which I remembered the substance of these words: "A great part of Soviet law as it affects the average citizen is not greatly different from the law of present day England, France, or the United States." [17]

By their laws, citizens of the U.S.S.R. are guaranteed the right to work; the right to education, including higher education, free of charge. Women are given equal rights with men. "Equality of rights of citizens of the U.S.S.R., irrespective of their nationality or race, in all spheres of economic, State, cultural, social and political life, is an indefeasible law." [18] Judges are held to be independent and subject only to the law. Church and state are separated "in order to ensure citizens freedom of conscience".

All of this sounds very wonderful, too good to be true. One must suspect that in Russia, as in Canada, the law in the books and the law in action are not identical twins. As Hon. Ivan C. Rand once said: "Whatever the quality of the rules of law, their purpose will be frustrated by defects and inadequacies in administration." [19]

Mr. Nice's two final sections deal with English Legal Documents and Legal Documents of America. Here we find a goodly selection of the great libertarian documents of English and American history.

One must quarrel with Mr. Nice in one particular. He has published a strange version of Magna Carta, not the version which should be familiar to every high school student.

As Maitland says in his famous essay on materials for history, Magna Carta is an act "for the amendment of the law of real property and for the advancement of justice". [20] The vital chapters of this Great Charter of Liberties are those that advanced the cause

[16] Maitland, A Prologue to a History of English Law, in Jurisprudence in Action (1953), p. 342.
[17] (1953-54), 10 U. of T. L. J. 87, at p. 90.
[18] P. 363.
[19] The Role of an Independent Judiciary in Preserving Freedom (1951-52), 9 U. of T. L. J. 1, at p. 6.
[20] Select Essays in Anglo-American Legal History, vol. 2 (1908), p. 80.

of justice by placing firm restraints upon the exercise of arbitrary powers. These chapters in the standard text are the twelth, fourteenth, thirty-ninth, fortieth and forty-fifth.

Chapters twelve and fourteen limit the sovereign's power to impose scutage or aid and provide for the calling of council to consent to the imposition of these tariffs. Later ages were to interpret these chapters as a restraint upon the imposition of taxes without the consent of the people.

Chapter thirty-nine (Blackstone said this chapter by itself "would have merited the title that it bears of the great charter"[21]) reads: "No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him except by the lawful judgment of his peers."

More weight has been placed on this chapter than it was ever designed to bear. Some observers have professed to find in it the origin of trial by jury. In King John's day "peers" meant feudal equals not common jury men, and the man who was bought and sold with the land upon which he toiled was certainly not the equal of a feudal baron. How this vital provision of Magna Carta broadened down from precedent to precedent, from age to age, is another story. We no longer have feudal barons and human beings who go with the land. How much of this is due to Magna Carta only a Maitland could determine. But certainly it all began on Monday, June 15th, 1215, "in the meadow which is called Runnymede between Windsor and Staines", when England's voice of freedom was heard clearly for the first time.

Chapter forty reads: "To no one will We sell, to none will We deny or delay, right or justice."

Chapter forty-five provides that no one will be appointed judge, constable, sheriff of bailiff except "such men as know the law of the land and will keep it well".

The very latest, most up-to-date International Business Machine Computer would be inadequate to determine how often this provision has been abused since the year 1215.

In the version of Magna Carta given by Mr. Nice these chapters are the fourteenth, seventeenth (given only in part), the forty-sixth, forty-seventh and fifty-third. The translation, moreover, is less effective than the standard translation. For example, chapter forty-seven reads: "we will sell to no man, we will deny no man, nor defer right or justice."

Mr. Nice has surely done his readers a disservice. Magna Carta lies at the centre of our way of life. Indeed, Bishop Stubbs asserts that "the whole of the Constitutional History of England is a com-

[21] Cited by Professor A. E. Dick Howard, in Magna Carta, Text and Commentary, published for The Magna Carta Commission of Virginia (1964), p. 14.

mentary on this charter".[22] With equal enthusiasm, Sir William Holdsworth says that Magna Carta closed one period in the history of English law, the period when the law was developed by the Crown alone, and began another, the period which ended in the establishment of a Parliament.[23]

In their reading of Stubbs, Holdsworth, Maitland and others, readers will come across frequent references to chapters thirty-nine and forty of Magna Carta. Mr. Nice's book will be of no help to them. When the commentators refer to the standard text, why has he given a different text?

Truly, as Mr. Justice Holmes says somewhere, law is a magic mirror wherein we see reflected not only our own lives but the lives of all men that have been. In reading Mr. Nice's pages, we may glean a wealth of miscellaneous information and catch many reflections of the lives of men that have been. For example, the price of a suckling pig in ancient Rome (sixteen denarii a pound, a denarius being approximately two-fifths of a cent);[24] how the Babylonians treated a judge who varied his judgment (he was made to pay twelve-fold the claim in the suit, removed from his place on the bench and not allowed to sit again);[25] the measure of justice among the Israelites (Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour):[26] the low cost of dying in Rome, when the Twelve Tables prevailed (Funerals shall not involve expense; the funeral pile shall not be smoothed with the axe);[27] what Cato the Elder thought of women (Suffer them once to arrive at an equality with you, and they will from that moment become your superiors);[28] the monetary system in vogue in ancient Rome (Therefore, in former times, those who paid out money to anyone did not count it but weighted it, and the slaves who were permitted to disburse money were called "weighers");[29] how the Romans decreed against Star Chamber methods ("the judge shall hear both civil and criminal suits with the doors of his private council chambers open and with everyone called inside");[30] the instructions of the Visigoths to their judges, and surely they had the root of the matter in them ("The Judge should be quick of perception; firm of purpose; clear in judgment; lenient in the infliction of penalties; assiduous in the practice of mercy; expeditious in the vindication of the innocent; clement in his treatment of criminals; careful of the rights of the stranger; gentle toward his countrymen. He should be no respecter of persons, and should avoid all appearance of

[22] Select Charters (9th ed., 1921), p. 291.
[23] History of English Law, vol. 1 (3rd ed., 1922), p. 54.
[24] P. 161. [25] P. 24. [26] P. 49.
[27] P. 73. [28] P. 78. [29] P. 149.
[30] P. 183.

partiality."); [31] why Beccaria was emboldened to publish his *Essay on Crimes and Punishments* ("I should have everything to fear, if tyrants were to read my book; but tyrants never read"). [32]

Any critic can find fault with Mr. Nice's *Treasury of Law*, and offer him scores of suggestions for its improvement. The only "perfect" treasury is one that each man makes for himself. It will be a great convenience to the serious reader to have under one cover the many good things which Mr. Nice has brought together. His book well illustrates, as Morris Raphael Cohen once put it, that "the law is not a homeless, wandering ghost. It is a phase of human life located in time and space." [33]

ROY ST. GEORGE STUBBS*

---

[31] P. 250.
[32] P. 292.
[33] Reason and Law (1950), p. 4.
*Roy St. George Stubbs, of the Manitoba Bar, Winnipeg.